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PARLIAMENTARY DEBATES
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HOUSE OF LORDS
OFFICIAL REPORT

ORDER OF BUSINESS

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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 14 December 2016

3 pm

Prayers—read by the Lord Bishop of Peterborough.

Immigration: International Students

Question

3.07 pm

Asked by ***Lord Holmes of Richmond***

To ask Her Majesty's Government what plans they have to amend the visa requirements for international students and to remove those students from the immigration figures.

Lord Holmes of Richmond (Con): My Lords, I beg leave to ask the Question standing in my name on the Order Paper and in doing so declare my interests as set out in the register.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, the Government will shortly be seeking views on a range of proposals to reform the visa system for international students. Like other migrant groups in the UK, international students use public services, contribute to population levels and affect local communities. The independent Office for National Statistics therefore includes international students in its net migration calculations, following international best practice in this regard.

Lord Holmes of Richmond: My Lords, international students are one of the most gleaming gems in the United Kingdom's soft power crown. My noble friend knows that I believe they should be removed from the immigration figures, because there would only be an upside to such a move.

Noble Lords: Hear, hear.

Lord Holmes of Richmond: Can she give the House information on the tier 4 pilot that is being undertaken? What are the results so far and what can be done to extend it to give even greater benefit across the sector?

Baroness Williams of Trafford: I certainly know my noble friend's feelings on this matter—in fact, I think I know the House's feeling, having answered this question several times—and I was very pleased to have a discussion with him the other day. The four institutions chosen were Oxford, Cambridge, Bath and Imperial College London, which were selected due to their consistently low level of visa refusals. But the pilot is intentionally narrow in scope in order that its outcomes against the stated objectives can be monitored, and to minimise the risk of unintended consequences. If the pilot is successful we will consider rolling it out more widely.

Lord Morgan (Lab): My Lords, has not the Foreign Secretary described the Government's policy in this area as totally crazy and pointed to the fact that the number of Indian students in our universities has roughly halved? He has called for post-study work visas to be restored, and has asked for reassurances to be given to the Indian Government and for international students to be removed from the total of recorded immigration, because it is completely misleading. Would the Minister like to commend the wise words of a sometimes misrepresented colleague?

Baroness Williams of Trafford: My Lords, I do not know who is misrepresenting who but I do not feel that I can speak for the Foreign Secretary. In fact, sometimes I do not know if the Foreign Secretary speaks for others. It is indeed true that Indian student numbers have gone down, but Chinese student numbers have gone up. Indeed, figures for the Russell Group have gone up.

Baroness Smith of Newnham (LD): My Lords, is not the figure of tens of thousands as a cap on immigration entirely arbitrary? If we accept the importance of international students, they should be taken out of that target. That does not mean taking them out of the OECD numbers, but it does mean that we could look again at the international numbers. I declare my interests as listed in the register.

Baroness Williams of Trafford: My Lords, there is no cap on the number of students who come here. As long as students are compliant with immigration rules, they should make only a very limited contribution to the migration numbers. The Government's ultimate goal is to get migration numbers down to the tens of thousands rather than the hundreds of thousands, but that will take time.

Lord Green of Deddington (CB): My Lords, does the Minister agree that the student situation has moved on? The problem has always been the 70,000 for whom there is no evidence of departure. That is roughly half the size of the British Army. Therefore, the issue has to be tackled. However, exit checks are coming into force and fairly soon we will have a much better handle on how many are overstaying. That, I suggest, will make it much easier to deal with the policy changes that a number of noble Lords have suggested.

Baroness Williams of Trafford: The noble Lord is right to bring up exit checks. The Home Office continues to analyse and assess the element of the exit check data which has been in place since April last year in relation to specific cohorts, in order to understand the extent to which the estimates provided are statistically robust. That level of detail is not yet available but the noble Lord is right to raise this issue.

Lord Rosser (Lab): We do not believe that international students should be included in the Government's target to reduce migration to tens of thousands. Given that many people may think that over, say, a five-year period the number of international students coming

[Lord Rosser]
to study in the UK would roughly match the number of such students departing the country in accordance with the terms of their visa, thus having little impact on the net migration figure over that period, can the Government tell us—I fear the answer will be no—the number of international students who came to study in the UK last year? Based on previous experience, how many of those students are likely to overstay their visa, or any authorised extension to stay, and remain in this country after the date by which they should have left? One would assume that the Government know the answer to that question.

Baroness Williams of Trafford: My Lords, I think that that was several questions. However, the National Audit Office reported that in 2009-10, up to 50,000 international students may have come to work, not study, and, before our changes, international student visa extensions were running at more than 100,000 a year, with some serial students renewing their leave repeatedly for many years.

Baroness Armstrong of Hill Top (Lab): My Lords, does the Minister think that areas that have been left behind are not relevant here? I remind her of somewhere she and I know well: Sunderland. Its university has recently had to make significant cutbacks, which means less money in the local economy and many local people losing their jobs. One of the reasons for that is its inability to get visas, particularly for India but also for other countries from where it has historically had significant numbers of students, particularly in pharmacy and engineering.

Baroness Williams of Trafford: My Lords, I repeat: there is no cap on the number of international students who come here. I take the noble Baroness's point, and I appreciate the problems some universities face in keeping student numbers up. However, others, such as the Russell Group universities, have of course seen their applications increase.

Asylum: Sexual Orientation

Question

3.15 pm

Asked by ***Lord Scriven***

To ask Her Majesty's Government how many people claiming asylum in the last year did so on the grounds of sexual orientation or gender identity; and of those, how many have been granted asylum.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, the Home Office does not publish statistics on the basis of asylum claims or the decisions arising from them. This is true for claims relating to gender and sexual identity. The Home Office is considering how data from its casework database may be assured and used to provide such information to a sufficiently accurate standard.

Lord Scriven (LD): My Lords, I thank the Minister for that Answer, but those who sit on the Home Office strategic engagement group, set up after the Vine report in June 2014, will be surprised by it. At the last meeting, in September of this year, a senior civil servant said that the only reason that the statistics have not yet been published is because they are waiting for authority from the Minister. Which is wrong: the Answer from the Dispatch Box or the civil servant, who says that they will be published with the authority of the Minister?

Baroness Williams of Trafford: My Lords, I am not that Minister. However, I can say that the Home Office collects information that records whether a claim is based on sexual orientation, and it is likely to correlate with the claimant's sexual orientation, although an individual may have an asylum claim that is quite distinct from their sexual orientation. The data are management information only—I can assure the noble Lord of that—and they do not form part of our published statistics because they have not been quality assured to a sufficient standard.

Lord Cashman (Lab): My Lords, claiming asylum on the grounds of sexual orientation and gender identity is deeply intrusive and personal. Often claimants have to prove their sexual orientation by disclosing elements of their private lives. Therefore, given the noble Baroness's commitment to issues of equality, will she work with organisations such as the UK Lesbian & Gay Immigration Group, Stonewall and others to ensure that the approach taken towards them is fair, just and balanced?

Baroness Williams of Trafford: The Home Office works, and continues to work, with groups like Stonewall, and we know that some of the training received by people who process claims has improved and that questions are much more sensitively put than perhaps some of the anecdotal evidence from the past suggests. The 2014 report of the Independent Chief Inspector of Borders and Immigration into the handling of sexual orientation claims praised our guidance.

Lord Lexden (Con): What is the Government's reaction to Stonewall's recent recommendations that alternatives to detaining LGBT asylum seekers should be developed, drawing on international best practice?

Baroness Williams of Trafford: I can tell my noble friend that certainly the Shaw review recommended that transgender and intersex people should be in the vulnerable persons category and as a general principle should not be detained.

Lord Winston (Lab): My Lords, it seems that the Government are constantly making decisions based on total lack of data. Six years ago the Science and Technology Select Committee had this question about immigration with regard to students. We now have it with regard to this issue as well. When will the Government, and in particular the Home Office, make strides to ensure that the data they are presenting are accurate and relevant to the decisions being made?

Baroness Williams of Trafford: The point I was making in my previous answer, which perhaps was not sufficiently articulated, was that we do not feel that the management data are as yet sufficiently robust, but I can keep the House updated on when such information might be available.

Baroness Barker (LD): My Lords, the department has been sitting on this information for two years. In that time, how many LGBT people have claimed asylum on the basis of their sexual orientation and how many of them have been denied?

Baroness Williams of Trafford: My Lords, as I said, those data are not published, so I cannot give the noble Baroness an answer at this time.

Lord Oates (LD): My Lords, the Minister confirmed in a Written Answer to my noble friend Lord Scriven that the Government do not record people who apply to the Syrian vulnerable persons relocation scheme on grounds of sexuality. She will be aware that it was a recommendation of the Independent Chief Inspector of Borders and Immigration that such information should be recorded. Can she therefore tell me how the Government can monitor whether these claims are being handled properly?

Baroness Williams of Trafford: My Lords, I said that this information is not published but that the Government collect it. There is guidance and there have been improvements in training, so we take this matter very seriously, as I hope I have explained. It is bad enough having to come here from a country where you have been persecuted because of your sexuality without then having to go through another very uncomfortable process, so we continue to monitor the guidance and the training around this very sensitive area.

Lord Rosser (Lab): The Minister referred in her last answer to information that was there but not published. Why is it not published?

Baroness Williams of Trafford: My Lords, I think that I have explained twice that it is management information only and that it is not yet sufficiently quality assured to be published. We need published information to be robust.

Lord Paddick (LD): My Lords, can the Minister explain how this House can hold the Government to account if they refuse to publish the figures?

Baroness Williams of Trafford: My Lords, I can only repeat the answer that I have now given three times.

Baroness Lister of Burtersett (Lab): Can the noble Baroness say how long it will take to quality assure this information?

Baroness Williams of Trafford: I cannot but I can assure noble Lords that, as soon as I get any information on this, your Lordships will be the first to know.

NHS: Congenital Heart Disease

Question

3.22 pm

Asked by ***Lord Sharkey***

To ask Her Majesty's Government how many hospitals have challenged NHS England's recommendation that they cease to provide special surgical services for congenital heart disease.

Baroness Chisholm of Owlpen (Con): My Lords, the department has not received any formal challenges to NHS England's proposals for changes to the way that congenital heart disease services are organised. I know that there are some concerns about NHS England's proposals but we must remember that no final decisions have been made. A service-change process is now under way that will include public consultation. NHS England will announce further details in the new year.

Lord Sharkey (LD): The Royal Brompton Hospital is one of the hospitals that has those concerns. NHS England said at a recent meeting in the Commons that there were no concerns over the quality of care provided by the hospital, yet the NHS England proposals for the Royal Brompton would remove a quarter of the paediatric care beds in London when there is already a growing shortage. They would also destroy the hospital's world-leading adult congenital heart disease programme and cost a lot of money. Given all that, can the Minister say exactly what problem the Royal Brompton proposals are aiming to solve?

Baroness Chisholm of Owlpen: I do not want to go into issues relating to specific hospitals but I emphasise that no decisions have been made. Where it is decided that changes need to be made, these will be managed carefully and will be carried out in partnership with current service providers, patient groups and advocates. Decisions are likely to be made in the summer but there will be no change on the ground until at least 2018. The public consultation will give everyone a chance to put forward their views and to discuss the plans further.

Lord Hunt of Kings Heath (Lab): My Lords, the noble Baroness says that she will not discuss individual hospitals but, in the end, Ministers are accountable. Will she confirm that the reason given by NHS England is that the Brompton does not meet its specification, which insists on same-site locations for all children's services? Can she confirm that one of the hospitals not threatened with closure has multi-site locations, and will she also confirm that the Brompton has one of the best outcomes in the country?

Baroness Chisholm of Owlpen: I am not going to be drawn into discussing specific hospitals and I have given my reasons for that. However, I will say that the statement made in July by the Royal College of Surgeons and the Society for Cardiothoracic Surgery said:

"We fully support these standards. NHS England must ensure that the standards are applied for the benefit of patients, by ensuring that expertise is concentrated where it is most appropriate.

[Baroness Chisholm of Owlpen]

The proposals put forward by NHS England today should improve patient outcomes and help address the variations in care currently provided.

It is fundamentally important that specialist surgical centres are large enough and treat patients regularly enough to develop full expertise to treat all conditions. It's vital they are properly staffed to provide on-call rotas and teams have the time to create a supportive environment where new techniques are shared and future specialists can learn".

Baroness Gardner of Parkes (Con): My Lords, I declare an interest in that I was a member of the hospital board of the Brompton for some 15 or 17 years—a long time. You have to look at this case specifically because the Brompton has been quite outstanding and does not work in complete isolation. I am a cardiac patient under the Chelsea and Westminster Hospital, and the same consultants work at both these hospitals and work fairly closely together. However, I do not think that anywhere exceeds the Brompton in standards of care for congenital heart conditions. Indeed, there are Members of this House whose children have had very successful treatment there. We cannot ignore the very special circumstances of this world-famous hospital.

Baroness Chisholm of Owlpen: I appreciate the concerns that noble Lords have raised and the concerns of the hospital trust. However, we must remember that no final decisions have been made and a public consultation will begin shortly. That is when all points can be raised and addressed.

Lord Rennard (LD): My Lords, will the Minister agree that NHS England should review the unfair and inconsistently applied standards that may force the closure of congenital heart disease services at the Royal Brompton Hospital, putting lives and life-saving heart disease research at risk?

Baroness Chisholm of Owlpen: I want to share with noble Lords a little of what these standards are about. I feel quite strongly about this: it is so important, and it is the right way forward to determine where these operations should be done. The standards state:

"Each congenital cardiac surgeon must perform a minimum of 125 … congenital cardiac … surgical procedures … each year, averaged over a three-year period … Each consultant congenital interventionist must be primary operator in a minimum of 50 congenital procedures per year, averaged over a three-year period. There must be a designated lead interventionist who must be primary operator in a minimum of 100 procedures per year, averaged over a three-year period".

This will ensure optimum outcomes for all patients.

Baroness Masham of Ilton (CB): My Lords, does the Minister agree that this debate has gone on for a long time and the insecurity is very bad for patients and for staff, and that it is not just about the Brompton hospital but about other hospitals throughout the country?

Baroness Chisholm of Owlpen: The noble Baroness makes a very good point. This has been fiercely debated since the publication in 2001 of the damning report into the high death rates among babies undergoing heart surgery at Bristol Royal Infirmary. The last time plans were put forward, in 2011, it led to a bitter fall-out, pitting hospitals against senior health bosses, and two years later the proposals were scrapped, with NHS bosses being told to look again. That is why we are now trying to go forward, so that we can cover both adult and children's services.

Lord Hunt of Kings Heath: My Lords, may I offer some advice to the noble Baroness? It is quite clear that, in the end, the Government will not agree to the closure of the Brompton, because that has been the decision on numerous occasions since 2001. Why not just pull the consultation? It is not going anywhere, my Lords.

Baroness Chisholm of Owlpen: We do not yet know that it is not going anywhere. A public consultation is coming forward, and the Brompton is not the only hospital concerned; it concerns a lot of hospitals all around the country. It is fair that it should go to a public consultation. Everybody will then have a chance to put their views, and that is going to be the way forward.

The Countess of Mar (CB): My Lords, does the Minister agree that as well has having surgical expertise, part of the patient's recovery depends on having access to their friends and their family? When the NHS is deciding these things, will someone please ensure that if a hospital is a long way away from where people live, the families are given funding for travel, because many people cannot afford to do so, and, if necessary, given accommodation in the hospitals where the operations take place?

Baroness Chisholm of Owlpen: The noble Countess raises a good point. NHS England recognises that it may be difficult for the families involved having to travel further, which is why a number of standards will certainly address that point.

Independent Schools: Free Places

Question

3.30 pm

Asked by ***Lord Lexden***

To ask Her Majesty's Government what assessment they have made of the Independent Schools Council's proposal to create 10,000 free places at independent schools funded jointly with the Government.

The Parliamentary Under-Secretary of State, Department for Education (Lord Nash) (Con): My Lords, we welcome the positive way in which the Independent Schools Council has responded to the consultation document *Schools that Work for Everyone* by putting forward a number of proposals for ways in which the independent schools sector can achieve the aim of improving access for families to good school places. The consultation

period closed on Monday this week. We are considering all the responses received and will publish our response in due course.

Lord Lexden (Con): My Lords, I declare my interest as a former general secretary of the Independent Schools Council and current president of the Independent Schools Association, one of the council's constituent bodies. Has my noble friend the Minister noted that the proposals contain plans that are specifically designed to assist social mobility by providing large numbers of new places across the age range based on need and need alone, at no extra cost to the Government? This is not a repetition of the assisted places scheme. Does my noble friend agree that this new constructive plan for partnership with the state could well represent the best way in which most independent schools can assist the Government's agenda for education reform, since so many of them are small and lack the financial resources to invest in the academies programme?

Lord Nash: I thank my noble friend for pointing out those particular aspects of the ISC's proposals. I have no doubt that its proposals are extremely well intentioned. We know that many, probably most, independent schools do valuable work with state schools and that is very welcome—87% of ISC members are engaged in some kind of partnership with the state sector. But we believe that many can do more, although we are also clear that the expectations that we place on the sector must be realistic, proportionate and practicable.

Baroness Armstrong of Hill Top (Lab): My Lords, does the Minister realise how unrealistic this is for areas such as the north-east? That is one of the prime areas where there needs to be improvement in educational outcomes and in social mobility, and it will not have much effect. We have very few independent schools in the north-east for historical reasons, because there has never been enough money around to support them. On that basis, will the Minister ensure that this is not seen as a realistic way of addressing what is a very important issue in our part of the country?

Lord Nash: I agree entirely with the noble Baroness's comment about educational issues in the north-east. Of course, this is not a panacea. Only 7% of the population is educated at private schools, and they are predominantly in the south of England. As I said, our proposals will have to be practicable.

Lord Storey (LD): The Minister will be aware that independent schools have the advantage of charitable status, and that advantage brings responsibilities. Is he confident that all independent schools are carrying out their obligations in terms of receiving charitable status? If not, what does he propose to do about it?

Lord Nash: The purpose of these proposals is to ensure that the public benefits widely from that charitable status. It is clear that many independent schools are possibly putting back into the system more than they are getting in charitable status, but it is also clear that some are not. As I said, we want to see a bigger effort on a wider front.

The Earl of Listowel (CB): Can the Minister say what progress has been made in developing boarding school places for young people in care and on the edge of care? He may wish to write to me. Does he think that this offer from the independent schools sector is a possible opportunity to develop that approach?

Lord Nash: The noble Earl makes an extremely good point—one that is very close to my heart. I have initiated a campaign to try to encourage more local authorities to send young children who are on the edge of care to state boarding schools and independent boarding schools. It is an area where there is quite a shortage of information. We have a new project that is providing a website essentially to market to local authorities the opportunities of sending some of their children on the edge of care to state boarding schools and independent schools very cheaply because they may qualify for full bursarships.

Lord Watson of Invergowrie: My Lords, what this offer reveals is that the cost of educating a pupil in the state sector is around £5,500, while the average level of private school fees is three times that, which is very revealing in terms of the different offers to children in the different sectors. Does the Minister know whether this offer will be conditional on a selection test being operated to see who is able to take up these places? If that happens, does he not agree that what will then occur is not so much that poorer children per se are helped but that already bright children will be helped to achieve what they would very likely have achieved in the state sector anyway? Does he agree that, if selection is to be involved in this offer, the Government should not accept it?

Lord Nash: A range of proposals is being submitted under the consultation document, some of which will involve selection and some of which will not. We will look at them all before we design the final proposals more carefully.

Baroness Vere of Norbiton (Con): My Lords, I too would like to declare an interest as a former general secretary, like my noble friend, of the Independent Schools Council. Will the Minister commit to working with the council perhaps to amend the scheme that it has put on the table to make sure that we take into account all the other issues that have been raised today?

Lord Nash: My noble friend is right to say that we may well have to work with a number of groups to amend their proposals before we have a final set of proposals. As I say, we have a wide-ranging group of ideas and we are determined to devise something that will actually work.

Baroness Farrington of Ribbleton (Lab): Will the Minister give an undertaking to ensure that, whatever happens, he will not take money from other schools'

[Baroness Farrington of Ribbleton]
budgets in order to fund a particular project that is being put forward by a group of people? As the Statement that the Minister is due to repeat later today shows, there is great concern that across the voluntary controlled and voluntary aided sector and local authority schools, money for school budgets is being cut. Projects like this ought not to be robbing children of funding for their schools just because the Government fancy a whim.

Lord Nash: This proposal is about encouraging independent schools to help the state sector, and the money will therefore be flowing towards the state sector, not away from it. As the noble Baroness knows, we have protected the core schools budget, but we will be talking about the national funding formula shortly.

Lord Wallace of Saltaire (LD): My Lords, the Minister will recall conversations with the noble Lord, Lord Moynihan, and myself about encouraging independent schools to demonstrate their public benefit by sharing their facilities for sport, drama, art, music and so on with their local state schools. I understand that a survey is being undertaken to see what the best practice is in the sector. Is his department following that survey, and will he repeat in public his private promise that, when it has been completed, we will have a debate in this Chamber on its results?

Lord Nash: We are certainly following these issues, but I cannot promise a debate because it is not in my power to do so. We have encouraged the independent sector to show its good practice and we have helped it to set up an interesting website called Schools Together, which now has more than 1,200 examples of co-operation between the state and the independent sector. Clearly, a lot is happening in this area.

Aleppo

Private Notice Question

3.38 pm

Asked by ***Baroness Symons of Vernham Dean***

To ask Her Majesty's Government what is their assessment of the conditions for civilians in eastern Aleppo and what prospect there is for humanitarian relief to reach those people.

Baroness Symons of Vernham Dean (Lab): My Lords, I beg leave to ask a Private Notice Question. In doing so, perhaps I may remind the House that I am the chairman of the Arab-British Chamber of Commerce.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, Aleppo is a humanitarian catastrophe. We are providing food, shelter, blankets and healthcare to fleeing civilians through our UN and NGO partners, but the regime is preventing aid reaching those who are still trapped. Pro-regime militia appear to be blocking the recent evacuation deal. It is paramount that the aid agencies get access to save lives and protect civilians.

Baroness Symons of Vernham Dean: My Lords, despite all that, it is almost four weeks since food or medical aid got into eastern Aleppo. Yesterday, the United Nations said that the Assad regime and its allies had executed 82 civilians, including 13 children. The ceasefire negotiated at the UN yesterday evening broke down this morning and the buses which were to evacuate people to places of safety have been withdrawn. We have heard what the Government have done. My question is: what is the Government's next step at the UN or with allies to do everything possible to get food and medical aid to the civilians and to evacuate the people of eastern Aleppo, particularly the children, to places of safety? As the US ambassador to the UN asked yesterday, is there no way in which this regime and its supporters can be shamed into facilitating this vitally needed humanitarian aid?

Lord Bates: I agree absolutely with the analysis which the noble Baroness, with her great experience, has brought in asking this Question today. We are of course working with partners at the UN Security Council, but she as a distinguished former Minister in the Foreign Office will know of the complexities and difficulties there, particularly with the Russian veto stopping us from taking action. We are trying to raise the issue at the European level—this was done last week. There is also the international Friends of Syria group, which continues to meet and do its work—task forces are involved in that. Our greatest influence at the present time is probably in meeting the humanitarian needs of people on the ground. That is something of note and of which we can be proud: that in the face of this "meltdown of humanity", as the high commissioner described it, the British people are there as the second-largest donor in cash terms and stand ready to help more when that is possible. But this is a human conflict between human actors, and it is within human hands for it to be resolved and stopped. That is what we are urging.

Lord Collins of Highbury (Lab): The Minister is absolutely right, but Assad said earlier today that the ceasefire request would simply "save the terrorists"—and, of course, this is one of the problems we have. Children and families are suffering. We need evidence from this Government that they will seek international co-operation, especially through the UN, for protection, evacuation, aid and, not least, evidence, because there is clear evidence of war crimes being committed. This Government must commit to those four things.

Lord Bates: That is absolutely right. We are collecting evidence with other agencies on the ground. One problem that we face in this situation is that there is a difficulty in obtaining real, credible information, because so many international actors, ourselves included, are not able to operate in and get access to east Aleppo, as we want to in order to verify what is happening there. We are collecting evidence. There is no question on the basis of the evidence at the moment that what we are witnessing here is a prima facie case of a breach of international humanitarian law and the Geneva Convention—and the people who are responsible will in time be brought to justice.

Baroness Northover (LD): My Lords, as we see the terrible events in Aleppo, what are we doing to make sure that men, women and children in the 16 other besieged areas in Syria are not also subjected to surrender and slaughter? Is Aleppo going to be a precedent?

Lord Bates: That is a great concern. We have not yet seen the besieging tactics adopted by the Assad regime in eastern Aleppo being used to the same degree in other cities, but he has gone on record with a menacing pledge that, as east Aleppo appears to fall, he will move the fight on to other cities. That urges all those who have influence over the people involved in this conflict to use all their powers to bring it to an end before we see it continuing on the same scale, and actually increasing in its brutality, in years to come.

Lord Alton of Liverpool (CB): My Lords, did the Minister see the statement from a United Nations spokesman yesterday, in which he described this as the darkest day in the history of the United Nations? With more than 5,000 dead in Aleppo in the last month —and returning to the Question asked by the noble Baroness, Lady Symons—did he see the report about the 100 unaccompanied children who have taken refuge in one derelict building? Do we know anything more about their fate or about the eight who were shot in their home for refusing to leave? In February, this House debated a Motion from all parts of your Lordships' House that those responsible for genocide and crimes against humanity should be brought to justice. It is not just a question of collecting evidence; it is about setting up the mechanisms necessary to do that. When will the Government do what the noble Lord said a few moments ago and bring those responsible to justice?

Lord Bates: That is right. The situation on the ground is horrific and we are now getting credible reports of summary executions. We have heard the reports about the children caught in that building, but unless people are given access to that area—it is in the control of the Assad regime and the Russian President to bring that about—we cannot get access. It will not be us directly, of course; we cannot be the actors involved in that situation. However, the agencies of the UN, the NGOs and those courageous, heroic people who are putting their lives at risk to protect other humanity in that situation should be allowed in. It is within people's hands to do it and they should do it.

Baroness Kinnock of Holyhead (Lab): My Lords, thousands of children—we are talking about that many—are suffering so much in Aleppo. The regional director of UNICEF has said:

"It is time for the world to stand up for the children of Aleppo and bring their living nightmare to an end".

When will it be safe for those children to be taken to safety? What is being done to deal with the plight of unaccompanied children, who I do not think have been mentioned, and separated children, who must surely have the right to be united with their families?

Lord Bates: Reception centres have now been set up in western Aleppo. The Red Crescent is operating these, with some UN supervision so that we can verify who is there. Sadly, a lot of those who are fleeing are not choosing to register, so we cannot track their situation. They are too fearful of the situation on the ground. We know of situations where convoys and exits have been planned for people to move out through certain corridors. Buses have been laid on but these have been turned back by Shia militia who did not feel that they were part of the deal. It is, as I say, a catastrophic and tragic situation of human making. I often stand at this Dispatch Box and respond for DfID to crises such as disease, a hurricane blowing through the Caribbean or an earthquake in Nepal. This crisis is entirely of human making and that is what causes outrage among the whole world and all of us. It needs to stop.

Lord Campbell of Pittenweem (LD): My Lords, there is a strong argument that the inaction of the United Kingdom and the United States in 2013 created a vacuum, but the existence of a vacuum, exploited by Russia, can never justify the indiscriminate bombing by Russian aircraft, flown by Russian or Syrian pilots, of children, hospitals and refugees. This is wholly contrary to the Geneva Conventions. Will the Minister repeat, once again, with the same authority as previously, that everything will be done to seek out those responsible and ensure that they are brought to justice?

Lord Bates: I can certainly give that reassurance. The noble Lord is absolutely right that we should engage in some soul searching over our responsibility. A very powerful debate took place in the other place yesterday: I commend it to all Members of this House so that we can bear it in mind when we face similar situations in the future.

Neighbourhood Planning Bill

First Reading

3.48 pm

The Bill was brought from the Commons, read a first time and ordered to be printed.

Bank Recovery and Resolution Order 2016

Bank of England Act 1998 (Macro-prudential Measures) Order 2016

Immigration Act 2014 (Current Accounts) (Excluded Accounts and Notification Requirements) Regulations 2016

Motions to Approve

3.49 pm

Moved by ***Lord Young of Cookham***

That the draft Orders and Regulations laid before the House on 3, 7, and 16 November be approved.

Relevant document: 16th Report from the Secondary Legislation Scrutiny Committee. Considered in Grand Committee on 12 December.

Motions agreed.

Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016

Motion to Approve

3.49 pm

Moved by ***Lord Henley***

That the draft Regulations laid before the House on 17 November be approved.

Considered in Grand Committee on 12 December.

Motion agreed.

Coasting Schools (England) Regulations 2016

Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016

Motions to Approve

3.49 pm

Moved by ***Lord Nash***

That the draft Regulations laid before the House on 20 October and 7 November be approved.

Relevant document: 12th Report from the Secondary Legislation Scrutiny Committee. Considered in Grand Committee on 12 December.

Motions agreed.

Housing and Planning Act 2016 (Compulsory Purchase) (Corresponding Amendments) Regulations 2016

Motion to Approve

3.50 pm

Moved by ***Lord Bourne of Aberystwyth***

That the draft Regulations laid before the House on 7 November be approved.

Considered in Grand Committee on 12 December.

Motion agreed.

National Funding Formulae for Schools and High Needs

Statement

3.50 pm

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

"Mr Speaker, with your permission I would like to make a Statement on the second stage consultation of the Government's proposals to create a national funding formula for schools, copies of which can be found on the GOV.UK website. Since 2010, this Government have protected the core schools budget in real terms, but the system by which schools and high-needs funding is distributed now needs to be reformed to tackle the historic postcode lottery in school funding. These crucial reforms sit at the heart of delivering the Government's pledge to build a country that works for everyone, not just the privileged few.

Our school funding system as it exists today is unfair, opaque and outdated. The reality is that patchy and inconsistent decisions on funding have built up over many years, based on data that are sometimes a decade or more out of date. What has been created over time is a funding system that allows similar schools with similar students to receive levels of funding so different that they put some young people at an educational disadvantage. For example, a school in Coventry can receive nearly £500 more per pupil than a school in Plymouth and a Nottingham school can attract £460 more per pupil than one in Halton, despite having the same proportion of pupils eligible for the pupil premium. As these figures demonstrate, our funding system is broken and unfair. We cannot allow that to continue.

Our overall proposals for the principles and broad design of the schools and high-needs funding system, as set out in the first stage of the national funding formula consultation by my predecessor, my right honourable friend the Member for Loughborough, were widely welcomed. Today, we set out our response to that and the next, final stage of putting in place a national funding formula.

First, we are proposing a consistent base rate for every pupil at primary and secondary, which steadily increases in value as they progress through the system between primary and secondary. This is the largest factor in the formula, accounting for more than £23 billion of annual core schools funding and over 70% of the funding total.

Secondly, we are proposing to protect resources for pupils who come from disadvantaged families and are taking a broad view to target £3 billion annually in funding for those most in need of support. Our formula will prioritise not only children in receipt of free school meals but those who live in areas of disadvantage, helping to support many more families who are most likely to be just about managing to get by. This is alongside our broader commitment to maintain the pupil premium for deprived pupils in full, which will be protected at current rates throughout the remainder of this Parliament. We have also listened to the responses received to the first stage of the consultation, so our funding formula will include a factor for mobility, reflecting the number of children who join a school mid-year. Respondents to the consultation from London called particularly strongly for this. We will also protect small, rural schools, which are so important for their local communities, by the inclusion of a sparsity factor.

Thirdly, alongside a basic amount and an uplift for disadvantage, we will be directing £2.4 billion in funding towards pupils with low prior attainment at both primary and secondary school to ensure that they get the vital support they need to be able to catch up with their peers.

Our proposed reforms will mean that schools and local authorities all across England that have been underfunded for years will see their funding increase. Our proposed formula will result in more than 10,000 schools gaining funding and more than 3,000 of them receiving an increase of more than 5%. Those that are due to see gains will also see them quickly, with increases of up to 3% in per pupil funding in 2018-19 and up to a further 2.5% in 2019-20.

At the same time as restoring fairness to the funding system, we are also building significant protections into our formula: no school will face a reduction of more than 3% per pupil overall as a result of the new formula, and none will lose more than 1.5% per pupil per year.

On high needs, which provides local authorities with the funding they need to deliver the extra support required by our most vulnerable children and young people, for those with the most extreme special needs, whether they are in special schools or mainstream schools, we propose allocating over £5 billion in funding a year. That will mean that no local authority area will see its funding reduce as a result of the formula being introduced. We also propose to give local areas limited flexibility to be able to redirect funding between their schools and high-needs budgets, through agreement between the local authority and local schools, to support collaborative approaches to provision for special needs pupils.

These protections will allow all schools and local authorities to manage the transition to fairer funding while making the best use of their resources and managing cost pressures, ensuring every pound is used effectively to drive up standards and have maximum impact for the young people we are investing in. In addition, to support schools in using their funding to greatest effect, we have put in place, and are continuing to develop, a comprehensive efficiency package.

As I said in my Statement to the House on 21 July, I recognise the importance of this reform. It is long overdue, and I am keen to allow the proper amount of time for all schools to have the chance to reflect on what is a detailed formula. The consultation will therefore be open for 14 weeks until 22 March, with final decisions to be made before the summer next year. It is our intention that once we reach a final decision, the national funding formula will be properly introduced in 2018-19. This will be a transitional year during which local authorities will continue to set local schools' funding formulae, before we move in 2019-20 to our schools funding going directly to schools, so that the great majority of each school's individual budget is determined on the basis of a single national formula.

It is now time for us to consult on the more detailed design of the formula so that, with the help of the sector, we can really get the national funding formula right. We are keen to hear as many views as possible, and I encourage Members and their constituents to scrutinise and respond to the detailed consultation documents.

The proposals for funding reform will mean all schools and local areas receive a consistent and fair share of the schools budget so that they can have the best possible chance to give every child the opportunity to reach their full potential. Once implemented, the formula will mean that wherever a family lives in England, their children will attract a similar level of funding—one that properly reflects their needs.

This Government believe that the funding system we are proposing will ensure our schools system works fairly, and I commend this Statement to the House".

3.58 pm

Lord Watson of Invergowrie (Lab): My Lords, I thank the Minister for repeating the Statement. I also thank him—or perhaps it should be his officials at the Department for Education—for assisting those of us who are unable to grasp the main arguments within the Statement by helpfully underlining the really important words in it, just as the red tops do for their readers. It is a quite extraordinary development in the issuing of Statements.

The outcome for schools across the country will undoubtedly be disappointing, even for the 10,000 or so—less than half of all schools—which are to gain, because no new money is promised by the Government. That is hardly a surprise, but what is a surprise is that the Government have chosen to release the Statement today, apparently oblivious to the fact that the National Audit Office was issuing its report on the financial sustainability of schools just hours earlier. This Statement has already been delayed for too long. Had it been produced in a more timely fashion, perhaps the Government could have enabled the NAO to take on board the plans outlined in it, but that has not happened.

I have no doubt that the Minister and the Secretary of State would rather that the National Audit Office had kept quiet, because Whitehall's spending watchdog paints a markedly different picture to the upbeat scene sketched out in the Statement. The NAO says that the Government's approach to managing the risks to schools' financial sustainability cannot be judged to be "effective" or to be "providing value for money". Schools have to make £3 billion in efficiency savings by 2019-20 against a background of growing pupil numbers and a real-terms reduction in funding per pupil. Indeed, Sir Amyas Morse, head of the NAO, does not pull his punches. He says:

> "Schools could make the 'desirable' efficiencies that the Department judges feasible or could make spending choices that put educational outcomes at risk. The Department, therefore, needs effective oversight arrangements that give early warning of problems, and it needs to be ready to intervene quickly where problems do arise".

Unfortunately, the department's own Statement is not leading the news agenda because it has been overshadowed by the NAO report—which, unlike the Government's, is not partisan because the NAO's remit is to help the Government in their drive to improve public services, national and locally. However, I would forgive the Minister if, at this point, he does not quite view the latest intervention by the National Audit Office in that way.

Not only is there no new money, but less than half of schools, as I said, stand to gain from the new funding formula. There is scant information in the Statement about the losers, just a rather complacent comment that no school will lose out by more than 3% per pupil overall. In many cases, school budgets are

[Lord Watson of Invergowrie]
already intolerably stretched, and there simply is no room to absorb any kind of cut, whether 3% or less. Can the Minister say precisely how many schools will lose, how much they will lose in total and over what timescale? Can he further say what estimate—if any—has been made of the resultant impact on them and their pupils? Will there be job losses? What will the effect be on class sizes? It really is unacceptable that the Statement does not even hint at such information. Perhaps it is in the more detailed papers that accompanied the Statement, which I regret I have not yet had time to scrutinise. But the Minister will have had sufficient time, so I hope he may be able to enlighten noble Lords.

The Statement repeats the palpably false claim that the core schools budget will be protected overall in real terms. The National Audit Office report debunks that myth, stating that although average funding per pupil will rise from £5,447 in the current year to £5,519 in 2019-20, once inflation is taken into account that amounts to a real-terms reduction. I suspect the Minister will be unwilling to accept that analysis. If so, I suggest that he hears it from the chalkface. He may, like other noble Lords, have been listening to Radio 4's "Today" programme this morning when Anne Lyons, head teacher at St John Fisher Catholic Primary School in London, was interviewed. Of course, it is likely that schools in London will be among the hardest hit by the new formula. She said that schools were at breaking point:

"We realise we have to do more with less money in reality … But we're now at the stage—we're at breaking point".

She also said:

"Like many schools … facing these cuts, we are worried … It means that we're struggling to maintain the services we've been able to offer. We're cutting activities. We're a school that is increasing in size … we can't increase the staffing in line with the increase in pupil numbers … the only way some schools are going to manage this significant cut in real terms is through staff cuts—and that's going to add to workload".

I accept that the news is not all bad, as high-needs pupils, as the Minister said, are to receive additional funding, and no local authority will see this part of their funding reduced. It is also to be welcomed that the issue of mobility has been recognised. But the Statement is plain wrong when it claims:

"Once implemented, the formula will mean that wherever a family lives in England, their children will attract a similar level of funding—one that properly reflects their needs".

That is not the case, and this cannot be fine-tuned in that manner. A new funding formula was certainly needed, but it should have protected any school from suffering a reduction in funding, no matter how small, because schools simply cannot afford to have already stretched budgets reduced.

The Secretary of State should have fought her corner much more robustly with the Chancellor prior to the Autumn Statement to secure additional funding to protect schools scheduled to lose as a result of this Statement. The suggestion that schools make £1.7 billion in savings by using staff more efficiently just does not connect with the real world. Is the Minister unaware of teaching shortages? He certainly should not be, because I bang on about it often enough. Perhaps he can explain how efficiencies can be wrung out of schools that are already understaffed. Can he also confirm that there is no plan to pay for this funding formula by raiding the further education budget to some extent? That is often seen as an easy choice, and within the Department for Education it could be done. I am not saying there has been such a suggestion, but I would like the Minister to confirm that there is no question of stretching an already overstretched sector yet further.

For six years the Government forged ahead with an education policy containing just one strand, academisation. It was not particularly successful but at least it was consistent. Cue a new Prime Minister and suddenly, that has been turned upside down, with grammar schools now the answer. Of course they are not—only a small clique within the Conservative Party, of which I know the Minister is not a member, believes that—but it serves to highlight the turmoil within current government education policy. This approach has resulted in no progress against international comparisons, a crisis in teacher recruitment and retention, a majority of secondary schools with budget deficits and now schools across the country facing the most severe cuts to their budgets in a generation, while the only new money being offered to schools in England is to expand the few remaining grammar schools—80% of them, unsurprisingly, in Tory-held seats—regardless of where the need for new places is. I suggest that that sums up the Government's priorities. Despite their platitudes about education for all, their concern is really only for the few. That simply is not good enough. Our children deserve much better than this.

Lord Storey (LD): My Lords, I thank the Minister for repeating the Statement. It says that our current system is "broken and unfair". Yes it is; as the noble Lord, Lord Watson, has rightly pointed out, we have real problems of teacher supply in schools throughout the country, and teacher shortages in major subjects such as mathematics. There is also the current funding crisis.

I slightly disagree with the Statement where it says the Government have,

"protected the core schools budget in real terms overall".

However, those school budgets have not taken account of the increases of on-costs and national insurance. Many schools have faced real financial problems. I welcome the Minister's comments about the pupil premium and rural schools, and the promise of further financial resources for the disadvantaged. The additional safeguards, including the redrafted formula, are very welcome, but schools are still currently facing reductions of more than 3% per pupil, and this does not resolve their concerns or ours. The proposal does not change the real financial situation that our schools are facing. We are seeing real-terms cuts to education funding and, as the noble Lord, Lord Watson, has said, the National Audit Office has pointed out that by 2020 schools will have seen cuts of £3 billion and pupil funding fall by 8%. Those figures are just unimaginable.

We know—this is not illusory—that some head teachers are seriously considering cutting the school week to four days because their budgets are so tight that they just cannot operate a five-day week. Yet at the same time, against that backcloth, we have the

Government committing £240 million-odd to the reintroduction of a grammar school system and, of course, the cost of enforced academisation.

I personally, along with my party, welcome the idea of fair funding. In my city of Liverpool, when my party took control, I felt it unfair that the previous party had funded pupils below the national average. We immediately increased the funding to above the national average, and the benefits were there for all to see: Liverpool pupils then outperformed the other core cities. Fair funding, as per its title, can be fair, but there are winners and losers. The only way that I think you can make it work is by ensuring that no school in a fair-funding system sees its pupil figure reduced; they have to be brought up to the top figure.

We are proposing a consistent base rate for every pupil at primary and secondary school that increases in value as they progress through the system. Does that mean that we will have differential rates of funding for an infant pupil as opposed to a junior, secondary or sixth form one? I thought the days had gone when we thought that an infant was not as worthy financially as a pupil at a sixth form college, when we know that in fact the equipment required for an infant costs far more. Perhaps the Minister could explain that point.

We welcome the consultation because it is important to get this right. How does the Minister see the consultation being fed back to your Lordships' House?

Lord Nash: My Lords, perhaps I could just point out a few inaccuracies in the statement of the noble Lord, Lord Watson: 10,740 schools will gain, 9,128 will lose—54% of schools gain; and we have provided an extra £200 million.

The noble Lords, Lord Watson and Lord Storey, referred to the National Audit Office statement. Schools are making substantial efficiency savings—certainly in the academy sector, where we have much closer and more stringent financial oversight and much more information. I agree with the comments of the National Audit Office about some local authority schools. Schools are coming over from the local authority sector, whose financial controls appear to be very poor.

I invite the noble Lords, Lord Watson and Lord Storey, to look at the financial toolkits that we have developed on our website, particularly the very good clip from Sir Michael Wilkins of Outward Grange Academies Trust, one of our top performing academy groups. It has developed a toolkit called curriculum-led financial planning, which is a bottom-up analysis of how to remodel schools more efficiently and is creating significant savings in schools, and it has absorbed a number of schools into its family which have made significant savings at the same time as driving up education standards substantially. Any school considering going to a four-day week should contact the EFA for advice, because I am sure that by the application of such techniques, that can be avoided.

On the question of the noble Lord, Lord Storey, about differential rates, the answer is yes.

4.12 pm

Lord Adonis (Non-Afl): My Lords, I have wrestled with the school funding issue myself in the past, particularly in 1997, when we inherited significant overfunding of grant-maintained schools relative to other schools. The decision we took after extensive consultation with schools was that it would not be appropriate for schools to have their budgets cut. Part of the reason for that is that there is only a certain amount of energy in the system to raise standards, and it was clear from the discussions that I and my colleagues had that that would lead to a massive draining of energy from the system, because every school to lose from its budget would blame every problem it faced, every failure to raise standards, and every controversy in which it was engaged on the Government having cut its budget.

That involved a very small number of schools. The Minister and his colleagues are being extremely courageous in proposing to cut the budget of 46% of schools. All I can predict with any certainty is that there will be massive controversy in the sector; that will distract from the challenge which he and I would agree is the most important one facing the education system—the relentless one of raising standards, particularly in poorer areas, where standards are still too low and too many schools are still underperforming.

There is a very simple remedy—the one suggested by the noble Lord, Lord Storey—which is that no school suffers a cut in its budget. It would take longer for the new funding formula to take effect, but it would ensure that no school has to sack teachers or is given the excuse of a reduction in its budget to take its eye off the most essential challenge that we face, which is raising standards, tackling disadvantage and ensuring that every pupil in every part of the country has an opportunity to succeed at school.

Lord Nash: My Lords, I share the view of the noble Lord, Lord Adonis, that raising school standards is the most important thing. I perhaps should declare an interest, because he got me into this in the first place.

I do not want to sound complacent, but all schools have known for some time that they effectively face a cost pressure of 8% through pensions and national insurance. The school system is adjusting to that remarkably well, actually. I can only repeat what I said earlier: the toolkits that we published and the methodology being developed to re-engineer some processes without resulting in redundancies, in many cases, are remarkably effective. A closer analysis of some of the techniques, where adopted—I agree that they need to be more widely adopted across the sector—will show that they are effective.

Baroness Scott of Bybrook (Con): My Lords, I bring the attention of the House to my entry in the register of interests as leader of Wiltshire Council. I welcome the review, which has been long awaited by all our schools. I particularly welcome the fact that it has been noted that there are issues with rural schools, and that the Government suggest that we protect those schools and particularly look at the sparsity factor and the cost of delivering education in a rural area.

However, when we look at this review of the funding formula, have we taken into account our military children and families? There is an issue about the funding of military children and its costs, and they are

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a group that often struggles to come up to the standards of other children because of the type of life they live and the moves they make. I urge the Minister to continue to look at having something in the formula that helps communities with large numbers of military children.

Lord Nash: I certainly share my noble friend's concern about small rural primary schools, which will on average benefit under these proposals by over 5%. We will publish, school by school, the impact of the national funding formula later today. I will certainly look more closely at the impact on military children and families.

Lord Sutherland of Houndwood (CB): My Lords, of course it is right to put at the centre of policy the raising of standards in schools. Members in this Chamber now are to be congratulated on setting this ball rolling a number of years ago, as is the Minister on continuing that in the school system today. That is fundamental—it is principle number one.

All is not well in schools, and we know it. In fact, the Statement accepts that. Plenty other folks have made the same point: the unions will certainly make it ad nauseam, and the OECD has pointed it out rather forcefully recently. I speak as one who is greatly concerned about shortage of cash in other areas of the Budget—not least social care—which will have a direct impact on the success of schools; we are not on a single track. Granted that the principle of higher standards is accepted, what are the other fundamental principles? Two are being enunciated today. The first is that there should be a national formula—there should not be postcode allocation of cash up and down the country. The second is that the focus should be on areas of high national need and schools that are exemplars of high national need in the system. I do not envy the Government, nor the Minister, in trying to square availability of cash with those principles, but it is absolutely right that we stick with them.

One thing I am sure about: any attempt to provide every school with above average funding will not work, mathematically.

Lord Nash: I am very grateful to the noble Lord for the sense of realism that he brings to the debate. I entirely agree with the point about focusing on areas with financial need; that is why we have developed these opportunity areas, and our regional schools commissioners are particularly focused on areas, many of which are up north, where a particular improvement in education is required.

Baroness McIntosh of Hudnall (Lab): My Lords, the Minister in his reply to the noble Lord, Lord Storey, gave a rather perfunctory response, if I can be forgiven for saying so, to his question about differential statements at different stages in the educational system. Speaking personally, I have not yet fully understood the rationale behind this. Could he give us a little more clarity on that, please?

Lord Nash: I invite the noble Baroness to submit any thoughts to the consultation process. As I say, the details of the impact that the formula will have on all schools one by one will be available later today and all schools can look at it, but the net effect is that most schools will have a gain and none will lose more than 3%. As I said, small rural schools will gain on average over 5%, and they are the sort of schools that particularly struggle with some of the issues that have been mentioned.

Baroness Redfern (Con): My Lords, first, I declare my interests as listed in the register. I formally welcome the new funding formula. As the Minister said, it was long overdue, and it is right that we get it right this time. I particularly want to emphasise, and am very pleased about, the fact that rural schools are going to be supported on sparsity as such. Rural schools provide the libraries and sports facilities for our young people and play a big and vital part of village life. I am pleased that we are also going to initiate a consultation, as it is important that we get people's views on how they see this formula working out. With the right formula, and a fairer formula, all children should have the right opportunity wherever they live in the country so that, as the Minister alluded to, every child can reach their potential, wherever they live in the UK.

Lord Nash: I am extremely grateful to the noble Baroness for her comments, which I can only support.

Baroness Farrington of Ribbleton (Lab): My Lords, has the Minister had a few moments to reconsider his answer to the noble Lord, Lord Storey, on the whole issue of differentials, because he did not answer it? There will be many schools, as the Minister admitted, which will lose funding and will face difficulties. Given the Question that we considered earlier, where it was suggested that the Government might put extra money into independent schools and money for grammar school expansion, will it be possible for all the schools affected—a large number, as the Minister admitted—to submit to the consultation that they would prefer to have the money shared out?

Lord Nash: It will be entirely possible for anybody to make any representations in the consultation, and maybe the noble Baroness would like to do so in that respect.

Baroness McIntosh of Hudnall: My Lords, I am sorry to take the time of the House, but I am not sure that I made myself clear with my first question. It appeared to me, from what the Minister said in the Statement, that he was suggesting—indeed, he confirmed it to the noble Lord, Lord Storey—that the amount of money per pupil would be different for children at an early stage in the education cycle, with smaller amounts being available for nursery school children, for example, to that available for pupils in sixth form. Given the amount of attention given by research lately to the importance of early years education, that seems an extraordinarily surprising decision for the Government to have taken. Could the Minister help us to understand it a bit better?

Lord Nash: We take the view that there are additional costs in secondary over primary and that they increase as one moves from key stage 3 to key stage 4. There will be three bands: key stages 1 and 2; key stage 3; and key stage 4.

Lord O'Shaughnessy (Con): My Lords, I was not intending to get involved on that particular topic but, as noble Lords may know, I have been involved in setting up primary schools. Much as I would like even more money for primary, it is the case that as you go through secondary and have to have specialised teaching in specialised subjects—whereas in primary school it tends to be whole class—there are other costs involved, because classes tend to be smaller, particularly if you are teaching niche subjects.

Despite some of the negativity around these plans, I want to encourage the Minister and the Government to go forward with them. Through the Floreat academy trust that I founded, we have opened schools both in one of the lowest-funded local authorities in the country and in one of the best funded, in inner London. The pupil needs in the schools are not so different, and the requirements in terms of hiring staff are the same, so it is quite palpably unfair. Indeed, for multi-academy trusts that span a number of local authorities, it causes problems in the trust and among the schools if there is a concern—or, if you like, sometimes a sense of unfairness—about what has happened. Notwithstanding the difficult circumstances in which we find ourselves with the overall funding element, righting that historic wrong is incredibly important and cannot come soon enough.

Lord Nash: I am grateful for my noble friend's support for this. Of course, he speaks with considerable knowledge in this area. As I said earlier, the first stage of the consultation was extremely well received and we believe that the second will be, too—but I invite all people who wish to make representations to do so.

Baroness Billingham (Lab): My Lords, I know that the Minister will be fully aware that there is one group of parents who will be looking at what has been said today and over the last few days with a special interest. They are parents of children with special needs. Quite honestly, they are the ones who are going to be looking at this very carefully and with understandable wariness. I wonder how the Minister will manage to give more information to those children and parents, especially to parents of children who are statemented, who are constantly wary of what the outcome will be as far as their own children are concerned. We need perhaps to focus on that particular area, if possible.

Lord Nash: The noble Baroness is quite right about that. I can reassure her that there will be no cuts to the funding for high needs—no per-pupil cuts at all. Indeed, we have increased funding for high needs every year since the high-needs funding system was changed in 2013. This year, local authorities are getting more than £90 million in high-needs allocations.

Baroness Farrington of Ribbleton: My Lords, can the Minister be a little more specific about special and higher needs? Many years ago, Baroness Warnock identified that 20% of children have special needs, of whom only about 2% have needs severe enough for statementing. I go back to the question from my noble friend about the funding formula for young children. The Government are to be commended for extending childcare, but no one will support moving children with special needs not at statementing level, who are currently educated properly in infant and nursery schools by qualified teachers. We need an assurance that finance for this group of children will be protected. These children form a large percentage of those who fail to achieve later in their school careers because their special needs have not been identified and met.

Lord Nash: The noble Baroness is absolutely right and I am sure that she will be delighted to hear that, at the moment, additional-needs funding accounts for 13% for the overall schools budget and that it will be increasing, under these proposals, by an additional £1.7 billion, so it will be 18%. So in fact substantially more money will be made available for that group.

Lord Watson of Invergowrie: My Lords, perhaps I may follow up an answer that the Minister gave to my initial question. He mentioned a figure of £200 million of new money. Why is it not in the Statement, how is it proposed that it should be allocated and where has it come from? I also asked about further education; can he allay any fears that this sector might have as a result of this Statement?

Lord Nash: The way the funding formula has worked means that we have been able to find an extra £200 million. We did not put it in the Statement because we felt that it was more important to focus on the percentage variation overall. As I say, this afternoon we will publish details on a school-by-school basis so that all schools can see where they stand.

National Citizen Service Bill [HL]

Third Reading

4.29 pm

Clause 6: Annual report etc

Amendment 1

Moved by ***Lord Ashton of Hyde***

1: Clause 6, page 3, line 4, at end insert—

"( ) the number of those participants who have a disability within the meaning of section 6 of the Equality Act 2010,"

The Parliamentary Under-Secretary of State, Department for Culture, Media and Sport (Lord Ashton of Hyde): My Lords, on Report, I committed that the Government would bring forward an amendment adding to Clause 6. I have listened to the points raised by noble Lords. The noble Baronesses, Lady Barker, Lady Scott and Lady Royall, and the noble Lord, Lord Shipley, have, over the course of these debates, made the point eloquently that we must do all we can to ensure that the NCS is accessible to disabled people.

The Government have put this amendment forward so that Parliament may see clearly, on a year-to-year basis, how the trust is performing in this area. The only way the trust will be able to report positively on

[Lord Ashton of Hyde]
the number of participants with a disability will be to work proactively with its provider base. I thank noble Lords for the worthwhile debate on this matter, and for making valid observations throughout. I hope that the House will support the amendment. I beg to move.

Lord Shipley (LD): My Lords, I thank the Minister for this amendment, which, as he said, has been brought forward following discussion in Committee and on Report. The amendment is reassuring in that the Government and the NCS Trust will formally acknowledge the importance of equal access to NCS projects for young people with a disability. We look forward to seeing the guidance that will be given to those running projects. I hope the Minister has taken on board the concerns expressed at previous stages of the Bill that, when reporting on the numbers of disabled young people participating in the scheme, it will be necessary to have a breakdown by type of impairment, because disabled young people are a very diverse population.

Secondly, I still have some concerns about funding. The Government have previously suggested that the current funding system would be maintained where funding for meeting additional needs is paid out on a discretionary basis. I hope the Minister will think further about creating a more transparent system so that it can be scrutinised to ensure that the sums are sufficient.

I thank the Minister for meeting us and listening very carefully to the arguments made at previous stages of the Bill. I fully support this government amendment.

Baroness Royall of Blaisdon (Lab): My Lords, I too am grateful to the Minister for tabling this amendment, which I fully support. I was also very grateful to him for agreeing on Report to amend the charter. It would have been helpful to see the draft charter with the amendments in it, and I hope it will be published soon. When will the charter be amended and published? Will the noble Lord be able to make an announcement about the review regarding a year of service? It was going to be "in due course", "soon", "imminent" and "very imminent", and I wonder if it will be today.

Baroness Scott of Needham Market (LD): My Lords, I add my thanks to the Minister not only for this amendment but for the way that he has approached the entire Bill and listened to the concerns which we have all raised. I re-emphasise the point about funding because, as we heard at previous stages, there are significant extra costs involved in the provision of services to people with disabilities to allow them to participate fully in the scheme. That is the point of this. It is not just about reporting the numbers and ticking the boxes but about genuine participation. It is important that sufficient funds are allowed and that they do not come from squeezing the providers and simply expecting them to provide the extra support. There needs to be a good dialogue between the NCS commissioners and the providers to make sure that sufficient funds are provided.

Amendment 1 agreed.

Clause 7: Notification of financial difficulties

Amendment 2

Moved by ***Lord Ashton of Hyde***

2: Clause 7, page 3, line 37, at end insert ", or

( ) is the subject of a police investigation into an allegation of criminal conduct which could have serious consequences for the NCS Trust."

Lord Ashton of Hyde: My Lords, before I turn to Amendment 2, perhaps I may answer a couple of points raised on Amendment 1. I take on board all the points about funding and the extra costs. I said what I said about funding on Report but, again, I note what noble Lords have said and will take it back to the department.

The noble Baroness, Lady Royall, asked about the charter. It will be available in its amended state before Second Reading in the House of Commons. I wrote to noble Lords stating the additions which we have put in but I agree it would be easier to have it all in one place, and that will be done before Second Reading.

I am absolutely delighted to be able to say that, earlier today, the Minister for Civil Society announced an independent review into young people's full-time volunteering. The review will look at how to increase participation in full-time social action by reviewing the opportunities and barriers faced by organisations that support young people. There will be an advisory panel, formed of experts from the private and voluntary sectors, and the review is expected to make recommendations to the Minister for Civil Society by October 2017.

On government Amendment 2, the NCS Trust's paramount concern, as expressed in the royal charter, is the safeguarding and well-being of its participants. Clause 7 currently provides a requirement on the trust to notify the Secretary of State of financial difficulties, as defined by the relevant subsections. The noble Lord, Lord Cromwell, who is not in his place because he is in the Finance Committee, tabled an amendment in Committee and then on Report which would also require the trust to notify the Secretary of State of criminal allegations or allegations of misconduct against a member of staff of the trust or of an NCS provider.

Noble Lords will be aware that the Government were unable to accept the precise drafting of the amendments tabled by the noble Lord, Lord Cromwell, but we absolutely recognise that he has raised an important point. The amendment is consistent with the intentions of Clause 7 as drafted. In the case of financial issues, the Government, as funder, will likely be the appropriate authority to take action. Where there are safeguarding concerns or allegations of abuse, the police are the appropriate authority to notify, but it will be appropriate to alert government to an investigation that might have serious consequences for the NCS Trust. The amendment has been drafted to that effect. I am grateful to the noble Lord, Lord Cromwell, for bringing this matter to my and my officials' attention and for making himself available for discussions. I hope the House will support the amendment. I beg to move.

Lord Cormack (Con): My Lords, I strongly support the amendment and admire the concise way in which my noble friend introduced it. I would like to take advantage of his mentioning the review that has been announced today merely to express the hope—this will not come as a surprise to him as I have taken part at Second Reading, in Committee and on Report and made similar points on each occasion—that the review will be able to look at the wider concept of citizenship and the possibility of the sort of national citizenship scheme that I advocated on those earlier occasions. I would be grateful for the Minister's assurance that this will fall within the remit of the committee that is to report in October of next year.

Baroness Barker (LD): My Lords, I thank the Minister for the way he introduced this amendment. When the noble Lord, Lord Cromwell, spoke to this matter in Committee and on Report, he was clear that his primary concern was not financial misconduct but that wider behaviour was at the heart of this. Charity legislation has had to grapple with this very difficult matter in the past. The Minister may know that during the passage of the draft Protection of Charities Bill we had a lengthy discussion about how one puts this concern into law. I note that this amendment still sits within a clause headed "Notification of financial difficulties". Will the purport of this measure be made clear in guidance—that is, that it is not about financial matters but about safeguarding and wider issues of that nature?

Lord Stevenson of Balmacara (Lab): My Lords, I just want to pick up on the point that has just been made—the unfortunate elision of financial difficulties with the broader issue raised by the amendment. I am sure that it is not something that we need to trouble with today. The Minister and I discovered that the wording in bold black type in Bills of this nature is not subject to amendment but it can be changed by the Government simply issuing instructions to the draftsman. Perhaps that can be arranged at some point in the magic that goes on behind the scenes, as I think that would remove the difficulty here.

Lord Ashton of Hyde: My Lords, I am glad to be able to leave this Bill by agreeing with the noble Lord and the noble Baroness. Two things are happening in this clause: one is financial and the other is criminal conduct, introduced by the noble Lord, Lord Cromwell. When the Bill is reprinted and goes to the House of Commons—assuming that it passes today—the new title of Clause 7 will be "Notification of financial issues and criminal conduct".

I am afraid I shall be less specific with my noble friend Lord Cormack. I know he has long had an interest in citizenship as a concept and in setting up a citizenship programme, culminating in a citizenship ceremony. I am not sure that that comes within the remit of this social action review, which is principally about volunteering, as opposed to citizenship. Therefore, I am afraid I cannot give him that guarantee, but I will take it back to the department and ask the Minister for Civil Society about it, and, if necessary, he can write to my noble friend.

Baroness Byford (Con): Unfortunately, I could not be present on Report but I think my noble friend Lord Cormack spoke about this matter. As the Minister will remember, the whole idea was to give those participating in the scheme some sort of public recognition. I was not too worried about the wording; I was just keen that other youngsters should be encouraged to take part. The suggestion was not necessarily that there should be a formal ceremony, as there is when people come to this country and take citizenship. This is about young people taking part in citizen service, and it seems a shame to miss the opportunity to have that recognition in what I think is a very good scheme. I am grateful to the Minister and everybody who has taken part for their efforts to make sure that it is a good scheme. The Minister said that he would refer the matter to the department. I am just saying that I hope it does not get lost, and I thank him for his courtesy.

Lord Ashton of Hyde: My Lords, I should be clear on this. I said on Report that the Bill will not encompass citizenship. This is completely different—we are talking about the social action review. I am sure my noble friend is aware of that but I just want to make it clear.

Amendment 2 agreed.

A privilege amendment was made.

4.43 pm

Motion

Moved by ***Lord Ashton of Hyde***

That the Bill do now pass.

Lord Ashton of Hyde: My Lords, in moving this Motion, I express my grateful thanks to all noble Lords who have contributed to the Bill's passage. I especially thank the noble Lords, Lord Stevenson and Lord Blunkett, and the noble Baroness, Lady Royall, from the Labour Benches, and the noble Baroness, Lady Barker, and the noble Lords, Lord Wallace and Lord Shipley, from the Liberal Democrat Benches. They all made themselves available for meetings in addition to the debates at the various stages of the Bill. Last, and certainly not least, I thank my private office and all the Bill team, especially Kate Brittain and Tom Blackburn. They are showing devotion to duty to the last by being here instead of going to the office Christmas party. They have made my job very easy. I beg to move.

Lord Stevenson of Balmacara: It is conventional to respond to the Minister's thanks, and I should like to do so very briefly. I also thank the Bill team—I am sorry they are not wearing their party hats. It was a privilege to work with them; they were very open and very good at giving us the information we needed. This was a complex enough Bill on its own, and to add to that the complications of a royal charter must have been slightly mad, but that has also happened. We are still waiting for the final draft but I am sure it will come. In addition, the Minister was able to operate the

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wheels of government machinery to the point that, within about a minute of his standing at the Dispatch Box, he received notification to be able to announce the volunteering review. We had been waiting for that and we are very pleased to see it.

The Minister very kindly mentioned my noble friends Lady Royall and Lord Blunkett. I have to pass on a message from my noble friend Lord Blunkett. Because of the changes to the timings in the House today, he is not able to be present, but he wished me to make it clear that he joins me in thanking the Minister and the team for making the Bill work in the way that it has. He is very pleased with the result.

Bill passed and sent to the Commons.

Wales Bill

Report (1st Day)

4.46 pm

Clause 1: Permanence of the National Assembly for Wales and Welsh Government

Amendment 1

Moved by ***Lord Bourne of Aberystwyth***

1: Clause 1, page 2, line 5, leave out "There is" and insert "The law that applies in Wales includes"

The Parliamentary Under-Secretary of State, Department for Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con): My Lords, before we begin our Report stage scrutiny of the Bill, I would like to say a few words on the wider context and timing of the Bill's remaining stages. This House has undertaken very effective scrutiny of the Bill. On our part, the Government have listened to points that have been made and concerns raised, and have brought forward amendments where we believe this will improve the Bill's provisions and put in place a more robust and lasting new devolution settlement. The amendments that the Government are bringing forward for debate today, and for consideration by this House on the second day of Report in the new year, are testament to this.

There is a need for the Assembly to consider an LCM on the Bill before our Third Reading, which we will certainly do. Should the Bill then be subsequently different from the one agreed to by the Assembly, a new LCM would be needed. A different Bill post 17 January would need a new LCM. I feel duty-bound to mention this difficulty and this pressure, although the attitude of noble Lords is of course entirely a matter for your Lordships' House.

On the amendments in this first group, Clause 1 gives important statutory recognition to the existence of a body of law created by the Assembly and Welsh Ministers which forms part of the law of England and Wales. In Committee, I committed to reflect further on the spirit of an amendment tabled by the noble Lord, Lord Elis-Thomas, that sought to clarify that the body of Welsh law made by the Assembly and the Welsh Ministers forms part of the law that applies in Wales. Having done so, I am pleased to bring forward government Amendment 1, which clarifies that the body of Welsh law made by the Assembly and Welsh Ministers forms part of a wider body of law that applies in Wales. In considering the wording of this government amendment, I am extremely grateful to the noble Lord, Lord Elis-Thomas, for his wise counsel, drawing on his expertise and experience as a former Presiding Officer of the National Assembly.

On Amendment 2, a non-government amendment, noble Lords will recall that we debated a similar amendment from the noble Lord, Lord Wigley, on the first day in Committee, and this issue was also considered in some detail in the other place. It is clear that is there a strong appetite to keep under review the operation of the justice system in Wales as a result of continuing divergence in the laws that apply in England and in Wales, and to ensure that the distinctiveness of Wales is properly reflected under the settlement provided by this Bill.

The Government have been clear throughout the passage of the Bill that we consider the most effective and efficient way to administer justice in England and Wales is through a single jurisdiction. The distinctiveness of Wales can be, and indeed already is, reflected within the single jurisdiction, for example through the National Offender Management Service in Wales and Her Majesty's Courts & Tribunals Service in Wales. This enables, for example, the National Offender Management Service in Wales to work closely and directly with the Welsh Government and with health and education providers to ensure appropriate provision of services for offenders. It allows the courts to be administered directly in Wales by staff in Wales, while ensuring that a consistent approach is taken on justice policy.

There is undoubtedly a distinctive legal identity in Wales. It has two legislatures and a small but growing body of law made by the Assembly and Welsh Ministers which lawyers and judges will have to specialise in and apply appropriately in relation to devolved matters. Even with increased divergence, the vast majority of laws will, however, continue to apply across England and Wales. A separate jurisdiction would therefore create significant upheaval and huge cost for no good reason.

In Committee, I agreed to take away the points made about establishing a commission to review the functioning of the justice system in relation to Wales, recognising the points made by the noble Baroness, Lady Morgan, that it is an evolving picture and the points made by the noble Baroness and the noble Lord, Lord Elis-Thomas, about the sources of Welsh law. But for the reasons that I have just outlined, such a review should be within the framework provided under the Bill; that is to say that it should review the functioning of the justice system in Wales within the single legal jurisdiction. I was also clear that a statutory commission would not be the appropriate solution. This would be unnecessarily costly and complex, and would be constrained in how it approached its task.

The principle of reviewing the functioning and operation of the justice system in Wales is sensible. That is why we established the Justice in Wales Working

Group to consider the administrative and practical implications for the justice system of diverging law. The group will report to Ministers and the Lord Chief Justice within the next week. I wrote to noble Lords yesterday with an early overview of its recommendations, and consideration is being given as to how best to inform Parliament and stakeholders of its findings.

The group has met a range of people involved in the justice system in Wales, including the judiciary, academics, legal practitioners, professional bodies and those directly responsible for the delivery of justice, including NOMS in Wales, HMCTS Wales, Youth Justice Board Cymru and the Crown Prosecution Service. Those discussions have yielded an invaluable source of information on the current processes as well as providing sensible, pragmatic solutions for managing the justice system as the law continues to diverge in Wales. But the work will not finish there. There will be a continuing need to ensure that justice operational arms and devolved authorities work closely together to deliver effective justice in Wales, building on existing examples of good practice and co-operation.

I understand that one of the group's main recommendations is likely to be the establishment of a committee to undertake periodic reviews of the operation of the justice system as the law continues to diverge. My right honourable friend the Secretary of State has written to the First Minister proposing that such a non-statutory group be established to keep the operation of the justice system in Wales under review on a permanent basis as the administrative arrangements continue to evolve to reflect Wales's distinctiveness within the single jurisdiction.

The committee will have a focused remit, and will be chaired by a senior official from the Cabinet Office. It will include a representative from the Ministry of Justice and from the Welsh Government. The committee would report periodically to the Lord Chancellor, with both the First Minister and the Secretary of State for Wales receiving copies. Further consideration will be given to the membership and terms of reference of the committee, and to issues such as how regularly it will report and when it should be established. I understand that my right honourable friend the Secretary of State and the First Minister are meeting tomorrow to discuss this issue, among others. However, the committee will not consider issues relating to the jurisdiction or the devolution boundary that this Bill puts in place. I trust that noble Lords will agree that this committee provides a solid basis through which to ensure that the justice system in Wales keeps pace with the dual influence of Assembly and parliamentary lawmaking within the single jurisdiction.

I turn now to Amendment 3. Clause 2 places the existing convention on legislative consent on a statutory footing—

Lord Carlile of Berriew (LD): I am most grateful to the noble Lord and I hear what he says about jurisdiction. If that is to be the case, can he confirm that although the committee will not deal with jurisdiction, it may make recommendations about the administration of parts of the joint jurisdiction so that, for example, a Wales division of the High Court, for instance, might be established which is separate in devolution terms from the Queen's Bench Division of the High Court, so that the High Court could be fully administered within Wales?

Lord Bourne of Aberystwyth: My Lords, I am sure that the noble Lord will understand that I do not want to be drawn into the specifics but, having said that, I understand that that would be within scope. As I say, my right honourable friend the Secretary of State and the First Minister are meeting tomorrow to discuss the terms of reference more fully, but as I say I understand that that would be in scope.

Again, I turn to Amendment 3, dealing with the convention on legislative consent which we are seeking to place on a statutory footing as the Government committed to do in the St David's Day agreement. This is also in line with Section 2 of the Scotland Act 2016. The convention states that Parliament will not normally legislate on matters devolved to the National Assembly for Wales without the consent of the Assembly. Through Amendment 3, the noble Lord, Lord Wigley, is seeking to broaden the convention by removing the word "normally" from it, and I understand that he will come to address the points on this later.

The use of the word "normally" reflects the convention as it is set out in devolution guidance and its removal from the clause would fundamentally change the nature of what is understood by the convention. That is not what was recommended by the Silk commission or what was set out in the St David's Day agreement and it is therefore not what we are doing in this Bill.

It is a fundamental principle of our constitution that Parliament is sovereign. As such, it can legislate for matters devolved to the National Assembly for Wales as it can for those devolved to the Scottish Parliament. The convention does not seek to fetter this ability. What it does is make clear that Parliament would not normally do so without the consent of the relevant devolved legislature. The inclusion of "not normally" is essential as it acknowledges parliamentary sovereignty. It also signals that it is not intended to be justiciable, because the courts would recognise that it is for Parliament to determine what is and is not normal in this context.

There may be occasions when it makes sense to legislate on a UK-wide basis. Since the convention was established, a legislative consent Motion has always been sought before Parliament passes legislation applying to Wales which, in the Government's view, relates to the conferred matters within the Assembly's legislative competence. I can confirm that this is part of the normal working arrangements between the UK and Welsh Governments that work well, and I expect that to continue.

I turn now to government Amendment 9. Clause 5 inserts new Section 13A into the Government of Wales Act which gives the Secretary of State the power to make regulations to combine the polls at certain Assembly elections with certain UK parliamentary elections and European parliamentary elections. The exercise of this power is subject to the agreement of Welsh Ministers. We consider that it is appropriate for the Secretary of State to be required to consult the Electoral Commission on any regulations made under Section 13A of the

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Government of Wales Act. This is consistent with the requirement to consult under Section 13 of that Act. Government Amendment 9 achieves this by adding Section 13A of the Government of Wales Act to Section 7(2)(f) of the Political Parties, Elections and Referendums Act 2000.

Government Amendments 10 and 105 relate to the current limit placed on the number of Welsh Ministers. Section 51 of the Government of Wales Act provides that no more than 12 persons are to hold relevant Welsh ministerial office at any time. A relevant Welsh ministerial office is defined in this section as the office of Welsh Minister appointed under Section 48 of the Government of Wales Act or the office of Deputy Welsh Minister. Noble Lords will be aware that the Bill provides significant powers to the Assembly to be able to increase its size if it so wishes. In this context, it is only right that the Assembly should also have the power to increase the size of the Executive. Amendment 105 devolves power to the Assembly to be able to modify or repeal this limit.

Amendment 10 provides that any Assembly legislation which sought to modify this limit would be subject to a supermajority; that is, it would need to be supported by at least two-thirds of Assembly Members. Given the current size of the Assembly in relation to the Welsh Government, we believe that this provides a sensible safeguard to ensure that any modification or repeal of the limit would have broad support among Assembly Members. We have worked closely with the Welsh Government and the Assembly Commission in preparing these amendments.

5 pm

Government Amendment 11 is a further minor change to the provisions in Clause 13 that has resulted from discussions with the Welsh Government and the Assembly Commission. Clause 13 requires the Assembly to design and put in place accounting and audit arrangements for various devolved bodies to which payments are made from the Welsh Consolidated Fund. Taking on these responsibilities is a natural next step in the progress of devolution to the Assembly. The Scottish Parliament, under the Scotland Act, has similar arrangements. It is with that in mind that this amendment has been brought forward.

The Assembly Commission in particular has argued that the Assembly needs the same powers as the Scottish Parliament to legislate to make devolved Welsh authorities accountable for funds they receive that are derived from the Welsh Consolidated Fund. The Government have looked at this issue pragmatically and agree that this should be within the Assembly's competence. Accordingly, having moved government Amendment 1, I shall move Amendments 9, 10, 11 and 105 in due course. I look forward to hearing from noble Lords and Baronesses on their amendments. I beg to move.

Lord Elis-Thomas (Non-Afl): My Lords, perhaps I may respond positively to the amendment introduced in response to the discussion that we had during our first day in Committee on the notion of so-called Welsh law. I commend the Government on their simplicity as well as their inclusiveness by invoking the terms of the law that applies in Wales and pointing to the various bodies of law that apply in Wales, which include the growing body of Welsh law produced by the National Assembly and Welsh Ministers, the law of England and Wales as enacted in this Parliament, the context of European law and the law that is made by precedents and the decisions of the courts. All that is very welcome and I am grateful to the Minister for his response.

It coincides with an equally important statement made in the National Assembly yesterday by Mick Antoniw, the Counsel General, who indicated that to pursue the greater public understanding of the law in Wales, and Welsh law as defined, he intends to instigate a project of consolidation and codification as a pilot. I warmly welcome that statement as well. Therefore, there is a willingness on the part of the legal profession in Wales and its senior government officer in the form of the Counsel General to ensure that the Law Commission's recommendations for the creation of a dedicated legislative code office and the greater consolidation and codification in an intelligible form of Welsh law are pursued. I particularly welcome as well the decision to publish on the Cyfraith Cymru/Law Wales website further discussion and evaluation of the advantages of consolidation and codification.

That brings me to the other issue I want briefly to touch on: the ongoing response of the UK Government and the Minister to how we progress the analysis and measurement of the effectiveness of the combined jurisdictions and the administration of justice in Wales. I have seen the letter from the Secretary of State to the Welsh First Minister and I had the benefit of a short discussion before I left Cardiff this morning with the First Minister about this, but it is not for me to stand up in this House and purport to represent the position of the Welsh Government. That would be severely out of order.

What the Minister has announced in response to the discussions we have had here and elsewhere has indicated a willingness to understand that there is a balance between the sovereignty of Parliament as understood historically and the increasing democratic accountability and lawmaking potential of the National Assembly. I am looking for a way in which we can move beyond a rather sterile debate where red lines are drawn between various approaches. I am not sure that the committee or commission that the Minister is outlining goes quite far enough on the kind of road I envisage.

I also point the Minister and this House towards the remarkable case presented to the Supreme Court by the Welsh Government which emphasises that, whatever the history of the United Kingdom has been historically, in terms of the relationship between the nations, the only way to operate is by treating the United Kingdom as an association of nations that is now not so hierarchical but more equal. Therefore, in looking for ways we can work within frameworks, is it not time to try to ensure greater equality of representation on commissions, committees or working groups that study these issues? I am not sure that the chairing of a committee by a senior person from the Cabinet Office meets the case. This requires equal representation from practitioners and stakeholders in Wales and in the United Kingdom, and an independent chair.

Lord Morris of Aberavon (Lab): My Lords, I want to add one word to what the noble Lord, Lord Elis-Thomas, has just said. I very much welcome what he has told us about the intentions of the Assembly, through its Counsel General, to consolidate the laws of Wales as they emerge. I raised this point earlier in the passage of the Bill. I was a consumer once, as a practitioner. Consumers generally, whether lawyers in Cardiff, Swansea, Caernarfon, London or elsewhere, want easy access to the law of Wales as it emerges from Cardiff; otherwise, they could be sued for being negligent in the advice they give. I welcome it very much and I am grateful to the noble Lord for telling us of those intentions.

Baroness Morgan of Ely (Lab): My Lords, I have tabled Amendment 2 relating to the establishment of a justice in Wales commission. I am very pleased to hear that there has been a degree of movement by the Government on this matter. We emphasised in Committee that we were largely dissatisfied, as I think are the Welsh Government, with attempts by the UK Government to address the fact that over time there will be this increasing disparity between English and Welsh laws, albeit they will both still be dealt with under the single England and Wales jurisdiction.

We have heard about this working group and I am glad that we have had a letter to inform us of the Government's suggestions. We have not had as much time as we would have liked to deliberate on those, but I am pleased that the Government have recognised the need for some kind of ongoing committee or representation to make sure that they are constantly taking the temperature of the changes that will be happening. We made it clear that we were unhappy with this working group; we did not think it had been thought through in agreement with the Welsh Government but had been imposed on the Welsh Government, who certainly did not feel that they necessarily needed to respect any outcomes of it. That is why we are pleased to see the move to a more equitable system in which the Welsh Government will be respected.

Whether the committee outlined by the Minister goes far enough is questionable. We wanted a commission rather than a committee, but I am not going to nit-pick on that point; it is more important to look at the purpose of this group. I am glad that the Minister recognises that there will be, and is already, a distinct legal identity to Welsh laws but a number of points need to be addressed in relation to this committee. The noble Lord, Lord Elis-Thomas, just made the point that it needs to be seen to be more independent—equidistant from the UK and Welsh Governments. We have moved from the Ministry of Justice having the chairmanship to the idea that it might be somebody from the Cabinet Office but, given that it could be chaired by a representative from the UK Government, we wonder whether it would be better to have a more independent representative chairing the committee.

However, what is more important to me is the need to be clear that the people on the committee should be senior individuals, with the independence and expertise required to carry weight with both Governments. In that sense, it is crucial that both Governments are involved in making sure that they can agree on its membership. Can the Minister give us a commitment today that that will be respected—that there will be a joint agreement on who those experts will be? I should like it to be absolutely clear that this will be an ongoing group, because the body of Welsh law is likely to grow over time. It should not be a task-and-finish group; it needs to be ongoing. I am anxious to hear the terms of reference for this group. Can the Minister give us some indication of them? Would they also be agreed with the Government of Wales? If we are not to get an independent chair, those terms of reference need to be agreed by both Governments.

I hope the Minister will listen to those few requests on this issue. I am very pleased to see that he has come a long way towards us on it. A few tiny paces further would be very welcome but there have been a number of changes, as he suggested in his opening statement. On the new definition of Welsh law and in other areas, the Government have once again kindly listened to the changes that need to be made to the Bill. I thank the Minister for that.

Lord Wigley (PC): My Lords, I had intended to speak in support of the noble Baroness, Lady Morgan of Ely, on her Amendment 2, but I am not sure whether she will now pursue Amendment 2 or seek to find a common way forward with the Minister. I will therefore truncate some of my comments on Amendment 2, but I also have Amendment 3 standing in my name in this group.

None the less, will the Minister confirm the permanent nature of the committee he has in mind? The noble Baroness raised that point herself. The difference between a statutory provision and an ad hoc provision is that the latter can easily run like water into the sand and disappear over time. A statutory commission not only would have the permanence that statute gives it but is also likely to have its terms of reference fairly clearly defined in an open way that people can respond to. A far greater degree of attention would also be given to drawing up the body's terms of reference when it is set up. There is therefore a strong case for it to be a statutory body. But if it is not to be, I would certainly be interested in knowing what safeguards the Minister proposes to ensure that this is not something that is granted now but then disappears. As we know, and as I think the Minister accepts, there will be an evolving context for Welsh law and there will occasionally need to be adjustments to respond to it.

5.15 pm

The Minister referred to Amendment 3—which, incongruously, has also been linked to this group of amendments. The noble and learned Lord, Lord Judge, the former Lord Chief Justice of England and Wales, made an eloquent and expert case, as did others, in favour of a similar amendment in Committee. Although the Government chose to ignore such expert opinions at that stage, I once again make the case that, if we are going to have a fair, equitable and lasting devolution settlement for Wales, these amendments should be supported to introduce a new reference that supports our case.

Effectively, this amendment seeks to ensure that the democratically accountable National Assembly for Wales has unquestionable authority in the areas in which it

[LORD WIGLEY]
has legislative competence, whether it is primary or secondary legislation. Under the Bill, we are faced with the dangerously vague and unquestionably weak commitment that the UK Government,

"will not normally legislate with regard to devolved matters".

As the noble and learned Lord, Lord Judge, graphically put it,

"The word 'normally' … is a weasel word. It does not mean anything very much in legislative terms".—[*Official Report*, 31/10/16; col. 465.]

I certainly accept his guidance on such matters. Who decides what is normal? In reality, this is nothing less than ensuring that Westminster can still keep a political grip on the National Assembly and thereby on Wales. Scotland may also be afflicted with the same burden. But the Minister now has a chance to be bold—to stand up for Wales and, once and for all, to put into statute that the National Assembly for Wales has the unquestionable authority, matching its democratic mandate, to legislate on matters that are its responsibility. It has been revealed by the recent Supreme Court case regarding Brexit—the so-called acknowledgement of the Sewel convention—that the word "normally" in the Scotland Act is not worth the paper, or the vellum for that matter, on which it is written.

The Government's Advocate-General, the noble and learned Lord, Lord Keen, only last week explained to the court that the reference to the Sewel convention in the Scotland Act was simply a political accord and should not be considered a legal obstacle to Westminster riding roughshod over Holyrood. Unfortunately, under the current circumstances, Wales will yet again be patronised by such a political accord. This is hardly a big ask. Despite the complexities of our haphazard, patchwork quilt of a constitution, this issue is quite simple: making the Assembly the authority that it should be when it comes to devolved matters.

Lord Morris of Aberavon: My Lords, I agree with the noble Lord, Lord Wigley, and my noble friend Lady Morgan of Ely. I firmly believe that a statutory commission is highly preferable to a non-statutory one. I learned that lesson many years ago when I was sorting out the problems of the various bodies that operated in mid-Wales. I introduced an Act in order to ensure that there was a statutory commission. I learned that at the feet of a very great Welshman, Huw T Edwards, who believed that a statute has permanence unless and until it is abolished. It has to make reports. This amendment deals with that issue. A report to Parliament is a great signal to anybody in that field that it has to consider and reflect on the observations of those who come before it. In due course, that report may be debated in London. That is a vital safeguard. I support very strongly the need for a statutory commission.

Baroness Finn (Con): My Lords, at Second Reading, I spoke in support of the maintenance of the single legal jurisdiction in England and Wales. I argued that the body of Assembly legislation can be accommodated for now within that single jurisdiction and that a separate jurisdiction would impose significant upheaval and unnecessary costs on the people of Wales, and that remains my view.

There has been a lot of change in administrative terms. There is already an administrative court to deal with judicial review and similar applications involving the interpretation of the legislation of the Assembly. However, this is a far way off from a wide separate jurisdiction. I agree with the noble Lord, Lord Thomas of Gresford, who argued that there was no need for procedural change and that the principles of statutory interpretation will remain the same. I would just continue to urge that more cases be heard in Wales.

However, although this is the position for now, I appreciate that the body of Welsh law will grow, with diverging Welsh laws over the years. My noble friend the Minister has listened to concerns that it is sensible to keep under review the functioning and operation of the justice system in Wales. I welcome his announcement that there should be a non-statutory committee—I have to disagree with the noble and learned Lord, Lord Morris—within the justice system that will undertake periodic reviews as the law continues to diverge. I believe that this is a proportionate and considered response that allows for a sensible evolution of the system.

A non-statutory review with a clear remit is the right way forward. The proposed statutory commission would have a broad remit and be unnecessarily expensive and complex to administer. Therefore the proposal from my noble friend the Minister is a sensible way through the issue. It recognises that the vast majority of laws will continue to apply across England and Wales and that there is no great appetite at the moment for a separate jurisdiction, with all the attendant cost and disruption. At the same time, it addresses the concerns of the noble Baroness, Lady Morgan, and of other noble Lords that it is important to keep the situation under review as the body of Welsh law grows and the system evolves.

Baroness Humphreys (LD): My Lords, I will speak to Amendment 2, in the name of the noble Baroness, Lady Morgan of Ely, to which I have added my name. Although the amendment does not perfectly achieve the objectives of those of us on these Benches, I welcome the opportunity it brings to debate this important issue and to allow me to place our objectives on record.

The amendment itself reflects the views of the Silk commission, which recommended that, along with the devolution of youth justice, prisons and policing to the Welsh Assembly, a review of the legislative devolution of other aspects of the justice system should be carried out over a period of 10 years. Sadly, this Bill has not gone far enough to meet any of these expectations, although we have of course seen some movement on the matter of justice today.

Let me make this point and make the opinion on these Benches clear. We have followed and taken part in the debate over whether there is a need for a separate or distinct legal jurisdiction for many years and feel strongly that, sooner or later, the current system will require substantial reform to cope with the growing distinctions between the bodies of law produced by the two Governments. However, we have been cautious over whether now is the time for Wales to have a fully separate system from England. At this stage in the devolution process, we call for a distinct

legal jurisdiction for Wales, but while the English and Welsh jurisdictions are still similar, we would support sharing the judicial framework, so as not to wastefully duplicate resources. The consequential massive savings on costs, at a time when Wales would be finding its feet as a legal jurisdiction, would be valuable.

Alan Trench, who drafted a report on behalf of the Wales Governance Centre and the Constitution Unit called *Delivering a Reserved Powers Model of Devolution for Wales*, said:

> "Establishing a Welsh jurisdiction would be a major political decision, and have cost implications if the courts were to be devolved as well".

We share this view. Our concern is how this can or will be achieved. We cannot allow this Bill to pass to its final stages without setting up a mechanism for further discussions on this vital issue. We owe it to the Welsh Assembly and the people of Wales to begin to sketch out a road map for the future of justice in Wales—a future which will highlight the relevance of the body of Welsh law which exists now and the additional Welsh laws which the Assembly will undoubtedly pass in the future.

I welcome the contents of the Minister's letter, which I received today, concerning the emerging findings of the Justice in Wales working group. I was particularly pleased to note its anticipated focus on a periodic review of the operation of the justice system under the framework of the Bill, and its likely recommendations on the need to be more effective in considering the distinctiveness of how justice is delivered in Wales.

I am grateful to the Minister for providing further details of the way in which these recommendations will be put into operation. I look forward to reading the details of this debate in *Hansard* and giving further thought to how the committee that he proposes will operate. I hope he will be able to provide us with further details about the operation of that committee.

Lord Morgan (Lab): My Lords, I think this is an occasion on which we should not speak for more than a minute and a half, and that is my intention. I support the Government's amendment, and I thank the Minister for his consideration, but I make it clear that I regard it as an interim statement—something that will not stand the test of time. As Welsh law develops, the case for a Welsh jurisdiction will become overwhelming. There is an old Welsh song that asks, "Who will be here in a hundred years' time?"—"Pwy fydd yma mewn can mlynedd?"—and perhaps that is the view that one should take.

At the moment we have a Bill that gives the Assembly reserved powers. The legislative competence of the Assembly is growing, yet we have two different legislatures passing laws for the same small territory. That is a situation unique in the UK and in Europe, and it seems bound to result in confusion and perhaps, in due course, conflict.

The idea of a distinct Welsh jurisdiction is supported by the legal professions in Wales. University law departments see Wales as lacking a legal identity, which actually it had for 300 years after Henry VIII's Act of Union, so we have to catch up with Henry VIII. The idea is supported strongly by the Lord Chief Justice, Lord Thomas of Cwmgiedd; his wording is careful but he has said that it is perfectly possible to have a single justice system with two separate jurisdictions within it. Similar views were expressed by the great Lord Bingham in his work *The Rule of Law*.

So this is a well-meant interim settlement, a stopgap, that will not last. There is a void in the devolution settlement and eventually we will need a permanent principal settlement, both for the sake of devolution in Wales and, frankly, for the sake of the union of the UK.

Lord Hope of Craighead (CB): My Lords, I shall raise two short points. One is to commend the Government's Amendment 1 and the skilled drafting that is revealed by it. However, there is no doubt that the wording that it seeks to replace was too tightly drawn. It looked only at the legislative part of the body of law that makes up, if one likes to put it this way, the body of England and Wales and, looking into the future, following the point by the noble Lord, Lord Morgan, it was designed to follow the law of Wales itself as it built up its own common law. What was missing was an acknowledgement that there is a body of law outside legislation that applies in both jurisdictions as part of the great heritage of the common law that England and Wales has exported around the world. It would be very sad if the common-law element was not accepted. So the word "include", as the noble Lord, Lord Elis-Thomas, pointed out, carries with it a great deal. That is not expressed at length, thank goodness, because, as he put it, the simplicity and exclusivity of the language chosen does it all for us. It is very nice to see simple language being used so effectively in legislation, so this is an excellent amendment and I warmly support it.

As for Amendment 3, I recall long arguments during discussion on the Scotland Bill—which the noble Lord, Lord Wigley, may have listened to but I am not sure took part in—when we tried to persuade the Minister, the noble and learned Lord, Lord Keen, to drop the word "normally", but he refused. The passage that the noble Lord, Lord Wigley, quoted from what was said in the Supreme Court last week was just a repetition of the points the noble and learned Lord made in response to those who were seeking to effect that change in the wording.

5.30 pm

I add a note of caution. Some of the justices last week picked up the point that once you put a convention into legislative form—which I think the Minister was saying was the purpose behind Clause 2—it is difficult to escape from the fact that judges will construe the wording of the legislation, because as soon as someone challenges a word in the legislative formula, someone has to work out what it means. We may find ourselves driven to the position where the judges will have to construe the word "normally", however slippery it is.

We will know more about this when the Supreme Court delivers its judgment, because I suspect something will be said about it. I respectfully warn the Minister that if he adheres to the wording as it is, he will take with it the judgment of the Supreme Court, yet to be

[Lord Hope of Craighead]
known, which will tell us what it really means. It may be a little more open to judicial interpretation than he suggested.

Lord Bourne of Aberystwyth: My Lords, I thank noble Lords who have participated in debate on this group of amendments. It was a debate of considerable weight. First, I thank the noble Lord, Lord Elis-Thomas, for his kind words and agree with him about the need for institutions in general to work together, but particularly in the context he mentioned of the legislatures in Wales and here, and his comments about the work of the Counsel General for Wales, Mick Antoniw—his work is much welcomed.

I turn to points made by the noble Baroness, Lady Morgan of Ely, about the committee—it is the Government's view that it should be non-statutory—that will look at the judicial arrangements within the jurisdiction of England and Wales. Points were also made by the noble Lords, Lord Elis-Thomas, Lord Wigley and Lord Morgan, the noble and learned Lords, Lord Morris and Lord Hope, and my noble friend Lady Finn.

First, let me reassure noble Lords that, as I think I indicated, it is intended that this should be a permanent body. We await the recommendations of the working group as to how often it should report. It has been suggested that it could be annually; others have suggested every three or five years. Let us look to see what the committee says. The Government have an open mind on this; we will await the recommendation. The important point is that it will be permanent. I accept the point made by noble Lords that this is an evolving picture; indeed, this is an interim arrangement, as the noble Lord, Lord Morgan, said. In a sense, it is interim between different reports. When the reports come, they will come with advice. It is an advisory committee, but Governments, unless there is good reason, listen to advice—and this will be advice from people with expertise in this area.

I return to the point that there is good will between the UK Government and the Welsh Government as to how this should operate. My right honourable friend the Secretary of State is meeting the First Minister to discuss this. I hesitate to say that it is a reserved area or that we feel that there is some veto on it by the Welsh Government, but we can progress only by consensus. I think it is accepted that it needs willing participation by both parties—and that is there, so let us see what evolves.

I should perhaps remind noble Lords that the LCM has not yet been passed, so if the Welsh Government are not happy with it, it will be open to them to turn it down. The LCM is not just about the fiscal framework—although that is clearly an important part—but about the Bill in general.

Welsh law is different in many respects now from English law—I recognise and accept that, and have said so myself before—but the noble and learned Lord, Lord Hope, referred to the common law of England and Wales. It is a point worth making that this is not exclusively the property of England; the common-law system belongs to both countries and will no doubt remain a bedrock of the legal system. That is what practitioners in Wales want—and what the law schools there want, so far as I can tell from my conversations. However, they recognise that this is an evolving picture, as do the Government. We need the expertise of practitioners and academics as well as the views of the Welsh and UK Governments in moving this forward. We have sought to craft something balanced. There is a general desire to do something in this area and, although opinions may differ to a degree, we are in the same territory, so I hope that this is acceptable.

I turn to the points made by the noble Lord, Lord Wigley, and the noble and learned Lord, Lord Hope, in relation to "normally". I accept that putting something into legislation is very different from having it as a convention. Obviously, we await the judgment of the Supreme Court for all sorts of reasons, as noble Lords know. I indicated—perhaps I should have reiterated it earlier—that we are looking at guidance notes, which will be the focus of attention after the Bill has passed. In the light of the Bill, we will obviously need to look at them anyway. I give an undertaking that we will flesh out "normally" in the context of guidance notes, which is probably a better way of proceeding than legislation.

I hope that I have covered the main points in relation to the non-government amendments and thank noble Lords for participating in this debate. I thank my noble friend Lady Finn for welcoming some of the changes that we have made, and the noble Baroness, Lady Humphreys, for her points about permanence; I certainly give reassurance on that.

Lord Elis-Thomas: May I pursue the point that the Minister just made about the non-statutory proposal for this commission between the legislatures and the Governments of the United Kingdom and Wales? Would he like to reflect further on the nature of that proposal? When we come to Third Reading, he might be able to tell us a little more. Does he intend to publish a report from the working group in time for us to be able to discuss it further at that stage?

Lord Bourne of Aberystwyth: My Lords, I indicated on the latter point that I certainly intended that we would publish, in some form, the findings of the group on this matter. Yes, I will reflect on what has been said and say more on Third Reading, when we will be further forward in discussions, to provide extra reassurance. I come back to the point that obviously we want to move by consensus in talking with the Welsh Government and, more broadly, with the National Assembly for Wales. Again, I remind noble Lords that the LCM is a requirement before we can move to Third Reading, so the membership of the National Assembly has to be happy with what is proposed—otherwise, presumably, no LCM will be forthcoming.

Lord Hain (Lab): My Lords, I apologise for not being here for the whole debate. The Minister mentioned the fiscal framework in the context of the LCM. I would be grateful if there were a prospect of that being published soon, as he kindly indicated to me, so that the House will have a chance to look at it before considering any amendments to be tabled for 10 January.

Lord Bourne of Aberystwyth: My Lords, in relation to the fiscal framework, things continue to move in a very satisfactory direction in the discussions between the UK Treasury and Government and the Welsh Government. I certainly anticipate and hope that we will be in a position to say much more about the fiscal framework before we rise next week. That is not an undertaking, but it looks promising. If it is not the case, I will write to noble Lords and indicate the timetable.

Baroness Morgan of Ely: My Lords, it was heartening to hear that the committee can go forward only through consensus—that was a welcome commitment. I am assuming that that means that the terms of reference would be agreed by consensus as well. Can the Minister confirm that that will be the case? He also did not address the issue of the membership of the group and whether that would be agreed by both the UK and Welsh Governments. That would be welcome. It is also worth underlining that this is a matter of critical importance for the Welsh Assembly in its broadest form—not just for the Welsh Government. I know that the Government are keen to see the Bill passed, and there is a need for a legislative consent Motion. I wonder whether we can keep open that opportunity to keep talking until Third Reading, just to give the flexibility that the Government may need to ensure that they can get the legislative consent Motion.

Lord Bourne of Aberystwyth: First, as I have said, these things are best done by consensus but it is a two-way street—both sides have to come to it in a consensual way. So I hope that that is the case when these matters are discussed subsequently.

I have gone as far as I can in relation to the discussions that are being conducted by the Secretary of State and the First Minister. They will discuss these things, and I do not want in any way to give an indication from here as to how those discussions will proceed—but I have undertaken to say more on this when we come back at Third Reading. If there is additional information in the mean time that I can convey in written form to noble Lords who have participated in the debates, I shall certainly do that. I ask the noble Lords and noble Baronesses not to press their amendments.

Amendment 1 agreed.

Amendment 2 not moved.

Clause 2: Convention about Parliament legislating on devolved matters

Amendment 3 not moved.

Clause 4: Wales public authorities

Amendment 4

Moved by ***Lord Bourne of Aberystwyth***

4: Clause 4, page 3, line 24, leave out "Wales public" and insert "Devolved Welsh"

Lord Bourne of Aberystwyth: My Lords, the amendments in this group relate to universities and public bodies. Their purpose is to address concerns expressed by universities in Wales that their classification as Wales public authorities in the Bill could have wider consequences in terms of categorising them as public authorities. The ministerial consent restrictions do not apply to legislation relating to "Wales public authorities". This expression is defined in Clause 4 of, and Schedule 3 to, the Bill. The Wales public authorities expressly include the governing body of an institution within the higher education sector within the meaning of Section 91(3) of the Further and Higher Education Act 1992 and a regulated institution within the meaning of the Higher Education (Wales) Act 2015, other than the Open University.

I am very grateful to the noble Baroness, Lady Randerson, and the noble Lord, Lord Thomas of Gresford, for raising this issue in Committee. During our debate on their amendments, the noble Baroness and the noble Lord expressed concerns which had been raised by universities based in Wales. They sought to reverse the universities' classification as Wales public authorities because of concerns that this might suggest that they should be classified more widely as public authorities. This was not the intention of the Government, and the relevant provisions did not purport to have any wider effect—but I had considerable sympathy with the points made, as did my right honourable friend the Secretary of State, and I agreed to reflect on the wording before Report. Having done so, I am pleased to bring forward these government amendments—I appreciate that there are many of them—to rename "Wales public authorities" as "devolved Welsh authorities". The amendments also move universities out of the list of public authorities in Schedule 3, because Clause 4 makes it clear that the listed authorities are public authorities.

Instead, separate provision is being made for governing bodies of an institution within the higher education sector in Wales, so that they are classified as devolved Welsh authorities and the Assembly can continue to legislate in relation to them without requiring ministerial consent. At this point I should also make clear that this will not apply to the Open University, because its activities are not principally or wholly carried out in Wales. It will be a "reserved authority" and the United Kingdom Minister's consent will be required for the Assembly to legislate in relation to the Open University.

Although we have responded to the particular concerns of universities, I should clarify that it is not our intention that the definition of devolved Welsh authorities and the list of authorities should have wider meaning. They apply only for the purposes of the Bill. Another effect of the amendments is that universities will be taken to be in Wales even if they carry out some activities outside Wales, so long as their activities are carried out principally in Wales. This is to ensure consistency with the approach taken in the Higher Education and Research Bill.

These amendments again demonstrate that the Government have listened to concerns expressed by noble Lords in Committee and, where we believe that there is good reason to modify the Bill's provisions, we

[Lord Bourne of Aberystwyth]
are bringing forward amendments to address the concerns. I commend the government amendments in this group and beg to move.

5.45 pm

Lord Thomas of Gresford (LD): My Lords, I must express our gratitude to the Government for clarifying this position. I also echo the noble and learned Lord, Lord Hope, in saying that there was some rather neat draftsmanship involved. The officials are to be congratulated on the way that this has clarified the situation.

Lord Morgan: My Lords, I was once vice-chancellor of the University of Wales and I think that this is a distinct improvement. It will strengthen the status of Welsh university institutions and I am grateful for it.

Baroness Randerson (LD): My Lords, I start by declaring an interest as a governor of Cardiff Metropolitan University. I echo other noble Lords by referring to Amendments 5 and 7; I am really pleased to see that the Government have clarified that they had no intention of changing the status of Welsh universities. It is a status that is rightly prized and valued, not least because it gives them charitable status, which is extremely important from the funding perspective.

Government Amendment 8 deals with the Open University, which the Minister referred to in his remarks. Does he believe that this clarification is adequate and fully addresses the concern of the Open University that it should be seen as operating equally in all four constituent countries? Obviously it would not be seen appropriately as a Welsh institution, but it does not want to be seen as an English institution. It wants to be seen as bestriding all the countries of the United Kingdom. It would therefore be helpful if the Minister could clarify that he believes those concerns are fully addressed.

Lord Crickhowell (Con): My Lords, as for expressing thanks and congratulations, may I, as the first president of Cardiff University, add to those thanks and congratulations from these Benches?

Lord Bourne of Aberystwyth: My Lords, I thank noble Lords who have participated in the debate on the second group of amendments and I particularly thank the noble Lord, Lord Thomas of Gresford, for reminding me that I had not thanked the noble and learned Lord, Lord Hope, for his very kind comments about the drafting. Obviously they will have been picked up by the people who were responsible for that drafting, as will be the case for the drafting of these amendments.

I also thank the noble Lord, Lord Morgan, who has very distinguished service in the education sector in Wales, and the noble Baroness, Lady Randerson, for their comments. I thank my noble friend Lord Crickhowell for his kind comments, too.

On the specific point raised by the noble Baroness, Lady Randerson, in relation to Amendment 8 in this group about the status of the Open University, I have looked at this quickly, since it has been raised. I take the point that she made. I would like to take it away and have a look at it. It is open to us to do something in this regard on the second day of Report, as I think it is within the scope of the list of reserved and devolved bodies, and, indeed, mixed-function bodies, which this may well be. Therefore, I will, if I may, take that away without prejudice and have a look at it to see whether we should bring something back on the second day of Report. With that undertaking, I commend the government amendments in this group.

Amendment 4 agreed.

Amendment 5

Moved by ***Lord Bourne of Aberystwyth***

5: Clause 4, page 3, leave out lines 25 to 28 and insert—

"(1) In this Act "devolved Welsh authority" means—

(a) a public authority that meets the conditions in subsection (2),

(b) a public authority that is specified, or is of a description specified, in Schedule 9A (whether or not it meets those conditions), or

(c) the governing body of an institution within the higher education sector (within the meaning of section 91(5) of the Further and Higher Education Act 1992) whose activities are carried on, or principally carried on, in Wales."

Amendment 5 agreed.

Schedule 3: New Schedule 9A to the Government of Wales Act 2006

Amendments 6 to 8

Moved by ***Lord Bourne of Aberystwyth***

6: Schedule 3, page 96, line 16, leave out "WALES PUBLIC" and insert "DEVOLVED WELSH"

7: Schedule 3, page 97, leave out lines 27 and 28

8: Schedule 3, page 98, line 30, leave out "the Open University" and insert "an institution within the higher education sector (within the meaning of section 91(5) of the Further and Higher Education Act 1992)"

Amendments 6 to 8 agreed.

Clause 5: Power to make provision about elections

Amendment 9

Moved by ***Lord Bourne of Aberystwyth***

9: Clause 5, page 6, line 21, at end insert—

"(3) In section 7 of the Political Parties, Elections and Referendums Act 2000 (Commission to be consulted on changes to electoral law), in subsection (2)(f), after "64(3)" insert "or regulations under section 13A(1)"."

Amendment 9 agreed.

Clause 9: Super-majority requirement for certain legislation

Amendment 10

Moved by ***Lord Bourne of Aberystwyth***

10: Clause 9, page 12, line 17, at end insert ", and

( ) the number of persons who may hold the office of Welsh Minister appointed under section 48 or the office of Deputy Welsh Minister."

Amendment 10 agreed.

Clause 13: Financial control, accounts and audit

Amendments 11 and 12

Moved by ***Lord Bourne of Aberystwyth***

11: Clause 13, page 15, line 40, at end insert—

"(3A) Welsh legislation may make further provision for the purpose of ensuring that devolved Welsh authorities that receive sums derived from the Fund are accountable.

That provision may, in particular, include provision for a devolved Welsh authority to which subsection (1)(a) does not apply to be accountable for its expenditure and receipts in respect of functions for which it receives sums derived from the Fund."

12: Clause 13, page 16, line 11, leave out "Wales public" and insert "devolved Welsh"

Amendments 11 and 12 agreed.

Clause 21: Transferred Ministerial functions

Amendment 13

Moved by ***Lord Bourne of Aberystwyth***

13: Clause 21, leave out Clause 21

Lord Bourne of Aberystwyth: My Lords, these new clauses and amendments in my name mainly take forward the recommendations of the Silk commission in relation to water and sewerage.

The Silk report recognised that water and sewerage devolution is a complex issue and that further work to consider the practical implications was needed. Following the St David's Day agreement, the Government set up the joint Governments' programme board with the Welsh Government to look at practical issues around Silk's recommendations and the effect they would have on the efficient delivery of water and sewerage services across England and Wales. It is widely acknowledged that the devolution arrangements around water and sewerage are incredibly complex, and they are not necessarily made any simpler by devolving legislative competence and executive functions along the border. This was recognised, not least by my noble friend Lord Crickhowell, in Committee.

The Silk recommendation on the devolution of sewerage was, of course, included in this Bill when it was introduced in another place. However, these provisions would devolve sewerage policy on a "wholly or mainly" basis, and Clause 46 includes a power for the Secretary of State for the Environment, Food and Rural Affairs to intervene where an Act of the Assembly or any action or inaction of the Welsh Ministers or a public body could have a serious adverse impact on sewerage services in England. This was to mirror the equivalent existing devolution arrangements for water.

Amendment 39 will amend Schedule 7A to the Government of Wales Act 2006, which is inserted by Schedule 1 to this Bill, to devolve both water and sewerage policy as it relates to Wales. While on paper this simplifies the devolution arrangements, it will involve the unpicking of a considerable number of provisions in both primary and secondary legislation to align respective ministerial powers and duties with the England-Wales border. Clause 21 currently provides the necessary powers to deliver this aspect of Silk's recommendations through secondary legislation by changing the extent of previously transferred provisions. Given this is quite a broad power, Amendment 40 will replace Clause 21 with an order-making power limited to making changes to previously transferred functions relating to water and sewerage. These amendments address a recommendation by the Delegated Powers and Regulatory Reform Committee in its report on the Wales Bill, and I am very grateful to the committee for its scrutiny of the Bill.

Amendment 41, tabled by my noble friend Lord Crickhowell, seeks to extend this list of "water-related" functions to include those relating to "fisheries" and "recreation". These matters are not devolved on a wholly or mainly basis and there are no plans to change any ministerial functions on these matters using this power.

Amendment 39 also places a requirement on Ofwat to make its annual reports to the Welsh Ministers rather than just sending them a copy, as is currently the case. The Welsh Ministers will be required to lay the annual report before the Assembly and publish it. This reflects the current duty on the Secretary of State to lay Ofwat's report before Parliament and is similar to one part of Amendment 43, tabled by the noble Baroness, Lady Morgan of Ely. The noble Baroness's Amendment 43 also seeks to amend other provisions in the Water Industry Act 1991 as it applies to Ofwat. I appreciate that the noble Baroness will address this later. Part of the amendment would require the Secretary of State for the Environment to seek the consent of the Welsh Ministers before making directions to Ofwat outlining her priorities for keeping the activities of water companies under review. This consent would include directions relevant to reserved matters, such as those relating to competition law, insolvency, mergers and so on. This would therefore give the Welsh Ministers considerable influence over policy areas for which they do not have legislative competence or executive functions.

The amendment requires appointments to Ofwat's boards to be made jointly by the Secretary of State and the Welsh Ministers and seeks to grant Welsh Ministers joint powers over board members' terms and conditions with the Secretary of State. There is already a duty on the Secretary of State to consult the Welsh Ministers before making any Ofwat appointment.

[Lord Bourne of Aberystwyth]
However, joint appointments would be unprecedented and could prove problematic where the Ministers could not agree.

Amendment 42, tabled by the noble Lord, Lord Wigley, would devolve legislative competence for all water policy, including the licensing of water supply and sewerage licensees. The Government believe that legislative competence for licensing should remain with the United Kingdom Parliament. There would be no obvious benefits for licensees or customers should the Assembly seek to introduce its own separate licensing regime for Wales.

I said in Committee that I would bring forward amendments to replace the controversial Secretary of State intervention powers relating to water. Amendments 45 and 53, tabled in my name, will repeal the water intervention powers and replace them with a power for the Secretary of State for the Environment and Welsh Ministers, to agree and lay before Parliament and the Assembly a water protocol. This will enable both parties to challenge any action or inaction by Ministers or relevant public bodies that could have a serious adverse impact on water on either side of the border. We have gone further than Silk recommends by giving the water protocol statutory backing and making it reciprocal so that the interests of water consumers in Wales, as well as those in England, are protected. However, Amendments 46 to 48, tabled by my noble friend Lord Crickhowell, seek to extend the scope of the water protocol to cover all water-related functions, not just those relating to water resources, water supply and water quality. I know that my noble friend has unrivalled expertise in this area but the amendments go much further than Silk recommends on the replacement of the existing intervention powers with a water protocol. As I have already mentioned, my noble friend appreciates the challenges around changing the devolution arrangements as they relate to Wales. I fear that the amendments are unnecessary and would no doubt be seen by the Welsh Government and the Assembly as a retrograde step.

Amendment 50 introduces new duties on the Secretary of State which, in practice, will fall on the Secretary of State for Environment, Food and Rural Affairs and on the Welsh Ministers, to have regard to the interests of water consumers across from their respective borders when carrying out their water functions. The amendment mirrors the definition of consumer interests in Section 2 of the Water Industry Act 1991. This defines the interests of consumers as being the interests of those that receive water and sewerage services from the networks of water companies. It is not affected by, and does not affect, the consumer objective set out in the 1991 Act. The new duties will require both Governments to consider the likely impacts of their policies on customers outside of their respective jurisdictions. This additional check will help ensure that, like the intervention powers, the disputes process contained within the protocol may never need to be used by either Government.

Amendment 44, tabled by the noble Lord, Lord Wigley, on the extraction of water from reservoirs, is the same as one tabled in Committee. I acknowledge the massive role that he has had in looking at this area. The Assembly already has legislative competence for environmental controls over abstractions in Wales. It therefore has the ability to introduce such a provision for Welsh reservoirs, should it require one.

The amendments in my name provide a significant package of water devolution to Wales. They deliver a stable, mature and effective devolution settlement by aligning powers over water and sewerage with the national border and replacing the Secretary of State's intervention powers relating to water with an inter-governmental protocol. Again, this illustrates the capabilities of mature institutions developing these things together. These new arrangements are in the best interests of water consumers on both sides of the border.

I look forward to hearing noble Lords speak to their amendments. I beg to move.

6 pm

Lord Crickhowell: My Lords, I refer in passing to Amendment 42, in the name of the noble Lord, Lord Wigley. I spoke about it at a previous stage and explained why I did not think it was workable, and I do not propose to add to my remarks on it today. I am a good deal more sympathetic to his Amendment 44, which my noble friend said was not necessary because it could be dealt with by the Welsh Assembly Government. However, it still seems a perfectly reasonable amendment.

I will concentrate my remarks on government Amendments 40, 45 and 50 and my amendments to them. I was delighted to see the amendments in the basic form they are in. I thought that we would probably only hear at this stage about the outcome of discussions between the Assembly and the Government on the arrangements for water in a kind of informal concordat form. I am delighted that the Minister has decided to introduce them all in statute, as that seems a considerable step forward. I will explain why I think that having made that great step forward, it is rather sad that he is not making them as comprehensive and effective as they could be. I will speak from my considerable experience—not always easy in this field—as the chairman of the National Rivers Authority, when I had to deal with exactly these issues on both sides of the border.

Amendment 40, which introduces the modification of water-related functions, as my noble friend explained, refers to "previously conferred or transferred" water-related functions. However, it happens to contain an extremely useful definition, I think taken from the 2006 Act, of what water-related functions mean. Because I want to use this definition later, I inserted something in it—which it is probably not appropriate to do at this stage—because we are dealing with matters previously conferred or transferred. I think that is what the definition confines itself to, although new subsection 2B refers to,

"provisions contained in or made under this Act or any other enactment".

I therefore raise the question of whether those words in fact apply to the matters I will refer to on the later clauses. My reason for inserting the important matters of fisheries and recreation into the definition here is not so much where it refers back to previously conferred or transferred functions but because I want at this stage to produce a definition of water-related functions, which would be extremely useful in the later clauses.

I therefore leave my point with a question about the wording and a comment about why I have inserted fisheries and recreation into the definition.

When we come to the later amendments, this becomes really important. It is equally important in both the later government Amendments 45 and 50, which deal with different aspects of the management of the water environment. When we come to the water protocol, which goes into statutory form, we refer only to water resources, water supply and water quality in England, but equally, we apply the same in Wales. The great thing about the protocol and all the government amendments is that they are of benefit equally to both parties, working both ways. Therefore I do not quite understand my noble friend's point that if we alter the Silk commission recommendation, which in my view is incomplete, we will somehow upset the Welsh Government. The reality is that the Welsh Government ought to be equally pleased.

On both this and the later amendment, which deals with the way in which we manage these affairs, it makes no sense at all to pick just one or other of the water matters. In managing the water environment and what is going on in the rivers, we are dealing with the whole package, so usefully defined by the definition I extracted from the earlier clause. I seek only to bring together and complete what seems to be an admirable, initial partial proposal from the Government to provide effective management for both England and Wales of the water environment, comprehensively, covering all the things they ought to be looking at, not just water supply and water resources but flood defence and other matters such as the purity of water supply.

I will enlarge for a moment on fisheries and recreation. Fisheries are extremely important here. The main rivers we are talking about, the Severn and the Dee, are both important fishery rivers, as important for Wales as they are for England. Recreation is important in both; recreation and fisheries are related, because canoeists can have an impact on the fishermen, and in the past there have been disagreements and quarrels between canoeists and fishermen. I am happy to say that they are usually resolved, but it may be useful for those managing the affairs to have them involved in the total package of water functions so that they can play a part for the benefit of both Wales and England.

The Government have set about doing an excellent thing in statutory form in giving partial effect to the proper management of water as it ought to be managed, on a catchment management basis, covering all aspects of water management. In a sense, they have baked a cake—I do not know whether it will be a very nice cake—but it is missing a central ingredient. My proposals are trying to be helpful and positive. They ought to be welcomed equally on both sides of the border, and I hope that the Minister will not simply reject them because Silk did not cover them adequately. That is rather a bad reason to reject them. If they can be improved on, it is our job, proceeding with statute, to do so here and now.

I therefore hope that the Minister will at least not reject what I suggest at this stage. I hope that with his usual good sense and courtesy he will say, "I will go away and consider very carefully what my noble friend has said and see if we cannot come back with something". He may not fully accept my amendments because Governments always say that amendments drafted from the Back Benches are likely to be imperfect in some way.

I thought that I would have to criticise my noble friend's partial set of proposals on the grounds that officials in his department have simply not given adequate thought to providing the most comprehensive and complete answer, but I find that that is not so. They were studiously obeying Silk. I know that my noble friend played a crucial role in the Silk commission and therefore the St David's Day agreement, but I suggest that if he is to do a complete, good and effective job, he should listen to my proposals and, I hope, accept them. If he cannot do so now, perhaps he can bring them back in a new or improved form at a later stage of the Bill.

Lord Wigley: My Lords, I am delighted to follow the noble Lord, Lord Crickhowell, whose interest and involvement in matters relating to water, and particularly water in Wales, has been known to us all for many years.

I wish to speak to Amendments 42, 44 and 49, which stand in my name and deal with water issues. I shall also speak to the other amendments in the group that impinge on these matters.

I say at the very start that, although the noble Lord, Lord Bourne, has rightly been praised for the way in which he has handled aspects of the Bill in Committee and, now, on Report, I am bitterly disappointed that we have not been able to get on to the face of the Bill substantive clauses that deal adequately with the three main issues in contention: an unambiguous statement that the National Assembly has total legislative control over all aspects of the creation of reservoirs in Wales, raised in Amendment 44; for the Assembly to have legislative control over all matters relating to water in all of Wales, with powers coterminous with Wales's border, addressed in Amendment 42; and the unqualified removal of the powers of the Secretary of State to intervene, which I provide for in Amendment 49.

A few weeks ago, we were treated to a fanfare of triumph by the Secretary of State—whom I see standing at the back of our Chamber—who asserted that these matters had been sorted and the vexed issue finally put to bed. I welcome that statement, accepting it at its face value. Even today, I am willing to believe that not only were Alun Cairns, Guto Bebb and the noble Lord, Lord Bourne, sincere in that declaration but they genuinely aspired for these changes to happen, knowing how sensitive in Wales are matters relating to water. It would indeed have been a feather in their cap had they been able to deliver what they claimed to have achieved.

Today, at this last opportunity to get these three principles firmly embedded in the Wales Bill, we come to the reality of the situation—that they have, so far, failed to deliver on all these details. There is nothing whatever in the Bill or in any of the Government's many amendments on Report that states unequivocally that the National Assembly has full legislative power over all aspects of authorising, building and controlling

[LORD WIGLEY]
reservoirs in Wales in all their many guises. Yes, we were told in Committee that this would be contained in a protocol and, yes, Amendment 45 provides for a new clause entitled "Water protocol", but we did not have the opportunity in Committee to see a copy of such an intended protocol and we still do not have one on Report. I assume of course that the detailed protocol will go way beyond the bare framework in this Bill to which the noble Lord, Lord Crickhowell, referred. We do not even have a draft protocol—not even an outline draft protocol—yet we are asked to confirm in legislation a provision about which we have next to no substantive knowledge whatever. We are being asked to rubber-stamp a pig in a poke.

In so doing, we are not even certain that the poke is there. Proposed new subsection (1) in Amendment 45 states:

"The Welsh Ministers and the Secretary of State may make an agreement (the 'water protocol') for the purpose of"—

which it goes on to define in outline but not in detail. It does not state that they "shall" produce a water protocol; it just states that they "may"—or, indeed, they may not. What a weak basis on which to build policies which the Wales Office Ministers paraded as being our salvation. There is no guarantee that there is in fact, in the murky room marked "Wales Office Water Policy", any poke whatever. It may exist at some time; equally, it may never come into being.

Even if we have this undefined poke of a protocol, what sort of a pig do we find inside? The clause goes on to stipulate that the provisions that will be facilitated by law are to safeguard the well-being of English consumers. It gratuitously adds that the protocol may also safeguard the well-being of Wales—something that would not be needed in any protocol whatever if full control over water in Wales were in the hands of the National Assembly. It gives the impression of being a charter for the meddling by English Ministers and English authorities in matters relating to water in Wales. That is what we have suffered in Wales down the years and it is something that the National Assembly was expected to bring to an end, although now it may not be able to do so. We do not know for certain for the very reason that we do not have a protocol or a draft protocol before us to examine the implications.

6.15 pm

One of the few things that we do know, by courtesy of government Amendment 50, which is also in this group, is that,

"'the interests of consumers' has the same meaning as in section 2 of the Water Industry Act 1991".

Noble Lords will remember that that Act was predicated on the Thatcherite belief that the needs of consumers are best met by competition and the market. Well, well. So we are to have a protocol based on Thatcherite dogma that the well-being of the consumer—in this case, the water consumer—is based on free-market competition. What does that mean for the future of the water industry in Wales? We currently benefit greatly from having Dwr Cymru operating as a not-for-distributed-profit entity. If the interests of consumers, whether in Wales or England, or in those bits of Wales still run by private sector profit-seeking companies from England, are to be driven by such a vision, God help Welsh water consumers. Not only do we not have a protocol but we do not have any outline of one—no draft protocol; not even an explanation of a protocol that might have cast light on such matters.

Do Ministers really think that the people of Wales will be so gullible as to buy a pig of dubious quality in a non-existent poke, with all the details shrouded in secrecy and defined in terms that could be a back-door means of generating private profit from what Welsh water consumers pay for their water? Come on. We really deserve better than that, and if we are not to get it at this stage in the House of Lords—it looks pretty unlikely that we will—then when Welsh MPs come to deal with the Bill, they must stand up and be counted. Alternatively, the National Assembly must use every device at its disposal to insist that the Bill cannot go ahead on such a flimsy basis.

I very strongly suggest that the Minister should accept my amendments, deficient in drafting though they no doubt are, and use his Christmas holiday to bring forward his own amendments, either when the House further considers the Bill on Report in January or at Third Reading, or, if the Government need more time, then as amendments to the amended Bill when it goes forward in another place.

One thing is certain: we do not have the information needed to come to a meaningful decision on the water provisions of this Bill. We need to build in a mechanism that can provide us with a further opportunity to return to it when, it is hoped, we have a draft protocol before us and are in a position to make a meaningful decision on the matter.

Lord Morgan: My Lords, I very strongly agree with what the noble Lord, Lord Wigley, has just said. To leave these matters uncertain and vague, and potentially as, yet again, a source of future bitter conflict, is quite contrary to what the Minister is doing in the Bill.

Two points occur to me. First, it seems that giving the Assembly authority over water is fully consonant with what we are doing in the rest of the Bill—that is, strengthening the regulatory powers of the Assembly over the natural resources of Wales. Secondly, and perhaps more fundamentally, we are—perhaps unintentionally—bypassing this enormous emotive issue in Wales. I would like it to be felt and seen by the citizens of Wales, who are not always clear on the point, that devolution is making a difference. I would like it to be felt that devolution means that there will be no more Tryweryns in Wales and no more treating with contempt the small rural communities for the benefit of others. I expect the Minister to listen with sympathy and I hope very much that the amendments of the noble Lord, Lord Wigley, will be supported.

Lord Thomas of Gresford: My Lords, to follow on from what the noble Lord, Lord Morgan, has just said, I have looked at the government amendments with some care and notice that Amendment 45, which sets out the proposed water protocol, refers to a,

"serious adverse impact on water resources in England, water supply in England or the quality of water in England",

and, conversely, water resources in Wales. What is not contained there is the impact on the social and environmental character of Wales from any proposal that may be brought forward for the extraction of water from Wales. When the Minister referred to Amendment 44 in the name of the noble Lord, Lord Wigley—that the extraction of water from Welsh reservoirs shall require the legislative consent of the National Assembly for Wales—he said that we need not worry about that because there is already environmental law that will protect the people of Wales from the building of reservoirs that would have such an environmental or social impact. I would like the Minister to state quite clearly that there will be no reservoirs built in Wales without the consent of the Welsh Assembly. I think that that must be said. Whether it is due to the existing position or the proposals he has brought forward in these amendments, I do not care. I just want it to be absolutely clear what the position is.

Lord Elystan-Morgan (CB): My Lords, I take exactly the same view and support completely everything that has been said by the noble Lord, Lord Wigley. I have, as the House well knows, spoken with bitterness and rancour on many previous occasions about what happened 50 years ago in Tryweryn in Wales. I make no apology for that. However, I jumped with joy when I had the impression—as I think every other Member of the House had the impression—that this matter had been settled once and for all on the previous occasion. I would have preferred it to have been included in an Act of Parliament as a matter of primary legislation, but I was perfectly prepared to accept the word of the Minister, a most honourable and splendid Minister whom we greatly admire, that this matter would be settled on the basis of a protocol. Now, it seems that that is left drifting in mid-air.

The noble Lord, Lord Wigley, speaks of a pig in a poke. I have no doubt that he is perfectly correct in that. There is no certitude at all now in relation to this matter. I feel that I acted rather foolishly when, some weeks ago, I, like many others, joined the choir of those on radio and television who revelled in the fact that this matter had been solved and a long-standing injustice had been righted. Although clearly there should be some further undertaking with regard to a protocol, I hope that the Minister will say tonight, in strict terms, that there will be no further Tryweryn—never, never, never.

Baroness Bloomfield of Hinton Waldrist (Con): My Lords, I defer to my noble friend Lord Crickhowell's specialist knowledge on fisheries and will restrict my comments to the general. I will also happily endeavour to follow the suggestion of the noble Lord, Lord Morgan, to limit contributions to under two minutes.

I spoke in Committee in support of reserving powers on consents for energy, on the basis that energy policy is so important as to be part of a national strategy determined by Westminster. On this occasion, however, I am delighted to support the devolution of matters relating to water and sewerage to the Welsh Government. As I hope will be mentioned today, and as was so passionately and eloquently referred to in the last debate on the Bill by the noble Lords, Lord Wigley and Lord Elystan-Morgan, this decision should put right a long-standing injustice following the flooding of the Tryweryn valley in 1965.

I welcome the positive steps that the Government have taken to put in place a comprehensive devolution settlement for water and sewerage in Wales. The amendments on this subject brought forward today reflect a clear devolution boundary on these matters. This, in turn, reflects the clearer boundary between devolved and reserved powers which underpins the new model of devolution set out in the Bill. Importantly, it includes a new statutory agreement, the water protocol, between the UK Government and the Welsh Government, setting out how they will work together in future on water and sewerage matters and how any disputes will be resolved. This replacement of intervention powers with a statutory intergovernmental agreement reflects the maturing of the relationship between the two Governments, one that is based on working together and resolving issues by discussion, rather than relying on powers of intervention. I particularly welcome the move to make this agreement reciprocal, with the same duties on the Welsh Ministers and the Secretary of State to have regard to the interests of consumers in both England and Wales respectively in exercising functions relating to water resources, water supply or water quality.

We must all hope that, as predicted by the noble Lord, Lord Wigley, on the last occasion, these decisions will be welcomed by every party in Wales and will put to rest any lingering rancour and bitterness that the tragic drowning of the Tryweryn valley created.

Baroness Morgan of Ely: My Lords, I was reflecting on how passionate and moving some of the speeches about water were in Committee, and then I remembered that we are also dealing in these provisions with sewerage, and we do not really get quite as excited about that.

I will speak to my Amendment 43, which would introduce a new clause to amend Section 27 of the Water Industry Act 1991. I acknowledge that there has been a degree of movement on the issue of Ofwat and its accountability to the Welsh Assembly. My amendment would require the Secretary of State to consult Welsh Ministers before giving general directions to Ofwat, the water regulator. Obviously, these directions would be in connection with matters relating to water and sewerage operators in Wales or where licensed activities are carried out using the supply system of water or sewerage operators in Wales. At an earlier stage of the passage of the Bill, I explained why these changes are necessary and I listened very carefully to the Minister's reply. I have therefore changed the amendment I proposed at that point so that his concerns relating to any non-devolved areas of Ofwat functions, which he alluded to again in his opening statement today, would be taken out so that there can be no question of the Assembly interfering in areas beyond its competence in relation to giving guidance on what Ofwat should do in Wales.

It should be emphasised that we are not interested in trying to step beyond the Welsh Assembly competence here. However, we believe that Ofwat should be accountable to the National Assembly for Wales and Welsh Ministers for the function that it exercises in Wales.

[Baroness Morgan of Ely]
Without this new clause, Welsh Ministers will find themselves in the bizarre situation of regulating water and sewerage operators in Wales but with the Secretary of State being able to exercise his function of giving a general direction to Ofwat without any consultation whatever with the Welsh Ministers. We do not think that that issue has been addressed yet.

I support the point made by the noble Lord, Lord Wigley, on the need for an unequivocal statement on the face of the Bill that Wales is now responsible for matters relating to water. We have not got that and it would be good to have it. Sometimes, when it is such a politically sensitive issue, it makes sense to write it into the Bill to make sure that people understand the politics of what is going on; it is not all about law. That is probably true also in relation to reservoirs. I have heard what people have said before, and yes, the Welsh Assembly has the ability through the laws that it has even now to stop reservoirs and a future Tryweryn happening. But let us do it because it is the right thing to do, and because it is politically sensitive and something that people in Wales would really appreciate.

I will deal now with the Government's amendments that relate to water. Noble Lords will recall, as we have just heard, the much-heralded announcement and fanfare in the media that everything was going to change in relation to water and that we were all thrilled. Yes, the idea that an intergovernmental protocol should be established on cross-border issues including water is a good thing. But it was also made clear that the Secretary of State's existing legislative and executive powers of intervention in relation to water should be removed in favour of mechanisms under the intergovernmental protocol. The Secretary of State cannot now use those interventionist powers with regard to water. That is a good thing because we can deal with it through this protocol.

6.30 pm

However, I return to the point made by the noble Lord, Lord Wigley. What is in this protocol? We have no idea. If no agreement can be reached on the protocol, it is possible that those intervention powers may never be removed. What will happen if there is a dispute between the two Governments in terms of what should happen in that protocol? Specifically, to whom would any disagreement be referred and how do the UK Government envisage this section would work in practice? We have no clarity on this protocol. We are clearly concerned about it.

I am also concerned about this new clause from the Government concerning the reciprocal cross-border duties in relation to water. This was not part of the Silk commission and we are concerned. We heard alarm bells ringing because of a reference to the Water Industry Act 1991, which again the noble Lord, Lord Wigley, emphasised, was based on promoting competition as the only way to secure the interests of consumers. I understand that the Minister made a reference to that at the beginning of his statement but can I be absolutely clear that this issue of promoting competition will not be enforced on Wales in this cross-border understanding? Please correct me if I have not understood—this is not about imposing competition on Wales where we do not want it in relation to water.

Scotland and England do not have cross-border operators and as such the issue in respect of consumers is not as obvious. But the Solway Tweed river basin district covers both Scotland and England and decisions either side of the border would impact on the other. I am not aware that such a requirement exists in the Scotland Act, so why do the Government propose to insert it into this Bill at such a late stage in the scrutiny process?

Lord Bourne of Aberystwyth: My Lords, I thank noble Lords for what has certainly been an impassioned debate on an area that I agree deserves passion. I will try to deal with the various issues that have been raised. I turn first to the package of provisions raised by my noble friend Lord Crickhowell in relation to his proposals for fisheries and recreation to be brought within the definition of water-related functions in Section 58 of the Government of Wales Act as amended. I obviously listen very carefully to everything that my noble friend says on any subject, but particularly in this area, where I know he has great expertise. I will look carefully again at this area and write to him. But I return to the basic point as I see it, which is that fisheries and recreation are already devolved matters, so there is no issue in relation to intervention in those areas. To use his analogy, the ingredients of the cake have already been passed to the Welsh Government. But I will take another look at it and write to the noble Lord.

Lord Crickhowell: The only thing that worries me about that is that they may have been passed to the Welsh Government when the fish are in Wales, but fish pass up and down the border, in and out of England and Wales, and affect both England and Wales—so there is an issue about cross-border arrangements.

Lord Bourne of Aberystwyth: My Lords, as I said, I will look at the issue, but my understanding is that if the fishing is taking place in England it will be a matter for England and if in Wales it will be a matter for Wales—but I will take a more detailed look at that and write to my noble friend and other noble Lords who have participated in the debate.

I turn now to the serious issue about the protocol and Tryweryn. I have said on more than one occasion—I feel that I have said this so often—that Tryweryn is not affected by this legislation. Tryweryn could not happen now. The power in relation to reservoirs in every respect is already with the National Assembly for Wales. I could not have been clearer on that. I understand the importance of the issue as part of our folklore, but it is unaffected by this legislation. One would not expect this legislation to claim to be doing things that it is not doing. That is the basic point—although I understand the passion in relation to this area. I give that reassurance to the noble Lords, Lord Wigley, Lord Thomas, Lord Elystan-Morgan and Lord Morgan. Tryweryn cannot happen—or if it does, it is a matter for the National Assembly for Wales.

Lord Wigley: I am grateful to the Minister, who is repeating—quite understandably—the points he made in Committee. However, I pray in aid the comments made by the noble Baroness, Lady Morgan of Ely,

with regard to the benefits of having something written in the Bill. Other declaratory points are included in the Bill—for example, the permanence of the Assembly. That is a declaration and there is no reason at all why there should be not that clear declaration. But it goes further than that. It goes to the question of the total control of reservoirs in Wales—every aspect of them should be under the control of the Assembly. Is the Minister saying that they are?

Lord Bourne of Aberystwyth: My Lords, I am saying that. The noble Lord is not often unfair, but I think that he is being unfair on this occasion. The issue in relation to the permanence of the Assembly is an aspiration and a declaration that was sought by his party and agreed by others. This is a very different issue. It is a statement of what this particular Act will do. This Bill as it is at present does not do anything in relation to the situation he is referring to—so it would be most extraordinary to claim that it did.

Turning to the broader issue of the protocol, once again I am conscious that the protocol is clearly important, but the Government have not claimed anything that is untrue or indeed misleading. We have said that the existing intervention powers will be substituted by a protocol. That remains the case. I understand noble Lords wanting information on what the protocol will cover, and perhaps some timetable for how it will be agreed, but noble Lords cannot have thought that I would be able to produce an agreed protocol at this stage of proceedings when we have only just agreed across government that this will be the way forward. I certainly undertake to write to noble Lords with a timetable for how the protocol will proceed and what it will cover, but I hope that they will accept that there has been no misleading in relation to the protocol. What we claimed is what we are delivering.

Lord Wigley: I am sorry to intervene again—I do not want to be a nuisance—but the Bill says that the protocol "may" be introduced. Why does it not say "shall"?

Lord Bourne of Aberystwyth: That is a drafting point. The noble Lord makes a fair point, but I can give the reassurance that there is certainly no intention on the part of the Government that this should not happen. It is something that is proceeding. I can confirm that it is the Government's intention. We want this to happen and I believe that it will happen. I am not taking a pessimistic view of this. The noble Lord makes a fair point about the drafting, which I had not picked up—but sometimes these things are referred to as "may" and sometimes as "must". From our point of view, we regard this as imperative.

Lord Elystan-Morgan: From what the Minister says, it seems pretty obvious that the protocol will not be in existence before the Bill receives royal assent. So one will be left with some sketch on the part of the Minister. That is not the ideal way of doing things, but I am sure that we would be prepared to accept the word of the Minister on what the basic content of the protocol will be.

Lord Bourne of Aberystwyth: I thank the noble Lord, Lord Elystan-Morgan, for that intervention. I cannot be certain, but I anticipate that the protocol will not be decided before Third Reading on our current timetable; that is most unlikely. But as I said, I will write to noble Lords giving an indication of what it will contain and some timescale ahead of Third Reading. I hope that that will be before the second day of Report. Once again I say that I do not think that there has been any misleading on this at all. We said that there would be a protocol to replace the intervention powers. That is the intention. We have good will and we want to get this agreed. We will do it with due expedition, as quickly as we can, but it may take longer than the middle of January, which is what we are looking at. With that, I ask noble Lords not to press their amendments.

Amendment 13 agreed.

Clause 29: Transfer of executive functions in relation to Welsh harbours

Amendment 14

Moved by ***Lord Wigley***

14: Clause 29, page 26, line 23, leave out ", other than harbours that are reserved trust ports"

Lord Wigley: My Lords, I shall speak briefly to Amendment 14 and the other amendments in the group which have been tabled by the noble Baroness, Lady Morgan of Ely, seeking to devolve the trust ports to the National Assembly for Wales. I have added my name to Amendments 14 to 22.

The noble Baroness's amendments were debated at the previous stage of the Bill, and I would like to remind the House of a point on which we were all agreed: the fact that Milford Haven is of strategic significance. It is unique in that it has a deep-water facility and handles 62% of all our liquefied natural gas, and as such it is of economic importance to Pembrokeshire. It was included in the Silk report and the St David's Day agreement. To my mind, the reasoning behind this reservation is totally unclear. On the previous occasion, the Minister implied that the Government were unwilling to compromise on this matter, stating that reserving Milford Haven was an essential part of the Bill. He went on to assure noble Lords that he would take another look at the arguments set out and report back on his conclusions. I look forward to hearing them.

I want to reiterate that I am in full agreement that Milford Haven should be devolved. There is, however, one deeply troubling comment that I wish to raise again, and that is that Milford Haven trust port was at one stage being suggested by the current First Minister of Wales as a base for the UK nuclear fleet. He went on to say that the Government are not considering that option, but using the hosting of Trident as a way to emphasise the strategic significance of the port immediately rang alarm bells. Devolved or reserved, Trident is not welcome in Wales, and I urge both the Government and the Opposition to put on the record today that they do not intend to acquire powers in

[LORD WIGLEY]
order to justify locating it there. However, I am very much in agreement with the main points made by the noble Baroness, Lady Morgan, in Committee. I beg to move.

Baroness Morgan of Ely: My Lords, I shall speak to Amendments 14 to 22 in my name and that of the noble Lord, Lord Wigley, and to Amendments 23 to 26 in my name, on the devolution of ports to Wales. The difference between my amendments and the Government's position is that I believe that all ports in Wales should be devolved. The Bill as currently drafted does not conform with the recommendation of the Silk commission on the devolution of ports to Wales, as the noble Lord, Lord Wigley, has just emphasised.

To be fair, the Bill allows the Assembly to legislate on ports and harbours, which is a welcome move, but there remains this category of reserved trust ports on which the Assembly cannot legislate and over which Welsh Ministers cannot exercise any powers. That category seems to be arbitrarily defined by a certain turnover in relation to ports. In fact, only one port in Wales falls within the category, and that is Milford Haven in Pembrokeshire. It strikes me as very odd that the UK Government are seeking to control this one particular port.

So far, the justification given is that Milford Haven is a strategic energy port because it handles 63% of all the liquefied natural gas that comes through UK ports. As I mentioned in Committee, this justification is particularly odd as the UK Government made no attempt to cite energy security as a policy driver for investment in Milford Haven to support the sale of the Murco refinery in 2014. Equally strange is the fact that the UK Government did not seek to control the trust port of Aberdeen, which has significant strategic energy value due to the importance of North Sea oil to the United Kingdom. There are definite double standards in this. In Scotland, all ports and harbours are devolved, while Wales is once again being treated as a second-class country.

I would also argue that devolving powers over the trust port at Milford Haven is incredibly important for the economic development of the area, and it should be within the power of the Assembly to help promote growth in Pembrokeshire. It is the Assembly which has responsibility for economic development.

Some powerful points were made in Committee by noble Lords, including one by the noble Lord, Lord Crickhowell, on the issue of safety at the port. Indeed, the very fact that so much fuel comes through the port makes safeguarding an essential issue. The emergency services, both ambulance and fire, are already devolved. I want noble Lords to recall the "Sea Empress" oil tanker, which in 1996 ran aground just outside the port of Milford Haven. Protecting our environment is equally as important as the safety issues, as is the policing of the legislation for both safety and the environment at the port. In order to have a truly holistic response to accidents, whether on safety or environmental grounds, it should be acknowledged that one umbrella of responsibility makes more sense.

Noble Lords can imagine that, if an accident such as that involving the "Sea Empress" happened today, there would be a great deal of passing the buck between the UK Government and their accountable body, the port authority, and the Welsh Government, who are responsible for environment and safety. This was not an issue in 1996 because the Assembly did not exist. I am always concerned that, when there is not an absolutely clear line of responsibility, where does the buck stop? In a case like that of the "Sea Empress", noble Lords can imagine how the bodies would pass the responsibility for it between each other for years.

The interrelated issues of the economy, the environment and safety, together with the interaction of local communities and the local authority, all need to be co-ordinated. Surely it would be easier and more effective to co-ordinate them at the Wales level. I hope that the Minister will reconsider this point and allow the port at Milford Haven to come under the control of the Welsh Assembly, as recommended by the Silk commission.

6.45 pm

Baroness Randerson: My Lords, it really rankles that, yet again, something which is taken for granted in Scotland is viewed as not appropriate for the Welsh Assembly and the Welsh Government. There is no logic to this decision. There might be an excuse, but that is different from logic. There is every reason to take a comprehensive approach to managing the ports in Wales on very good strategic and economic grounds, along with developing a strategy in relation to them as a whole. Moreover, as the noble Lord, Lord Crickhowell, mentioned in Committee, there is the importance of the safety aspects of this issue. So I would say to the Minister, who I realise understands only too well the importance of ports to the Welsh economy and who understands extremely well the economy of that part of Wales, that even at this late stage of our consideration of the Bill he should give this matter further thought and come back at Third Reading.

Lord Crickhowell: My Lords, I had not intended to intervene again on this issue. I have long experience of dealing with the port authority and sometimes the relationships were very good. One particular person was running the authority during my early years as the local MP with whom I had an absolutely first-class relationship. However, they were not always as good. What people ought to understand about the port authority is that it will not be the Welsh Government, or indeed the UK Government, actually operating and controlling things; that is very much for the port authority, which has extensive powers. I once had a profound disagreement with the authority over a campaign that I and others fought on the safety issue because we were deeply concerned about some of the actions being taken not by the Government but by the port authority for its own commercial or other reasons.

I wonder whether there is not some solution here. I understand entirely the crucial fact that the gas terminals are at the end of pipelines that carry gas into England and form an important part of our energy package. Surely it would be possible for some agreement to be reached by the Government with the Welsh Assembly that would take the authority for dealing with the strategic link and the gas facility out of the specific responsibility of the Welsh Government and make it a

separate strategic effort, while somehow allowing the Welsh Government much more involvement for the reasons that have been outlined in the handling of such matters as safety within the port.

The fact is that the town of Milford, the oil facilities and the people who live around them on the south of the haven, as well as Neyland and Pembroke Dock, are all close to areas where, if an accident occurred, the impact would be enormous on the local population. So there is a real issue here, and I have a good deal of sympathy with the view that these matters should not necessarily be in the hands of a trust port whose powers were established a long time ago in very different circumstances. I wonder whether the powers and authority of this port should not be looked at again, perhaps jointly, by the Welsh Government and the UK Government, because there are practical issues here that go back to the original creation of this facility, when the circumstances were wholly different.

I understand the vital strategic issue, which needs to be covered and dealt with adequately, but I hope that the Government will give at least some further thought at some stage—whether they can do it during the passage of this Bill I am not sure—to the way in which these issues are managed and handled in the port of Milford Haven.

Lord Hain: My Lords, following that very interesting contribution from the noble Lord, Lord Crickhowell, perhaps I may ask the Minister to explain exactly how all the other issues to do with Milford Haven port are devolved to the Welsh Government. Economic development—which is crucial in the area—environmental questions, safety issues and matters relating to the sea are all devolved, yet, uniquely, Milford Haven port is excluded. If the sole reason for that is the energy question—one can understand the strategic importance of the LNG capacity there—surely the vehicle to address that might be a protocol. Since the Minister has wheeled out the protocol—I do not mean that pejoratively—in a way that is meant to satisfy the legitimate demands for control over water within Wales, why could that not be the vehicle for addressing the strategic energy question, while ensuring that the Welsh Government have full control over Milford Haven as they have over all other ports?

Lord Bourne of Aberystwyth: My Lords, I thank noble Lords who have participated in the debate on these amendments. Obviously, the Government have some amendments in this group as well, which I will move in due course.

Amendments 14 to 26 and Amendments 86 to 89 are opposition amendments. We debated amendments that were very similar to Amendments 14 to 26 and Amendments 86 to 89, tabled by the noble Baroness, Lady Morgan of Ely, and the noble Lord, Lord Wigley, in Committee on 7 November. The amendments would remove the reservation of reserved trust ports from the Bill and so transfer functions to the Welsh Ministers and devolve legislative competence for these ports to the Assembly in the same way as the Bill does for other ports wholly within Wales.

During that debate, in light of our discussion and the points raised by noble Lords, I undertook to take another look at the reservation of reserved trust ports without prejudice—that is, not saying that I would come along with revised proposals. I am now convinced of the strategic case for excluding Milford Haven and will seek to explain why.

Trust ports have unique governance arrangements. They are run by independent statutory bodies whose role is to manage, maintain and improve a harbour. Trust ports operate on a commercial basis, generally without financial support from government. Harbour authorities for trust ports have no shareholders but are accountable to, and run for the benefit of, their stakeholders, who include port users, local communities and local economies as well as local government and national Governments. Any profits are reinvested by the harbour authority in the port for the benefit of those stakeholders. Indeed, it is the duty of a trust port board to hand on the harbour to succeeding generations in the same or better condition. There are five trust ports in Wales, at Caernarfon, Milford Haven, Neath, Newport and Saundersfoot.

In light of the unique governance arrangements that I have just outlined, the Government believe that trust ports that have a nationally significant role in Wales should continue to be accountable to UK Ministers, which is what the reservation of reserved trust ports in the Bill achieves. During our debate on 7 November, all noble Lords who participated were in agreement about the importance of the port of Milford Haven. The significant volume of liquid bulk cargo—that is, oil and oil products, and liquefied natural gas—passing through the port each year is a clear testament to that. The oil refinery and fuel storage facilities at Milford Haven, which are dependent on the port, play an important national role in securing supplies of road and aviation fuel in Wales and England.

Perhaps I may at this stage take issue with something that the noble Baroness, Lady Morgan, stated in relation to the Murco refinery. I am in a position to say something from direct experience because I was chair of the Haven Waterway Enterprise Zone when the Murco refinery was threatened with closure, which sadly came to pass. The two Governments, the Government in Wales and the Government at Westminster, worked closely and amicably in relation to this; there was no disagreement. As chair of the enterprise zone, I had frequent discussion with the Department of Energy and Climate Change, as it was at the time, and the Minister there. There were also discussions with the relevant Welsh Minister. It was all perfectly amicable. So on matters relating to Milford Haven, I would not want noble Lords to think that the two Governments are always at loggerheads on these issues; that was certainly not the case in relation to the Murco refinery and on other issues that came up while I was chairman there over a period of some two years.

It is because of the importance of the oil refinery and fuel storage facilities at Milford Haven, dependent on the port, that we take the view that it is of strategic significance. The turnover threshold in Clause 32, referred to by the noble Baroness, is used to determine which trust ports in Wales are reserved trust ports and is based on a turnover threshold in the Ports Act 1991. Although the context is different, it seemed to be a suitable test for determining which trust ports in Wales are nationally significant and so should be reserved.

[Lord Bourne of Aberystwyth]

I accept—I note the spirit of contributions made by the noble Lord, Lord Hain, and others—that Welsh Ministers will remain a very important stakeholder for Milford Haven given their devolved responsibilities for other matters, such as for economic development, surface transport and marine licensing. I say once again that it is wrong to anticipate that every time a serious issue arises the two Governments will not work together. I refer noble Lords by way of example to the situation in relation to foot and mouth. That would no doubt be the case if there was some national emergency involving both Wales and the rest of the United Kingdom. The two Governments would work successfully together again where there was a need for it.

Lord Hain: In that case, if the Minister is saying that the two Governments would work together anyway in the common interest of both Wales and the rest of the UK, why would that not apply also in the case of the strategic energy question?

Lord Bourne of Aberystwyth: My Lords, if I have understood the point correctly, this is in the context of our firm belief that the port is of strategic UK significance but that there are occasions when it is absolutely right that the Welsh Government need to be involved. They are a significant stakeholder in the port at the moment and—again, I can speak from experience of chairing the enterprise zone—are involved very much in issues there. It is not that the two Governments were at loggerheads; that is far from the case. It seems that we always anticipate that the two legislatures and the two sets of Ministers will always be at each others' throats; that is far from the case. These two mature institutions very often—indeed, most often—work very successfully together. That is the point I am seeking to make.

Lord Hain: My Lords—

7 pm

Lord Bourne of Aberystwyth: May I just develop this point? I remind noble Lords that the rule on Report is that they should speak only once—but I will give way since I am sure that it is a relevant contribution. I shall write to noble Lords on issues that have been discussed to explain how the relationship with the Welsh Government works, the matters they are involved in and, perhaps, how we can move that forward to ensure that we have harmonious relationships.

Lord Hain: I am grateful. Incidentally, that was an intervention, not another speech. If the Welsh Government and the UK Government will not be at loggerheads on things, why would the Welsh Government be at loggerheads with the UK Government on the supply of LNG, which is just as important to Wales, proportionately, as it is to the rest of the UK? I do not understand the logic of the Minister's point.

Lord Bourne of Aberystwyth: My Lords, we could disagree on this issue until the cows come home but the basic point, which I think the noble Lord would accept, is that some matters are rightly retained as reserved matters for the United Kingdom Government while other matters are appropriate for the Welsh Government. It is our belief that the significance of this port in UK terms means that this should be a reserved port and not a devolved port. We disagree on that, but that is the basis on which we are moving forward, recognising that the Welsh Government have a role to play in relation to Milford Haven—a role that they fulfil at the moment. As I say, I will endeavour to ensure that I write to noble Lords to explain how that relationship is working at the moment.

In our debate on 7 November, some noble Lords questioned the matter of the devolution of strategic ports in relation to Aberdeen, which has been cited, quite appropriately, I acknowledge, in relation to Scotland. That was, of course, a devolution arrangement that was put in place in 1998. The Government's thinking has developed since then and the Wales Bill includes the important concept of reserving to the United Kingdom Government trust ports that are nationally significant. I repeat to the noble Lord, Lord Hain, and others that that is the reason we seek to retain Milford Haven as a reserved port.

Government Amendments 27 to 35 are concerned with reciprocal requirements for the consent of the Secretary of State and the Welsh Ministers imposed by Sections 42C and 42D of the Harbours Act 1964. These requirements relate to harbour orders and schemes made under that Act which amend existing harbour orders and schemes made by the Secretary of State or the Welsh Ministers. The amendments are needed because the consent requirements are not consistent with the new devolution settlement for harbours in Wales set out in the Bill.

The amendments remove the reciprocal consent requirements. The transfer of harbour functions to the Welsh Ministers in the Bill will mean that the Welsh Ministers, not the Secretary of State, will exercise these harbour order and scheme-making functions for all harbours wholly in Wales, apart from reserved trust ports, which I shall refer to as "devolved harbours". This would cover issues such as improvements to harbour facilities in relation to devolved harbours. The Secretary of State or his delegate could make such orders or schemes relating to devolved harbours only in very limited circumstances. In all such cases, the Secretary of State or his delegate will have a duty to consult the Welsh Ministers before making such a scheme or order, including under new provisions in the amendments.

Also, it would be unduly restrictive if Welsh Ministers were required to obtain consent from the Secretary of State when making, for example, a harbour revision order for a devolved harbour that alters the effect of a harbour revision order made for the harbour by the Secretary of State before the new devolution settlement. Other amendments in the group contain consequential amendments applying to Clause 36—provisions supplementary to Clauses 34 and 35—covering the Secretary of State's new consultation obligation introduced by the amendments.

Lastly, Amendment 31 removes wording from Clause 36(1) which carries an exception from the duties to consult where consultation is not reasonably practicable. This amendment has been requested by Welsh Ministers.

Government Amendments 54 and 110 to 114 fulfil a commitment I gave in Committee to examine further the fisheries management functions being transferred to Welsh Ministers to regulate fishing vessels outside the Welsh zone. Amendment 54 introduces a new clause that transfers additional fisheries management functions to Welsh Ministers. The functions replicate, to a large extent, those already exercisable in the Welsh zone which were transferred under the Welsh Zone (Boundaries and Transfer of Functions) Order 2010. The effect of the amendments is that Welsh Ministers will have available to them the functions they require to manage Welsh vessels wherever they are. They also preserve the United Kingdom Government's requirement to retain a symmetry between the concurrent functions available to the Secretary of State in relation to Scottish and Welsh fishing vessels operating outside their respective zones. Welsh Government officials worked with their colleagues in the Wales Office and in the Department for Environment, Food and Rural Affairs to recommend these amendments, which we are pleased to present.

Finally in this group, Amendment 55 requires the Secretary of State to consult Welsh Ministers while setting strategic priorities in relation to the Secretary of State's delivery, in Wales, of functions under two pieces of primary legislation: the Coastguard Act 1925 and the Merchant Shipping Act 1995. In practice, each of these functions is carried out by the Maritime and Coastguard Agency, an executive agency of the Department for Transport. While day-to-day operational and incident response decisions are, quite properly, the responsibility of the chief executive of the Maritime and Coastguard Agency, the Secretary of State is responsible for setting its strategic priorities. Areas covered include the 24-hour search and rescue helicopter service provided by the coastguard and the promotion of seafarer health and safety standards.

Noble Lords will be aware that statutory provision has been made for consultation between the Scottish Government and the Secretary of State in the Scotland Act 2016, and in Committee I agreed to reflect on the case for making similar provision for Wales, in line with the amendments brought forward in Committee by the noble Baroness, Lady Morgan, and the noble Lord, Lord Wigley, and by the Smith commission in respect of Scotland. I am pleased to say that we can make such provision, and this amendment is the result. I commend the government amendments in this group and urge noble Lords not to press their amendments.

Lord Wigley: I thank those who have taken part in this debate, including the noble Baronesses, Lady Morgan and Lady Randerson, the noble Lords, Lord Crickhowell and Lord Hain, and, of course, the Minister. On Milford Haven, I think that there is a feeling across the House that there is a greater role for the National Assembly and the Welsh Government in this matter, particularly when one considers that they have responsibility for the safety and civil emergency aspects. There are questions of coherence in manpower planning, in transportation and road planning and in the economic infrastructure of the whole area. None the less, we note the points that the Minister made and it appears that we will have to agree to differ on this. I thank the Minister for government Amendments 54 and 55 on fisheries, which are a response to amendments we tabled in Committee and which will be welcome in Wales. On that basis, I beg leave to withdraw the amendment.

Amendment 14 withdrawn.

Amendments 15 and 16 not moved.

Clause 30: Transfer of executive functions: amendments of the Harbours Act 1964

Amendments 17 to 22 not moved.

Clause 32: Reserved trust ports

Amendment 23 not moved.

Clause 33: Development consent

Amendments 24 to 26 not moved.

Clause 35: Cross-border exercise of pilotage functions

Amendment 27

Moved by ***Lord Bourne of Aberystwyth***

27: Clause 35, page 30, line 46, at end insert—

"( ) Where the Secretary of State or the Welsh Ministers have made an order under section 42A of the Harbours Act 1964 delegating the function of making a harbour revision order, the duty in subsection (1) or (2), so far as it relates to the function mentioned in subsection (4)(c), applies to the delegate as it applies to the Secretary of State or the Welsh Ministers."

Amendment 27 agreed.

Amendments 28 and 29

Moved by ***Lord Bourne of Aberystwyth***

28: After Clause 35, insert the following new Clause—

"Exercise of functions in relation to two or more harbours

(1) Where—

(a) a Minister of the Crown proposes to exercise a relevant function in relation to two or more harbours, and

(b) at least one of those harbours is a harbour that is wholly in Wales and is not a reserved trust port,

the Minister of the Crown must first consult the Welsh Ministers (except where section 36(1) applies).

(2) Where a Minister of the Crown has made an order under section 42A of the Harbours Act 1964, the duty in subsection (1) applies to the delegate as it applies to a Minister of the Crown.

(3) In this section—

"relevant function" has the same meaning as in section 34;

"reserved trust port" has the meaning given in section 32;

"Wales" has the same meaning as in section 34."

29: After Clause 35, insert the following new Clause—

"Consequential amendments to consent requirements in Harbours Act 1964

(1) In section 42C of the Harbours Act 1964 (consent of Welsh Ministers for certain orders and schemes), after subsection (2) insert—

"(2A) The references in subsections (1)(c) and (2) to a statutory provision of local application do not include a harbour revision order, a harbour empowerment order or a harbour reorganisation scheme."

(2) In section 42D of that Act (consent of Secretary of State for certain orders and schemes), after subsection (2) insert—

"(2A) The references in subsections (1)(c) and (2) to a statutory provision of local application do not include a harbour revision order, a harbour empowerment order or a harbour reorganisation scheme.""

Amendments 28 and 29 agreed.

Clause 36: Sections 34 and 35: supplementary

Amendments 30 to 35

Moved by ***Lord Bourne of Aberystwyth***

30: Clause 36, page 31, line 28, leave out "or section 35(1) or (3)" and insert ", section 35(1) or (3) or section (Exercise of functions in relation to two or more harbours)(1)"

31: Clause 36, page 31, line 30, leave out from "function" to end of line 31

32: Clause 36, page 31, line 32, leave out "or section 35(1)" and insert ", section 35(1) or section (Exercise of functions in relation to two or more harbours)(1)"

33: Clause 36, page 31, line 40, leave out "or section 35(1) or (3)" and insert ", section 35(1) or (3) or section (Exercise of functions in relation to two or more harbours)(1)"

34: Clause 36, page 31, line 44, after "35" insert ", (Exercise of functions in relation to two or more harbours)"

35: Clause 36, page 32, line 10, leave out "or 35" and insert ", 35 or (Exercise of functions in relation to two or more harbours)"

Amendments 30 to 35 agreed.

Clause 37: Development consent for generating stations with 350MW capacity or less

Amendment 36

Moved by ***Lord Wigley***

36: Clause 37, page 32, line 32, leave out "350" and insert "2000"

Lord Wigley: My Lords, here we go again. I rise to move Amendment 36 and to speak to Amendment 37, which is coupled with it. I shall speak to Amendment 60 a little later.

I welcome the Minister's acknowledgement in the previous stage of the Bill that the limit placed on energy projects is in fact arbitrary. However, he failed to outline in any way why such a low arbitrary limit is necessary. I am sure that I will catch his eye, or his ear, in a moment so that he will be able to respond to that point in due course. The Minister rightly made the point that if you have to put a limit somewhere it will always, in some respects, be arbitrary. An obvious solution is to remove the limit altogether, as is the case in Scotland. Does he not think it bizarre that the Government are happy to use words such as "arbitrary" to justify their imposition of a regime which means that Welsh people will not decide how and when Welsh resources are developed? I do not want to replay the battles already fought. However, I am keen to respond to some points that he made during our last discussion on this matter.

First, as he knows well, and as I have already made clear, the Silk commission serves as no cover to justify the failure to enhance the Bill, since the Government have blatantly ignored unanimous Silk recommendations on other matters. The Minister cannot have it both ways. Although I accept that the 350 megawatt limit was agreed in the cross-party commission, that was in the context of an understanding that other parties would support the devolution of a range of policies in other areas and part of a carefully constructed compromise, as he will well recall, several aspects of which are now being sidelined. The Government have ignored the recommendations of the commission on policing, youth justice and rail infrastructure, among other areas. Just to cherry pick from the commission's recommendations makes a mockery of the process.

Secondly, I am pleased that the Minister has agreed that I was right to highlight the absurd situation of the tidal lagoons, which means that the already approved 320 megawatt Swansea Bay lagoon would be within the threshold, while almost all the other proposed lagoons would not be within the competence of the Assembly. That makes it impossible for the Assembly to develop a coherent expertise, recognised by all people in such matters. Since we already have projects on the stocks in this area and close to each other in size, it really begs the question: seeing that it is arbitrary, why should it not be so at a slightly higher level?

I do not agree with the Minister that the 350 megawatt limit is the only way to do things, as he said, even when it comes to tidal lagoons. He justified the arbitrary 350 megawatt limit by intimating that some strategically important energy projects were not safe in the hands of Wales—at least, that was the implication. Of course, it is the policy of my party that the people of Wales should decide on how all its resources are utilised, regardless of technology or size. However, I emphasise that the Minister need not be concerned about strategically important energy projects being scuppered by Wales. Nuclear energy is already listed in the reservations. A limit well in excess of 2,000 megawatts would still fail to capture much of what is considered as strategically significant by way of energy generation. Fundamentally, a more sensible and pragmatic approach to these energy limits would create a clear, lasting devolution settlement. Even more importantly, in practical and pragmatic terms it would be easier for the developers and for the expertise within the Assembly.

The amendments in my name, unlike the previous ones tabled by Plaid Cymru MPs, recommend a 2,000 megawatt cut-off offer. This would still not encapsulate many of the projects which I had hoped the Government would recognise should be decided on by the Welsh people. But I hope that it offers a more amenable arbitrary limit—yes, arbitrary, as the Minister put it—which would increase Welsh people's

ability to decide how Welsh resources are utilised and give the Assembly a coherent role. The 2,000 megawatt figure, although undoubtedly arbitrary, has been inspired by the Labour amendment in Committee; I readily acknowledge that it proposed the same figure. I therefore hope that I can count on their support for this amendment. Can the Minister outline how any arbitrary limit, be it 350 megawatts or 2,000, can be increased without the need for primary legislation in a pragmatic and sensible fashion, or adjusted in any way that circumstances require, to ensure that we get to a point where Wales's natural resources are decided on by Welsh people to the maximum possible extent?

7.15 pm

Amendment 60, which stands in this group, is on a totally different matter but that is how the group has been put together so I will speak to it now. It deals with the devolution of the Crown Estate to Wales, as is the case in the Scotland Act 2016. The Crown Estate is not currently accountable to the people of Wales. All profits from its holdings are passed to the UK Government. These profits are likely to grow substantially, mainly on account of the demand for renewable energy, and Plaid Cymru firmly believes that the ownership of and control over the Crown Estate in Wales should be transferred to the Welsh Government, as indeed is the case with those in Scotland and the Scottish Government.

I have tabled this amendment in the wake of the recent announcement about spending £369 million on refurbishing Buckingham Palace, funded by an increase in the sovereign grant. Profits from the independent property business of the Crown Estate go to the Treasury, which in turn gives 15% of the sum to the monarch in the form of a sovereign grant for official duties, which this year will total £43 million. The trustees say that the grant should be raised to 25% of these profits to pay for the repairs. I cannot see on what basis of logic or equity we in Wales should forgo the energy revenue potential to pay for such expensive projects, but be that as it may. At present, the Crown Estate receives the financial rights of the Crown in Wales from fishing, mining, oil and gas exploration, tidal and wave power, wind farms and gold and silver, as well as all energy and resources within the territorial waters and borders designated to Wales. It is as if we still live in an imperial time, with an imposition on our natural resources to subsidise in some way the monarchy.

It is true that the devolution of the Crown Estate to Scotland was recommended by cross-party consensus in the Smith agreement, whereas the St David's Day process found no similar consensus in respect of Wales. I question the Government's logic, however, when they use omissions in the Silk commission to justify not devolving a policy area and then ignore recommendations to devolve policy areas at their own discretion.

During the year ended March 2016, the Crown Estate in Wales generated £10.5 million in revenue and its capital value is almost £100 million. In Wales, this includes: the Gwynt y Môr offshore wind farm; the marina in Deganwy and Conwy; the Morfa developments in Swansea; 3,238 acres of farmland; 66,470 acres of common land; and 245,000 acres with amenity rights, and much more. It is high time that the power over Welsh land and coast rested in Welsh hands in our National Assembly, with the income used for the benefit of the people of Wales.

Wales was once the leader in carbon-based energy and it is clear that we have the potential to be world leaders again in renewables. Wales is well placed to thrive from the increasing global demand for renewable energy. A recent report by RenewableUK Cymru estimates that the current pipeline of onshore wind projects will generate £2.3 billion of GVA and more than 2,000 full-time equivalent jobs per year. Our 1,200 kilometres of coastline, our deep sea ports and our university expertise in both north and south make Welsh waters particularly valuable to the marine energy industry, which is estimated to be worth up to £3.7 billion to the UK economy by 2020. At the moment, Wales is unable to profit from this huge potential. The country's ability to do so is constrained by the rules set here at Westminster. Increasing the arbitrary limit on the Welsh Government's energy competence, which I discussed in my earlier amendment, is one key to the people of Wales seeing greater benefit from this potential. Devolving the Crown Estate is another way of freeing some of those constraints.

In his evidence to the Silk commission, Dr Richard Cowell of Cardiff University suggested that,

"bringing ownership of the Crown Estate in Wales to the Welsh Government might enable a better quality of debate about the kind of off-shore renewable energy development pathway that is appropriate for Wales, and open up discussion on how the royalties from resource exploitation should be best invested".

I hope the House will agree that devolving the Crown Estate would be a step towards fully harnessing the potential offered by Wales's natural resources, and will offer a gateway to a prosperous renewables-focused future, encouraging us to do more to help ourselves by utilising our own resources for the benefit of our people. I beg to move.

Baroness Morgan of Ely: My Lords, I shall speak to Amendments 57 and 58, which seek to amend government Amendment 56. These amendments have been bizarrely grouped with the amendments to which the noble Lord, Lord Wigley, has just spoken. These amendments are about fixed-odds betting terminals. We were really pleased when the Minister suggested in Committee that he would be minded to devolve the regulation of fixed-odds betting terminals in Wales, and we are grateful that an amendment has been tabled by the Government on this issue. However, a detailed reading of the amendment reveals that it does not go nearly far enough in addressing the issue of concern to us.

The government amendment will enable the Welsh Government to address fixed-odds betting terminals in Wales under the Gambling Act 2005. It states that Welsh Ministers may legislate for the number of machines in the betting establishment for which the maximum stake exceeds £10. In other words, the only machines that would come under this provision are those where you have to spend at least £10 every time you play. At least, that is my understanding of the Government's amendment; perhaps the Minister will correct me if I am wrong on that point.

Under the current Gambling Act, up to four machines are authorised per betting premises. Our amendment would enable the Welsh Government to make laws that would affect machines where anything over £2 could

[Baroness Morgan of Ely]
be gambled. I am not saying that we need to regulate the 2p slot machines in Nessa's Slots in Barry Island where, like thousands of others, I frittered away my coppers in years gone by, but we need to lower the amount that can be gambled at a time. This is something which has exercised many experts in the field. We are aware that a review of betting machines is being undertaken by the UK Government, and this issue has been taken up by the All-Party Parliamentary Group on Fixed Odds Betting Terminals. There seems to be all-party support to reduce the maximum bet to £2. Will the Minister give us an assurance that the amount could be reduced if the matter is devolved? It would be good if the Minister could indicate that to us. If the amount could be amended here, that would be the ideal situation, but if not, will he give us an indication about how it could be done in future?

However, that is not my biggest concern with this amendment. My real concern with the Government's amendment is that it would apply only to new betting premises. In other words, all the betting shops that exist in Wales today would be entirely unaffected and the Welsh Government would have no powers whatever over fixed-odds betting terminals currently in Wales. I know what the Government will say. They are going to say that that is what the Scotland Bill said. That is not good enough. Just because the SNP was not keeping an eye on its Bill does not mean that we will wave this Bill through when it is fundamentally flawed. It is important that we take note and the Scots should take note as well. They were not keeping an eye on their Bill. They flagged through the Henry VIII clauses as well. A message should be given to the SNP that it should step up and keep an eye on things.

Gambling is causing massive social, economic and health problems in Wales, and we want the tools to deal with them. Research conducted by the Gambling Commission identified 1.1% of the Welsh population as problem gamblers. Figures show that nearly one-fifth of problem gamblers in the UK have reported debts of between £20,000 and £100,000, while counselling sessions increased by 29% between 2013 and 2015. This is happening now, it is an epidemic and we need to do something to stop it. These machines are phenomenally popular. It is estimated that on average £3,000 a day is wagered on the 1,500 terminals in Wales. You can lose up to £100 every second on these machines. The gambling prevalence survey, a major study of British gambling, found that these machines are most popular among young, male, low-income gamblers, particularly the unemployed, as well as among students and those from ethnic minorities. Where have bookmakers decided to concentrate their efforts? They are putting them in high streets in poorer areas. To date, the UK Government have not done nearly enough to curtail the proliferation of fixed-odds betting terminals, so if the UK Government are reluctant to act, they should give the Assembly the freedom to act to reduce the maximum stake to £2 and make sure that the Assembly can act retrospectively, not just in the future. The problem exists now, and the Assembly is expected to wipe up the mess.

I guess I should be grateful that the Government have brought something forward, but I am afraid that, in its current form, I am disappointed with the amendment. I hope the Government will take on board our amendments on this important issue.

Lord James of Blackheath (Con): I believe that the noble Baroness, Lady Morgan, has been led astray by a very faulty piece of wording here on which I have written to the Minister. I think it is not a question of a minimum bet of £10. I believe you can nominate any value you want down to 20p on any machine. It is not a minimum bet; it is a minimum bank that you have to open to have the right to play on the machine. That is £10. Then you can have any value of stake you want within it down to 20p, even perhaps 10p in some instances. The confusion comes from the difference between a minimum stake and a minimum bank that you can buy into on any machine. If we could get that clear once and for all, this problem would largely go away.

Baroness Randerson: My Lords, I start by making clear that I do not share the views of the noble Lord, Lord Wigley, on the value for money of the repairs to Buckingham Palace, which I see as a major tourist attraction and therefore well worth the investment.

I agree, however, with his views on the limits to the Assembly's powers on energy and support his amendments to increase them. For many years, it has been Liberal Democrat policy to give the Assembly power over energy, with the exception of nuclear energy. It is essential that we keep pressing this issue because it is so illogical to have this 350 megawatt limit plucked—I understand why—out of the air.

Will the Minister supply us with further information on fixed-odds betting terminals? We have had some very interesting suggestions. The noble Baroness, Lady Morgan, said that she is unclear about issues associated with gambling. It is certainly not something on which I can speak with any authority, but I am sure we need to make sure that the powers given to the Welsh Assembly are sufficient to be meaningful. The only reason for giving it powers over this would be to allow it to exert those powers in a way to change behaviour and deal with a very serious problem. I would be very grateful for any further information that the Minister can give us about the intention of this amendment and about, for example, the percentage of terminals that would be affected and the percentage of gamblers whose activities would be affected by this amendment.

I am very grateful that the Government have made a concession on this. It is something that has been pressed by many noble Lords, and not just in the context of this Bill. However, it is important that it should be a meaningful concession.

7.30 pm

Lord Griffiths of Burry Port (Lab): My Lords, I will intervene for a short moment, with real apologies for not having been here at earlier stages in these discussions—I fear that I have duties that do not make it possible to be here all that often. I take the definition of the £10 bank very seriously to heart, but that is not the issue for me. I congratulate the Government and the Minister on recognising that there is a problem and bringing forward a government amendment that

reflects that. The curious paradox for me is that having recognised there is a problem, on the basis of fixed-odds betting machines as they currently exist, the one area that devolved responsibility does not address is the very part of the problem that creates the discussion in the first place. To have an amendment that provides powers for the Welsh Assembly to look after what happens in the future, when the problem that has generated the debate cannot yield a similar level of control, seems to me a curious paradox. So while thanking the noble and genial Lord the Minister, who has handled things so magnificently in these debates, I just urge him to think about something that is paradoxical but could be tidied up. If retrospective responsibility could be introduced, that would make it a much better amendment from the Government.

Lord Howarth of Newport (Lab): My Lords, my noble friend Lord Griffiths of Burry Port is rather charitable, indeed flattering, to the Government in referring to their creation of a paradox. I would say that this is simply confused and bad policy-making and endorse what my noble friend Lady Morgan of Ely said at the outset. First, it is not a good way to treat the House for the Government to insist on mixing up, in one group, amendments on this variety of topics—energy, the Crown Estate and gambling. This is not a basis for rational scrutiny of legislation and it should not have happened.

I want to dwell on the gambling issue for only a moment, as much more important is the confusion in the handling of it. To make this distinction between different sizes of bank or stake—I am grateful to the noble Lord, Lord James, for his elucidation of the issue—and to attempt to make a distinction between responsibility for supervision of machines that are already in Wales and for machines that may in future be in Wales is to fragment responsibility. If the Government are going to devolve responsibility for a very important social issue, they should devolve it properly and produce a coherent solution. Fragmenting responsibility can only make for confused and ineffective policy-making. This issue matters far too much to Welsh society, and in particular to the prospects for significant numbers of young people in Wales, and we need a coherent and proper policy for it.

Lord Bourne of Aberystwyth: My Lords, I will address the remarks on this group of amendments and I thank noble Lords who have participated in the discussion. First, I will deal with a point raised by the noble Lord, Lord Howarth, in relation to the grouping of amendments by pointing out that it is entirely possible through the usual channels to decouple amendments. That has happened in at least one other group, so I do not think the accusation was entirely fair. It is open to other parties to challenge that.

Initially, I will address government Amendment 38 to Clause 37, as well as Amendments 36 and 37, tabled by the noble Lord, Lord Wigley. The government amendment is a technical one to address concerns raised by the Welsh Government. Consistent with the principle of establishing a lasting settlement, it simply acknowledges that future Acts of the Assembly may prove relevant factors in the exercise of consenting powers under the Electricity Act 1989. This addition simply amends that Act accordingly to allow for that possibility.

The noble Lord's amendments seek once more to reopen the basis on which the Government endorsed a key recommendation of the Silk commission. I note what the noble Lord said about the commission, but he will know that the legislation is essentially based on the St David's Day agreement, which took forward a lot of the Silk commission recommendations but not all of them. What is in the Bill is essentially based on the St David's Day consensus rather than on the Silk recommendations, although in this context they are the same.

As I said in Committee and have subsequently reiterated in writing to your Lordships, the Bill has been carefully drafted to give effect to that political consensus around the devolution of new powers which will give Wales a substantially greater degree of autonomy in determining the shape of its future energy structure. To use a word that has been used recently, it would be paradoxical if the Government ignored that consensus and came up with a figure that was not part of it. Key to that consensus was recognition that Wales and England are, and will remain, intrinsically linked through a common electricity transmission system which depends on the inputs from a broad range of generating sources.

The Government continue to be firmly of the view that the larger the capacity of those sources, the greater their significance beyond Wales and to the United Kingdom as a whole. Consensus was reached around 350 megawatts being the appropriate watershed, and I do not believe that the landscape has changed to such a degree since then as to necessitate exploring an alternative approach. The noble Lord, Lord Wigley, I think, and possibly others asked whether we already have the powers if we were to subsequently seek to increase that. Yes, we have the powers, without fresh primary legislation, under, I think, the Electricity Act. It might be under a planning Act, but I can assure the noble Lord that those powers exist in relation to upping the figure. That is not to say that factors might not emerge in the future which would give us pause for thought on this front. I do not believe, however, that now is the time to alter the 350 megawatts figure, but as I have indicated, the power is there if it should be needed.

Government Amendments 117, 118 and 119 relate to generating stations and provide Welsh Ministers with greater flexibility for the future around the exercise of their new electricity generation consenting functions in Welsh waters and in relation to the amendment of existing onshore consents up to 350 megawatts under the Electricity Act 1989. They simply and sensibly provide Welsh Ministers with the ability to delegate the exercise of their new functions to a person they appoint for the purpose. This is a flexibility which the Welsh Government have asked for, and I am happy to provide it.

Government Amendments 56 and 83, and opposition Amendments 57 and 58, relate to fixed-odds betting terminals. I confess that I am not acquainted with these either, although I understand that the noble Baroness, Lady Morgan of Ely, has been experiencing them in the last week or so to see how they work, in

[Lord Bourne of Aberystwyth]
addition to Nessa's Slots in Barry Island. In Committee last month, I committed to reflect further on the arguments in favour of devolving powers over fixed-odds betting terminals. Having done so carefully, I am pleased to bring forward Amendment 56, which will transfer the power on fixed-odds betting terminals in exactly the same way as has been done for Scotland. I am very grateful for the intervention from my noble friend Lord James, indicating that the amount relates to a bank rather than a stake. I hope that gives some reassurance to the noble Baroness opposite and ties in with her experience on this issue.

The noble Baroness, quite fairly, raised the issue of whether, if the amount were to change in England, it would translate across to Wales. I can confirm it would. As she rightly says, this is a serious problem which has been exercising the all-party group and others. If it were to be altered in England, that would have the effect of transferring that same amount to Wales. I thank the noble Lord, Lord Griffiths, as well for his contribution. I know he feels strongly about these issues and has spoken on them forcefully and persuasively in the past.

The amendments would devolve legislative and executive competence to the Assembly and Welsh Ministers to regulate the number of high-stakes gaming machines authorised by new betting premises licences in Wales. It is right that they are new betting premises, as the noble Baroness confirmed. Once again, I think the Government have been given rather a raw deal here; having come up with something that has been welcomed, we have then been accused of not going as far as noble Lords thought we had gone. I thought I was absolutely clear that we have gone as far on this as we did with Scotland. I note the comments and this is a serious issue, but I hope I have given some reassurance that if there is some movement in England, that would affect the position in Wales as well.

The Silk commission made no recommendations on the devolution of betting, gaming and lotteries, but we agreed as part of the St David's Day process to consider non-fiscal recommendations by the Smith commission and it was in that context that we decided it would be appropriate to take this forward in relation to Wales. We reflected on it and mirrored the provisions in the Scotland Act 2016. The noble Baroness, Lady Morgan, has proposed going much further than the position in Scotland in the Scotland Act but I am afraid we cannot agree to that. I take issue with her on one point on which she spoke passionately in relation not just to gaming machines but to the SNP. The Scotland Act is not an SNP Act—it is an Act of Westminster to which we all contributed. I think we can all reflect on that.

Amendment 60, tabled by the noble Lord, Lord Wigley, seeks to devolve the management functions of the Crown Estate commissioners in relation to Wales to Welsh Ministers or a person nominated by them. This broadly reflects a provision in the Scotland Act 2016 that devolves management functions of the Crown Estate commissioners in relation to Scotland to the Scottish Ministers or a person nominated by those Ministers. The devolution of the Crown Estate in Scotland was recommended by cross-party consensus in the Smith commission report. It was not part of the Silk recommendations and I am not aware that such a consensus exists in respect of Wales.

The Crown Estate works closely with devolved services in Wales; for example, it has agreed memorandums of understanding with the Welsh Government and Natural Resources Wales. I believe the Crown Estate commissioners are doing an excellent job. Last year the Crown Estate recorded a record profit of £304 million, which was returned to the Exchequer. This is not revenue retained by the Crown. The revenue from the Crown Estate is used to fund public services across the UK, including in Wales. This means that Wales is already directly benefiting from the management of Crown assets by the Crown Estate. I urge the noble Lord, Lord Wigley, to withdraw his amendment.

Baroness Morgan of Ely: Before the Minister sits down, I should like to be clear on this point. The suggestion is that there will be no possibility for the Welsh Government to look at fixed-odds betting terminals that currently exist, despite there being this incredible social problem in Wales. If the UK Government will not allow the Welsh Government to deal with this, do they have any intention of bringing forward something that would address this issue, which is devastating communities not just in Wales but across the UK?

Lord Bourne of Aberystwyth: My Lords, I acknowledge that this is a serious issue. I am grateful to the noble Baroness for exaggerating my powers in relation to the Government as a whole regarding what legislation is forthcoming. I will have to write to her on that, but I acknowledge that it is a problem and I have given her an indication that if we deal with it in Westminster, of course any consequent changes would apply in Wales as well.

Lord Wigley: My Lords, I am grateful to everyone who has taken part in this debate. I have noted the replies given to the various subjects that have arisen. I still feel very strongly that some of the powers that Scotland has regarding the Crown Estate are powers that we should have as well, but clearly we are not going to make much progress on that today. I also suspect that we will come back to the diverse matters that we have discussed, including the gambling questions and possible legislation. On the basis of the debate, though, I beg leave to withdraw the amendment.

Amendment 36 withdrawn.

Amendment 37 not moved.

Amendment 38

Moved by ***Lord Bourne of Aberystwyth***

38: Clause 37, page 34, line 11, at end insert—

"( ) in the definition of "statutory provision", after "Scottish Parliament" insert "and an Act of the Assembly";"

Amendment 38 agreed.

Amendment 39

Moved by ***Lord Bourne of Aberystwyth***

39: After Clause 45, insert the following new Clause—

"Water and sewerage

(1) In Schedule 7A to the Government of Wales Act 2006 (substituted by this Act), in section C15 (water and sewerage)—

(a) omit paragraph 90;

(b) in paragraph 91 omit "and regulation";

(c) omit the two exceptions (and the heading "Exceptions");

(d) omit the definitions of "supply system of a water undertaker" and "sewerage system of a sewerage undertaker".

(2) In section 192B of the Water Industry Act 1991 (annual and other reports)—

(a) in subsection (1), after "the Secretary of State" insert "and the Welsh Ministers";

(b) after subsection (5) insert—

"(5A) The Welsh Ministers shall—

(a) lay a copy of each annual report before the Assembly; and

(b) arrange for the report to be published in such manner as they consider appropriate.";

(c) in subsection (7) omit "the Assembly,"."

Amendment 39 agreed.

Amendment 40

Moved by ***Lord Bourne of Aberystwyth***

40: After Clause 45, insert the following new Clause—

"Modification of water-related functions

In section 58 of the Government of Wales Act 2006, after subsection (2) insert—

"(2A) Her Majesty may by Order in Council—

(a) make provision modifying (by reference to geographical extent or otherwise) a previously conferred or transferred water-related function;

(b) provide for such a function to be exercisable—

(i) concurrently or jointly with a Minister of the Crown or the Welsh Ministers, or

(ii) only with the agreement of, or after consultation with, a Minister of the Crown or the Welsh Ministers.

(2B) In subsection (2A)—

"previously conferred or transferred function" means a function exercisable by—

(a) the Welsh Ministers, the First Minister or the Counsel General,

(b) a Minister of the Crown, or

(c) any authority or other body,

by virtue of provision contained in or made under this Act or any other enactment;

"water-related function" means a function exercisable in relation to water supply, water quality, water resources management, control of pollution of water resources, sewerage, rivers and other watercourses, land drainage, flood risk management or coastal protection.""

Amendment 41 (to Amendment 40) not moved.

Amendment 40 agreed.

Amendments 42 to 44 not moved.

Clause 46: Marine conservation zones

Amendment 45

Moved by ***Lord Bourne of Aberystwyth***

45: Clause 46, leave out Clause 46 and insert the following new Clause—

"Water protocol

(1) The Welsh Ministers and the Secretary of State may make an agreement (the "water protocol") for the purpose of ensuring that—

(a) actions or inaction of the Welsh Ministers, or public bodies exercising functions in Wales, do not have a serious adverse impact on water resources in England, water supply in England or the quality of water in England, and

(b) actions or inaction of the Secretary of State, or public bodies exercising functions in England, do not have a serious adverse impact on water resources in Wales, water supply in Wales or the quality of water in Wales.

(2) The water protocol must—

(a) provide for a procedure for resolving matters of disagreement between the Welsh Ministers and the Secretary of State;

(b) make provision about whether, or to what extent, functions relating to such matters may be exercised pending the outcome of the procedure.

(3) The water protocol may be revised by agreement of the Welsh Ministers and the Secretary of State.

(4) The water protocol, and any revised protocol, must be laid before both Houses of Parliament and the National Assembly for Wales.

(5) The Welsh Ministers and the Secretary of State must exercise their functions in accordance with the provisions of the water protocol, unless it is revoked by agreement of the Welsh Ministers and the Secretary of State."

Amendments 46 to 48 (to Amendment 45) not moved.

Amendment 45 agreed.

Amendment 49 not moved.

Amendment 50

Moved by ***Lord Bourne of Aberystwyth***

50: After Clause 46, insert the following new Clause—

"Reciprocal cross-border duties in relation to water

(1) In exercising functions relating to water resources, water supply or water quality—

(a) the Welsh Ministers must have regard to the interests of consumers in England;

(b) the Secretary of State must have regard to the interests of consumers in Wales.

(2) In subsection (1) "the interests of consumers" has the same meaning as in section 2 of the Water Industry Act 1991."

Amendment 51 and 52 (to Amendment 50) not moved.

Amendment 50 agreed.

Amendments 53 and 54

Moved by ***Lord Bourne of Aberystwyth***

53: After Clause 46, insert the following new Clause—

"Repeal of intervention powers relating to water

(1) In the Government of Wales Act 2006—

(a) in section 114 (power to intervene in certain cases) omit paragraph (b) of subsection (1);

(b) omit section 152 (intervention in case of functions relating to water).

(2) Regulations under section 62 bringing this section into force may not be made until an agreement under section (Water protocol) has been laid before both Houses of Parliament and the National Assembly for Wales."

54: Before Clause 47, insert the following new Clause—

"Transfer of functions in relation to fishing vessels

(1) The functions to which this section applies, so far as exercisable in relation to Welsh fishing boats beyond the seaward limits of the Welsh zone, are transferred to the Welsh Ministers.

(2) This section applies to —

(a) functions of a Minister of the Crown or the Marine Management Organisation under the Sea Fish (Conservation) Act 1967,

(b) functions of a Minister of the Crown under the Sea Fisheries Act 1968,

(c) functions of a Minister of the Crown under Parts 2 to 4 of the Fisheries Act 1981, and

(d) functions of a Minister of the Crown or the Marine Management Organisation under the Sea Fisheries (Wildlife Conservation) Act 1992.

(3) But this section does not apply to—

(a) functions conferred on the Board of Trade by section 8 of the Sea Fish (Conservation) Act 1967;

(b) functions listed in paragraph 2(2) of Schedule 3A to the Government of Wales Act 2006 (inserted by this Act) (functions concurrently exercisable with the Welsh Ministers).

(4) In this section—

"Welsh fishing boat" means a fishing vessel which is registered in the register maintained under section 8 of the Merchant Shipping Act 1995 and whose entry in the register specifies a port in Wales as the port to which the vessel is to be treated as belonging;

"Welsh zone" has the meaning given in section 158 of the Government of Wales Act 2006."

Amendments 53 and 54 agreed.

Amendment 55

Moved by ***Lord Bourne of Aberystwyth***

55: After Clause 49, insert the following new Clause—

"Maritime and Coastguard Agency

(1) In section 1 of the Coastguard Act 1925 (transfer of the coastguard to the Board of Trade), after subsection (4) insert—

"(5) The Secretary of State must consult the Welsh Ministers about the strategic priorities of the Secretary of State in exercising functions under subsection (1) in relation to activities of Her Majesty's Coastguard in Wales.

(6) In subsection (5) "Wales" has the same meaning as in the Government of Wales Act 2006."

(2) In section 292 of the Merchant Shipping Act 1995 (general functions of the Secretary of State), after subsection (4) insert—

"(5) The Secretary of State must consult the Welsh Ministers about the strategic priorities of the Secretary of State in exercising functions under subsection (1) in relation to the safety standards of ships in Wales and protecting the health and safety of persons on them.

(6) In subsection (5) "Wales" has the same meaning as in the Government of Wales Act 2006.""

Amendment 55 agreed.

Amendment 56

Moved by ***Lord Bourne of Aberystwyth***

56: After Clause 49, insert the following new Clause—

"Gaming machines on licensed betting premises

(1) In section 172 of the Gambling Act 2005 (gaming machines), in subsection (12) (definition of "appropriate Minister"), after paragraph (a) insert—

"(aa) the Welsh Ministers, so far as, in the case of a betting premises licence in respect of premises in Wales and not in respect of a track, the order varies—

(i) the number of gaming machines authorised for which the maximum charge for use is more than £10, or

(ii) whether such machines are authorised;".

(2) In section 355 of that Act (regulations, orders and rules)—

(a) in subsection (1), after "the Secretary of State" insert ", the Welsh Ministers";

(b) in subsection (3), after "the Secretary of State" insert "or the Welsh Ministers";

(c) after subsection (8) insert—

"(8A) An order of the Welsh Ministers under section 172 shall not be made unless a draft has been laid before and approved by resolution of the National Assembly for Wales."

(3) The amendments made by this section do not apply in relation to a betting premises licence issued before this section comes into force."

Amendment 57 and 58 (to Amendment 56) not moved.

Amendment 56 agreed.

7.47 pm

Consideration on Report adjourned until not before 8.47 pm.

Surrogacy

Question for Short Debate

7.47 pm

Asked by ***Baroness Barker***

To ask Her Majesty's Government whether they have plans to update the law on surrogacy.

Baroness Barker (LD): My Lords, for 30 years this Parliament has shown the world how to legislate and regulate matters regarding human fertilisation and embryology. This House remains indebted to the noble Baroness, Lady Warnock, for her landmark report of 1978, which set out with such clarity the enduring ethical basis upon which parliamentarians, the judiciary,

scientists and academics still judge the permissibility and advisability of successive scientific and medical innovations in the treatment of infertility.

The legislation that was drawn up three decades ago was designed with one overarching aim: to prevent the development of commercial surrogacy in the UK. In that respect, it has been successful. The authors of the Warnock report hoped in the 1980s that a restrictive legal climate in the UK would make surrogacy "wither on the vine". It did not, but it has restricted the development of ethical, altruistic surrogacy. That is what I wish to talk about today.

In the last 30 years there has been considerable change in societal understanding of the composition of families. Parliament has, thoughtfully and rightly, updated the Human Fertilisation and Embryology Act 1990, most notably in 2008, to include same-sex parental couples and to regulate new developments in scientific knowledge and medical practice—for example, the banning of sex selection of embryos. However, one element of the legislation was founded on flawed assumptions from the start, the element that dealt with surrogacy. Thirty years on, it is referred to by academic researchers as "the fertility treatment that time forgot" and the law that relates to it as "thoroughly confused". It should be changed.

The people who say so are judges in the Family Division who repeatedly state in their judgments that they are forced to make rulings that are not in the best interests of the children; intended parents, the people who at every stage intend to give lifelong care to the children; and surrogates. Here it is necessary to address a fundamental confusion that stems from terminology.

Earlier this year, I was privileged to listen to some young women who have been and are surrogates. They are absolutely clear that they are surrogates: they are never surrogate mothers; they are not the mothers of the children. In reality, the protection that the law gives to birth mothers is almost never wanted by surrogates, and it is not in the best interests of newborn children, whose intended parents are labelled as legal strangers, unable to make medical decisions at the early time of a child's life, close to birth.

Leading researchers include Professor Margaret Brazier from the University of Manchester Law School, who chaired the review of surrogacy arrangements between 1996 and 1998, and others whom noble Lords will know, such as Professor Susan Golombok, Professor of Family Research at Cambridge, and Dr Kirsty Horsey, senior lecturer at Kent School, who has researched surrogacy for 18 years.

In May 2016, on "Woman's Hour", Baroness Warnock herself admitted that, back in the 1980s, she did not fully understand the motivation of surrogates and that now, as in the intervening years it has proved possible to encourage non-commercial surrogacy, she believes that the law should be changed.

Surrogacy is a subject that suffers greatly from sensationalist journalism and broadcasting. We are very fortunate, therefore, to have the research published by organisations such as Surrogacy UK, which has had a working group on surrogacy law reform. Those researchers admit that, while existing data on surrogacy are inadequate, in so far as it is possible to gather information from passport applications and applications for parental orders, the number of surrogacy arrangements is small but growing. In 2007, fewer than 50 parental orders were granted. In 2011, the number was 149, and of those approximately a quarter took place overseas. It is therefore safe to assume, in a way that the *Daily Mail* does not, that the majority of surrogacy arrangements are domestic.

The research also showed that only 15% of intended parents were gay male couples. Many intended parents are women who have survived cancer treatment. Happily, they are alive; but unhappily, they either cannot conceive or cannot carry a pregnancy to term, which is what they would wish. The majority of surrogates had been introduced to the intended parents through a surrogacy agency or support group; others were friends or family—as in a case recently in the news. None met through a commercial agency.

Of those who have given birth, 95% remain in contact with the children and the intended parents, which would suggest an openness and an ongoing affection in the relationship. The majority—just under 95%—of surrogates received less than £15,000 compensation. At first glance, that might sound like a significant payment, but when one stops to consider what it may cover—loss of earnings, because some employers do not give maternity pay to surrogates, although the law was recently changed to allow them to do so; rent or mortgage payments; income for the surrogate's existing children, which many of them have; and travel costs—it soon becomes obvious that those payments rarely cover more than expenses, and they are closely monitored by the courts. Surrogacy UK uses a surrogacy calculator to help surrogate and intended parents to estimate the degree of the likely costs, and that is how most surrogates want it. They are surrogates because they want to help people for whom pregnancy is impossible. Their motivation is much misunderstood, and they can well do without unjust accusations that money is a dominant factor in their decision-making, when for most of them it is not.

Time is short, so I will leave it to more learned noble Lords to explain how the current law on parental orders causes problems not just for families but for the judiciary.

The number of people involved in surrogacy in the UK is small. A few, non-commercial organisations are developing surrogacy. For example, Surrogacy UK runs a Friendship First programme in which potential surrogates and intended parents can meet and, free from pressure, work out whether they could have a successful, enduring relationship—a relationship in which there is openness, transparency and pride for the children, the intended parents and the surrogates.

I suggest to the Minister that the rules on surrogacy-related advertising and its criminalisation could and should be reviewed, but only for not-for-profit organisations. Only charities or social enterprises registered as community interest companies should be allowed to advertise, and they should be required to include evidence of their legal status on all advertising. Nobody who is campaigning for a change in the law today wants the development of commercial surrogacy; all they want is to enable more people who freely choose to do so to be involved in surrogacy.

[Baroness Barker]

Noble Lords will be aware of a case that came before the courts recently in which a single person who had entered into a surrogacy arrangement abroad could not be considered the legal parent of a child in this country. That law will have to be reviewed because of incompatibility with the Human Rights Act. I suggest to the Minister that challenges such as that will become more frequent. We could amend this law in a piecemeal fashion, but we really ought to take the opportunity to legislate for surrogacy on an entirely different basis: not as a transaction but as a relationship between surrogates and intended parents.

I know that the noble Baroness has been dropped in to cover at short notice, and I wish her well with that, but I want to ask her some questions. She may choose to write to me; I will understand. Will the Government encourage the Law Commission, whose consultation on this closed on 31 October, to include a review of surrogacy legislation in its next programme of work? Will they commit to review parental orders, including parental orders in cases in which neither partner has been able to use their own gametes—the so-called double donation orders? Will they agree that parental order and surrogacy birth data should be centrally and transparently collected and published annually, and that IVF surrogacy cycles and birth should be accurately recorded by fertility clinics and the Human Fertilisation and Embryology Authority?

We have shown the world that, in this field of assisted reproduction, it is possible to make laws that reflect the realities of modern life while protecting the best interests of children. Surrogacy is, and will remain, a matter of intense importance to a very few people, many of whom are often misunderstood. I submit that this is an area in which there will never be a widespread, popular clamour for change in the law. It is a matter which needs detailed consideration. It is one in which Members of your Lordships' House, even those who disagree in principle, should be involved in lengthy debate. Above all, it needs the Government to put their shoulder behind law reform which, in the interests of children, is now urgent.

7.57 pm

Lord Faulks (Con): My Lords, I am extremely grateful to the noble Baroness, Lady Barker, for initiating this debate, and I endorse everything that she said. She referred to Baroness Warnock's recent acceptance that the law needed change and to a report published in 2015 by a working group led by Surrogacy UK which concluded that existing legislation was,

"out of date and in dire need of reform".

The report recommended a complete overhaul of the law, introducing pre-birth parental orders. It is on the question of parental orders that I wish to focus my remarks.

I do so on the basis of a particular case where judgment was handed down on 25 October of this year under the name "Re AB (Surrogacy: Consent) [2016] EWHC 2643 (Fam)". The case arose out of a consensual, altruistic surrogacy arrangement. Embryos were created, using the genetic material of both biological parents, and twins were born in 2015. The embryos were transferred to the surrogate, who carried the twins to birth. The children have since had no contact with the surrogate mother and her husband, who have made it clear that they seek to have no involvement in the children's lives.

It was agreed at a hearing involving all parties that the court should make a child arrangements order providing for the children to live with their biological parents. This gave them parental responsibility, and the orders made prevented the surrogate mother and her husband being able to exercise any parental responsibility in relation to the children. Except in one respect, the relevant criteria for the making of a parental order under Section 54 of the 2008 Act were met; that was in relation to the respondent's consent. Section 54(6) provides that the court must be satisfied that the respondents have,

"freely, and with full understanding of what is involved, agreed unconditionally to the making of the order".

Why did the surrogate mother and her husband refuse consent? Apparently, they did so because of a feeling of injustice about the process rather than being motivated in any way by the children's best interests. Noble Lords may have seen the article by Alice Thomson today on page 28 of the *Times*, which goes into more detail about the facts of that case.

The lack of consent meant that the application for a parental order came to a juddering halt, which of course caused great distress to the biological parents. The children were then left—and are left—in a legal limbo which, contrary to what was agreed by the parties at the time of the arrangement, meant that the surrogate mother and her husband would remain the legal parents even though they were not biologically related to them and they expressly wished to play no part in the children's lives.

The court acknowledged the "very unusual circumstances" of the case and said that it was prepared to accede to the request for the applications for a parental order to be adjourned generally, with liberty to restore. The problem is that a surrogate, as here, and her husband can refuse consent to orders of this sort for any reason or no reason at all. Effectively, the surrogate and her husband—who has no connection at all with the children—have a complete veto over the process. In this case, for nearly a year Cafcass and the court made extensive efforts to persuade the surrogate to "see sense", put the interests of the children first and sign the papers, but those efforts came to nothing.

The law needs changing in this regard. The only circumstances in which a court can currently dispense with the consent of the surrogate and her husband is if they "cannot be found" or are "incapable of giving agreement". I understand why those provisions were brought in: to cater for the situation where the surrogate might change her mind during the pregnancy, bond with the baby and want to keep it. In cases like the one that I have described, it is open to the biological parents to adopt their own children. Indeed, that may well prove to be the only option. It is something of an anomaly that, in adoption proceedings, the court would have the power to dispense with the consent of the surrogate and her husband and would be inclined to exercise that power if consent was not forthcoming.

If pre-birth parental orders are introduced, that will certainly assist, although it is understood that there will have to be some form of escape clause to deal with the problems of a surrogate changing her mind during the pregnancy. But where the issue arises post-birth, there will still need to be a satisfactory system to deal with parental orders. That could take the form of a welfare provision in relation to the child such as exists in adoption, which would make the welfare of the children paramount. Another possibility is that legislation could be amended to enable the court to dispense with the surrogate's consent where consent was withheld unreasonably, or where the surrogate is not seeking to care for the child. Those two criteria are likely to overlap.

The situation is serious. The Law Commission is considering it. The Government should take notice of those concerns and take an early opportunity to legislate to deal with these serious lacunae.

8.03 pm

Viscount Craigavon (CB): My Lords, we should be grateful to the noble Baroness, Lady Barker, for initiating this debate and taking the lead on this subject as she has done. As she said, the law relating to surrogacy is seriously out of date. My main message this evening is that the law needs urgent updating, and that we should very much hope that the Law Commission would be able to include this task in one of its current projects. Despite the deadline for submissions officially having closed at the end of October, I learned in its acknowledgement of my submission that it would nevertheless be able to monitor this debate.

I shall give some brief examples of things going wrong at the moment. We have stories, some documented in newspapers, of newborn babies being handed over in car parks. We have the increased use of social media and self-help leading to what might be called underground transactions, sometimes in closed online groups. We have the courts and judges having to—rightly—bend the law laid down in 1985, and now out of date, to allow deadlines, time limits and even expense limits to be breached, for the very good reason of putting the best interests of the child first. That might be good British pragmatism, but it is not normally how we think of our law working and it adds uncertainty for following future cases. We should not rely on the law to be reformed only in response to outrage at a certain type of train-crash situation or worse. Having mentioned all that, I should say that the present system can work satisfactorily and happily for many people, but it is the increasing number of bad experiences, especially for those driven abroad by uncertainties, that need to be addressed.

I want now to mention two recent, largely academic milestones by those who have wanted to bring together the voices and opinions in this field, to assist serious reform taking place on the basis of more accurate information and data. First, in November 2015 an academic working group produced the excellent publication *Surrogacy in the UK: Myth Busting and Reform*, which is contained in full in the very useful Lords Library briefing for this debate and is available online. To give some credit, I say that the working group was led by the lead writer, Dr Kirsty Horsey, an academic lawyer at Kent Law School at the University of Kent, with strong support from trustees of Surrogacy UK, which is a not-for-profit agency and provider of information and support, as well as Sarah Norcross, the director of the Progress Educational Trust. For those who might wonder, that organisation is my personal link to this subject and past connection to related fields, going back to its foundation at the time of the HFE Bills in this House in the 1990s. It is good to see listening to this debate the noble and learned Lord, Lord Mackay of Clashfern, who took some of those Bills through this House. I know that he is interested in how the law will progress.

The report to which I referred supported the existing altruistic, compensatory model for surrogacy. One of its major recommendations was that much of the legal work that now takes considerable time after birth could be done before birth, so that the intended parents could register the birth and assume legal responsibility right from the start. Some of the existing legal time limits, already being breached, could be relaxed. The systematic collecting of information and data—currently lacking—would provide the basis for sound future decisions.

I come to the second recent milestone. As the noble Baroness, Lady Barker, mentioned, in May this year the aforementioned team convened an all-day conference in London, at which both she and I were present. It was a chance for all parts of this interest group to meet, debate and interact, as well as to hear from the varied experience of some surrogate mothers and to some extent, so far as possible, to arrive at a consensus for changing and updating the law. Again the consensus was in support of the present altruistic, compensatory model, but there was discussion about the extent of reasonable expenses, currently allowed under the law. Also, there was wide consensus that legal parentage should be granted to the intended parents before birth. As my time in this debate is a bit short, I shall just refer noble Lords to the report of the proceedings of that conference, which will be published by the end of this year in a special edition of the *Journal of Law, Medicine & Ethics*.

I want to mention one of my most remarkable Cross-Bench colleagues, who is listening next to me, the noble Baroness, Lady Lane-Fox, who has had her own recent known experience of surrogacy. She has asked me to say that she is happy to lend her full support to a reference to the Law Commission—a powerful endorsement.

As I have been saying, we hope that the Law Commission can look favourably on this subject as one of its projects. Given the timescale before anything might be turned into legislation, I hope that the Department of Health can produce, and keep up to date, guidelines for best practice in this field both for the medical profession and clinics and, quite separately, for the lay public wanting to know what their options are. Could the Minister give a commitment and timescale to that, and that the guidelines would be updated?

Finally and very briefly, I say that it would be helpful if the Minister could deal with one outstanding legal matter, which has already been referred to—the declaration of incompatibility in the High Court Family

[Viscount Craigavon]
Division in May. Can the Government say how and how soon they will rectify what they are required to do under that judgment?

8.09 pm

Lord Berkeley of Knighton (CB): My Lords, it is a pleasure to contribute to the timely debate of the noble Baroness, Lady Barker. Not being a lawyer, I want to focus on the particular aspect of public perception of surrogacy and the law surrounding donation.

My parents had a great friend who was a doctor. He was a huge inspiration to me as a child and young man. Patrick Trevor-Roper, brother of the historian, Hugh, was an eye surgeon who helped to pioneer cornea grafting. He went round Africa restoring sight to thousands by removing cataracts. When I expressed my interest in what he did, he immediately invited me to watch him operating at the Westminster Hospital. I realise that it is not a prospect that might appeal to many noble Lords, but I was mesmerised. As he worked, I realised that we were listening to my father's guitar sonatina, played by Julian Bream.

Pat was a maverick—bohemian, unorthodox. One patient arrived in his consulting room in Regent's Park to find him peeing in the sink. These eccentricities seemed only, by and large, to endear him to his patients. He infuriated the art world with his extraordinary book, *The World Through Blunted Sight*, by suggesting that El Greco's willowy figures were the result of astigmatism. In 1955, long before it was fashionable or wise to do so, he became one of the first gay rights activists, giving evidence to the Wolfenden committee.

The relevance of all that to the important debate introduced by the noble Baroness, Lady Barker, is that Pat taught me that, if one human being can make another whole by the gift of donation—of surrogacy—that was a completely normal and utterly joyous thing to do. He felt, 40 years ago, that too much taboo and squeamishness surrounded these most natural acts of procreation, acts which might assist intending parents who were often going through agonies of frustration as they attempted to have children.

As Surrogacy UK urges in its 2015 report we must guard the principle of altruistic surrogacy in the UK, surrogacy, as we have already heard, as a relationship not a transaction. We must learn to be less suspicious. Just as we need corneas, kidneys and hearts, so too do we need gifts from the living—sperm, for example. Here I would like to make a suggestion to the Minister to take back to her department. The law, as it currently stands, is careful to say that sperm donors are protected from pursuit by, for example, the Child Support Agency, only if they go through a licensed clinic. Clearly, you cannot have a loophole that would allow fathers to avoid their fiscal responsibilities—I completely accept that. But there are scenarios in which friends of the family, for instance, are keen to help, and where altruism reigns. I have seen this in heterosexual and gay communities, and it is profoundly touching. Furthermore, the law is discriminatory in that it favours better-off women who can afford to use expensive clinics but denies many poor ones access to donation. Wealth apart, should there not anyway be a provision for altruistic donation, one that could attract legal security and therefore attract more men to donate? It should surely be possible for a donor and a recipient to enter into a legally binding agreement without the use of an expensive clinic.

I have seen the misery and heartbreak of childlessness. When I did, I vowed to do anything I could to help—and I can tell noble Lords that there are few things in this world as rewarding as seeing, whether through surrogacy or donation, the successful outcome of this generosity from one human being to another. Are there risks? Yes, of course there are, as in everything else that we do, as we heard from the noble Lord, Lord Faulks—including having children in the usual way. The imperative to procreate, next to birth and death, is one of the great evolutionary acts of being human—it should belong to all of us.

8.14 pm

Lord Brown of Eaton-under-Heywood (CB): My Lords, I, too, am most grateful to the noble Baroness, Lady Barker. Despite more than 50 years in law, I can claim no particular experience or expertise in this subject, although I have boned up on a number of recent cases. I have chosen to speak in this debate not to canvass any particular view as to how precisely to change and develop our existing inadequate surrogacy law, but rather to urge that this is, par excellence, a topic self-contained and policy-laden as it is, that cries out for attention by the Law Commission for inclusion in its imminent next programme of law reform. As the noble Viscount said, its consultation period on what projects to take ended on 31 October, but I have no doubt at all that it will take full account of what is said in this debate for which, alas, no earlier date was available. I have the very highest regard for the Law Commission—its chairman, commissioners, support staff and processes. In many debates in this House, we express regret about the lack of pre-legislative consultation on the various Bills before us, but such consultation is at the very heart of the Law Commission's processes and, if ever it was desirable, surely it is so here, with regard to reshaping—as we now should—our obviously outdated surrogacy law.

In the 30-odd years since the Warnock committee report and the first surrogacy legislation in 1985, there has been a huge increase in the use of surrogacy to satisfy aspiring parents' understandable and estimable craving for a full family life. This is due variously, no doubt, to advances in genetics; the expansion of social media, which so greatly facilitate surrogacy arrangements, here in the UK and abroad; and perhaps, also, to the widening recognition of differing types of secure family unit. All too plainly, the law has struggled to keep up with those developments. As others have already said, some of its basic architecture has been causing problems, most notably perhaps in the provision for parental orders to be made only after birth. This results in the surrogate mother and her spouse being at birth the legal parent, the biological parents being wholly dependent on the surrogate's consent for an order, and the child in the meantime being in legal limbo. That particular aspect of the law was admirably brought to light in the piece mentioned by the noble Lord, Lord Faulks, in today's *Times* by Alice Thomson, plainly based on the

very case that the noble Lord, Lord Faulks, cited and has now described—as I was proposing to do but now need not do.

But this is far from the only problem that arises in this ever-expanding, sensitive and profoundly important area of our law. As has rightly been said, parental orders are transformational; they go to the very identity of the child as a human being. Another problem encountered was the inability of the court to make a parental order in favour of a single father, as opposed to a recognised couple, declared by Sir James Munby in the case of Z this May to be incompatible with the father's and child's rights under the European Convention on Human Rights—the one mentioned by the noble Viscount, Lord Craigavon. It may well be, and the Minister may inform us about this, that that particular problem will be solved by way of a ministerial order under Section 10(2) of the Human Rights Act. But even if it is, surrogacy law as a whole would to my mind be best reviewed and brought up to date in the light of a Law Commission report. As Alice Thomson said at the end of her article today, it is true that the Law Commission could take years, but I question whether the problem that she and the noble Lord, Lord Faulks, have fully described can be regarded as,

"a simple anomaly that could be changed right now".

Law reform is now required but, in a controversial and difficult subject such as this, I would urge that it be done with the initial involvement and invaluable assistance of a Law Commission report.

8.20 pm

Lord Mackay of Clashfern (Con): My Lords, it was not my intention to speak in this debate but since the noble Lord, Lord Winston, has not been able to come, I thought that I might take up just a little bit of the spare time. As the noble Viscount, Lord Craigavon, has said, it was my responsibility to introduce the Human Fertilisation and Embryology Act in the 1990s. It was immensely helped by the work that Mary Warnock had done before that. There was still quite a lot of debate, as those who were here will remember, about various matters, including the very contentious matter of embryo research. This particular matter was dealt with in the law in the way that it was, mainly because, at that time, the general impression was that the arrangements for transfer of sperm material should be confidential. Therefore, unless there was some clear indication, it was not clear who the child belonged to in the real sense, except that there could be certainty that the child was born of a particular person. So that was what was done at that time. In 2008, there was a relaxation of a number of these issues, but I think that it is quite clear that this kind of difficulty ought to be dealt with now or as soon as possible.

Mary Warnock's report was, as I said, a tremendous help in getting the legislation through, and a proper investigation by the Law Commission would be extremely helpful now in getting legislation through. I agree that the Law Commission can take some time—it was my responsibility at the time that I was Lord Chancellor to be Minister for the Law Commission and we were able to get a lot of the legislation through—but the time that it would take is really a matter for the commission. I think that a fairly thorough investigation would be needed, but I do not see that a thorough investigation needs to be very long. I hope therefore that if the Law Commission is empowered to take this on by a programme which includes it, then things could proceed quite quickly. It would involve a good deal of consultation but, as my noble and learned friend Lord Brown of Eaton-under-Heywood said, the Law Commission really invented the system of pre-legislative consultation. Lord Scarman, the first chairman of the Law Commission, developed that in a way that Governments have taken up. So the Law Commission knows all about dealing with complicated issues such as this. I hope that it might be able to do it quickly, and I sincerely hope that the Government will think it right to refer the issue to it.

8.23 pm

Baroness Walmsley (LD): My Lords, I am grateful to my noble friend Lady Barker for raising this important topic tonight and I agree with everything she said. There are, as we have heard, many issues to untangle and I, like the noble and learned Lord, Lord Mackay of Clashfern, hope that the Law Commission will be able to consider what changes need to be made and make recommendations. I hope that the Government will then find time, during a very busy legislative programme, to take up these recommendations and make the necessary changes to bring the law up to date, which is being called for by parents and by judges.

It is desirable that every child is a wanted child, because it means that the child will be loved and that is what he or she needs, much more than a well-filled Christmas stocking. So, for the sake of the children and their new families, I hope we will hear from the Minister some willingness to put right the problems that have been outlined and which beset many couples trying to make a family through surrogacy. As we have heard from my noble friend, there are many reasons why people have to resort to surrogacy and clearly it is growing, so we must make sure that the law is brought up to date, adapts to changes in society and protects all those involved. The first principle, of course, must be the rights of the child and its health and well-being. Secondly, the rights of the surrogates and the commissioning parents must be fairly considered. Even though we have heard about some of its shortcomings, the law in the UK at least gives some sort of framework for this, but rules around the world vary. I hope the UK Government would take a lead in trying to get some comprehensive universal principles adopted, once we have our own house in order.

In preparing for this debate I read the debate in another place from 14 October 2014, and was very struck by the many practical difficulties encountered by MPs on behalf of their constituents. Even though the couples had tried to do everything correctly, they often met a brick wall. Many of the cases cited by MPs were of people who had resorted to surrogacy abroad because accessing it in the UK was too difficult or complicated, getting a passport for the child was slow or they were unsure of the law. There were lots of reasons, but brick walls were encountered. In those cases, it cannot be right that complications and delays in the administrative procedures for bringing the child

[BARONESS WALMSLEY]
home should cause a child to be without his or her parents in those first vital few months of life when bonding with the principal carer should be taking place, which is so important for their future mental health. But that is what happened in too many of those cases cited in another place.

We need a transparent structure that is as uncomplicated as possible, we need data—as the noble Viscount, Lord Craigavon, emphasised—and we need clear advice for parents intending to set out on this route to parenthood. Of course, this often happens only when many years have been spent exploring other routes, and failing with all the pain and stress that this causes. Sometimes, parents turn to other countries because they are considered too old to adopt a child in the UK, after many cycles of IVF have failed.

I agree with many of the demands of the organisation Surrogacy UK, in particular that a parental order should be applied for prior to the birth so that the child is never left without both its parents being known or, as in some cases, left stateless. I certainly agree that there should be no commercialisation of surrogacy. This is a wonderful and generous thing that a woman can do for another or for a same-sex couple and it should not be commercialised, apart from appropriate expenses. That brings me to fears that have been expressed about exploitation of surrogate mothers in other countries. This is a very difficult issue, as many of those who offer to bear a child for others live in very poor countries. There is nothing wrong with ensuring that she and her other children, if she has any, remain healthy, well fed and without stress during the process—but how do you ensure it is limited to that? It is very difficult. Large payments would be bound to lead to women who were not suitable seeking to be surrogates. This would be contrary to the principle that the mother must be protected as well as the child. We need some international standards to prevent that.

Another recommendation is for a clear agreement between the commissioning parents and the surrogate. There are so many things that may need to be decided and things that can go wrong; these need to be laid on the line right from the start. I certainly think that "friends first" is a very good idea.

From the health point of view, it is of course highly desirable that infertile couples get as much medical help as possible and in a timely way, so that surrogacy is not necessary. If that were the case, would-be parents may not have to take that route. Also, if UK surrogacy law were more in line with what is needed in today's society, people would not need to go abroad. So I ask the Minister to promise us today that the Government will support the Law Commission review and act on its recommendations if it happens.

8.29 pm

Lord Hunt of Kings Heath (Lab): My Lords, I, too, welcome the initiative of the noble Baroness, Lady Barker. I endorse her praise for Baroness Warnock's outstanding work, which led to the legislation which the noble and learned Lord, Lord Mackay, took through the House. I very much hope that he will speak more often in the gap in future because his contributions in this area are always so welcome.

The noble Baroness, Lady Barker, spoke compassionately and persuasively in favour of updating the law to deal with some of the problems she identified. The noble Lord, Lord Faulks, illuminated the problems arising from a case where the children were left in limbo. However, as the noble and learned Lord, Lord Brown, said, this, of course, is not the only problem. The report of Surrogacy UK, which was endorsed by Baroness Warnock, sets out very clearly some of the challenges that we face with the current law. The report concludes that,

"the time is ripe to embark upon reform of surrogacy law",

and makes it clear that the current law is,

"out of date and in dire need of reform".

I will refer to three areas that the report identifies. First, it states:

> "Our recommendations for reform centre on the welfare of surrogate-born children and on realigning the law with their best interests".

Secondly, it states that,

"the principle of altruistic surrogacy in the UK",

must be guarded. Thirdly, it states:

> "The law must recognise the correct people as parents of children born through surrogacy".

I also draw the House's attention to the three recommendations the report makes to the Government. First, it states:

> "The Department of Health … should … publish a 'legal pathway' document for intended parents and surrogates".

That is a very interesting and important recommendation. Secondly, the report states:

> "The Department of Health should produce guidance for professionals in the field".

Thirdly, the report states:

> "Surrogacy should be included in schools' sex and relationships education".

Perhaps the Minister, in responding, will say whether the Government have considered those three specific recommendations and are prepared to take them forward.

The noble and learned Lords, Lord Mackay and Lord Brown, and the noble Viscount, Lord Craigavon, emphasised their desire for the Law Commission to undertake a review. It has undertaken a consultation and the noble Viscount, Lord Craigavon, said that it is monitoring this debate. We appeal to the Government to refer this matter to the Law Commission.

If the Law Commission option is not taken forward, will the Government then be prepared to undertake their own review of the law? It is clear that, one way or another, we need this issue taken forward. The work needs to be done carefully but at a pace. I hope that the Minister will give us a positive response tonight and I look forward to her comments.

8.32 pm

Baroness Chisholm of Owlpen (Con): My Lords, I thank the noble Baroness for raising this important subject for debate. I also thank all noble Lords for their contributions on this highly sensitive, contentious and complex issue.

There is no doubt that surrogacy has an important role to play in our society, helping to create much-wanted families where that might otherwise not be possible. As the noble Lord, Lord Berkeley, mentioned, it enables

relatives and friends to provide a truly altruistic gift to women who are not able to have a child themselves, and helps same-sex couples to have their own genetically-related children—and, of course, the UK Government recognise the value of this.

The legislation ensures that the woman who gives birth—the surrogate—is regarded as the child's mother until legal parenthood is transferred, and that surrogacy arrangements are not legally enforceable. This is to avoid the situation of a newly-born child being taken away from its birth mother against her wishes.

Legislation sets out the criteria for a parental order to be awarded to transfer legal parenthood from the surrogate to the intended parents. These include: the requirement that genetic material of at least one of the intended parents is used to create the child; that the surrogate should be paid only for reasonable expenses; and that there is a "cooling off" period of six weeks after the birth before an application for a parental order can be made. It also provides for a six-month window after the birth for applications to be made.

These are some of the key provisions and principles that are currently in effect. However, as the noble Baroness, Lady Barker, mentioned, we all recognise that there are well-founded concerns about the struggle that surrogacy policy and legislation are facing to keep pace with 21st-century attitudes and lifestyles. This legislation is based largely on thinking and debate from the 1980s. We recognise that family structures are now much more diverse than when the policy and legislation were originally developed. The ability of intending parents to go outside the UK for surrogacy and return with a child is a particularly challenging situation.

The courts have increasingly had to address these issues when dealing with surrogacy cases and, as the noble Baroness, Lady Barker, mentioned, have expressed concerns about the legislation when doing so. Most recently, the High Court delivered a judgment in May that the legislative provision which allows couples, but not single people, to obtain parental orders is incompatible with human rights—a judgment which the Government have accepted.

Noble Lords will be aware of Surrogacy UK's 2015 report, *Myth Busting and Reform*. This report reflects the views of some people who have undertaken surrogacy arrangements, either as intended parents, surrogates or supporting family members. The Government have welcomed the report's continuing commitment to the altruistic principles of surrogacy and the important message about applying for parental orders to secure legal parenthood. It is also helpful that the report provides reassurance that the tendency towards seeking international surrogacy arrangements, although undoubtedly a concern and a challenge, is not as widespread as some have sought to portray. The Government have taken note of the changes to surrogacy legislation and policy that the report recommends.

It is worth noting that other parliamentary colleagues have exchanged correspondence with the Children and Family Court Advisory and Support Service—Cafcass—about the Surrogacy UK report. Cafcass has made a point of saying that it disagrees with the report recommendation for the introduction of pre-birth contracts to transfer legal parenthood from the surrogate mother immediately upon the birth of the child. That is an indication of the difficult and contentious ethical issues that potential review or reform of surrogacy raises.

I have listened with great interest to the points made in this debate. For some time, the Government have considered potential positive action that could be taken on surrogacy, and many of the points made tonight are therefore familiar through that consideration. Three key strands of government activity are being developed, which I will draw to the attention of the House.

First, the Department of Health intends to produce guidance on surrogacy arrangements in the UK, including best practice and clarification about the process and the legislation. This will provide authoritative information for people who are considering surrogacy. It will reflect the ground rules of the current arrangements in the UK and emphasise the benefits of undertaking surrogacy in UK-licensed clinics rather than going abroad. It will make clear the importance of seeking and obtaining a parental order to confer legal parenthood.

A project group has therefore been established to produce the guidance in close collaboration with key surrogacy organisations and other stakeholders, taking account of their input about the particular issues on which clarity and information is most needed. The aim of the project is to produce guidance on surrogacy for professionals, surrogates and intended parents to improve experiences under the current system. A number of meetings have taken place already, and good progress is being made. The intention is to complete the project and disseminate the guidance after Easter 2017.

Secondly, the Government recognise that surrogacy policy and legislation have not been significantly addressed by respective Administrations since the Surrogacy Arrangements Act was introduced in 1985. We have heard and taken account of the arguments for the need for a review. As a result—in answer to the question asked by the noble Baronesses, Lady Barker and Lady Walmsley—the Government informed the Law Commission that they fully support the commission's proposal to include a review of surrogacy in its work programme from 2017.

The Law Commission's consultation on its work programme concluded on 31 October and referred specifically to the Government's support for the inclusion of a review of surrogacy. The Government have strongly encouraged all those with an interest in or views about surrogacy to respond directly to the commission, supporting the inclusion of surrogacy and setting out the particular aspects, views and issues concerning surrogacy that they consider important and wish to see covered by the review.

As I have already indicated, there are differences in opinion across the surrogacy sector about the changes that could or should be made, including some of the recommendations in Surrogacy UK's report. It is important that we do not prejudge the positions. Having encouraged all interested parties to make their points to the Law Commission as part of the consultation process, it is now for the commission to assess the totality of views expressed in coming to a conclusion about any proposed final work programme.

[Baroness Chisholm of Owlpen]

The third strand of activity concerns the Government's response to the recent High Court judgment that declared that a provision in the Human Fertilisation and Embryology Act 2008—which enables couples but not single people to obtain a parental order following surrogacy—is incompatible with the Human Rights Act. We will, therefore, update the legislation on parental orders to ensure that it is compatible with the court judgment. I can confirm that the Government will introduce a remedial order to achieve this, so that single people can apply for parental orders on the same basis as couples. The remedial order will be subject to consultation and will include transitional arrangements, which would put all single people on the same footing and allow a reasonable time period to apply. The House will recognise that there are complexities and a considerable number of consequential amendments to other pieces of legislation, so our current plan is that the remedial order will be introduced to Parliament in early 2017. This strand of work will be undertaken separately to the Law Commission's considerations of a potential wider review of surrogacy.

I am sorry that I galloped through that, but I always feel that the 12 minutes will be up so soon that I will not have time to go through everything. That is why it sounded like a terrible gallop. However, I hope that noble Lords were able to understand the points I made rather than feeling that I read my speech parrot-fashion, which I did not want to do.

I will answer some of the questions that were raised. The noble Baroness, Lady Barker, mentioned that surrogacy should be looked at as a whole, to include all aspects of parental orders. We absolutely agree with this, and I will certainly go back to the department with consideration about improved information collection.

My noble friend Lord Faulks mentioned the case reported in today's *Times*. This is an unfortunate case, but thankfully very rare. Nevertheless, that does not help the parents who are trying to deal with it at the moment. Consent is a very important principle, which underpins all the legislation concerning assisted reproduction that Parliament has agreed. Any isolated amendment to surrogacy law, such as that relating to consent, would be controversial given the range of views held about surrogacy. Parliament would expect a thorough public consultation about any proposed changes to legislation in this area. We have given this issue consideration and our preference is therefore for it to be explored through the review by the Law Commission as part of the broad policy area.

The noble Viscount, Lord Craigavon, mentioned maternity units that ask couples to exchange their babies in the car park. The Government absolutely do not support the practice of surrogate families being forced to move off NHS premises after the birth of children. Altruistic surrogacy is an alternative approach to family-building, not a form of child trafficking. The Department of Health has recently established a project group with surrogacy stakeholders to develop best-practice guidance on surrogacy for those considering entering into such arrangements and for care professionals to increase awareness and understanding of the key issues and improve the experience of those undertaking surrogacy arrangements.

The noble Lord, Lord Berkeley, talked about Patrick Trevor-Roper. That was rather extraordinary as I did my eye surgery nursing under him and he became a huge friend of mine—partly because the only bit of nursing I could not bear was eyes. Every time I went into surgery, he told me what he was doing and I watched with my eyes shut, which was not best practice. But he was certainly the most marvellous man and very much a mentor to me during my nursing training at Westminster Hospital.

The noble Lord asked whether sperm donation could be allowed with protections. There are no plans for this but I will look into the matter further and write to him.

The noble Baroness, Lady Walmsley, asked about support for an international agreement. The UK Government are willing to consider supporting an international agreement on legal parenthood, including surrogacy, to help safeguard children who travel across international borders. UK officials are currently participating in feasibility considerations with the Hague working group. However, it is important to recognise that there may be significant difficulties in preparing such an agreement due to the evolving nature of much local legislation on surrogacy and the sensitivity with which it is regarded in many countries. It would be for individual counties to determine how such an agreement might impact on issues such as nationality. Such an agreement could also be a way of minimising the risks of child trafficking.

I think that the noble Lord, Lord Hunt, asked three questions. I will need to get back to him on those if that is all right. I think that the answers are yes, yes and yes—but I do not want to say that if it is not correct. However, that is my belief.

I can give noble Lords a clear and unequivocal message that this Government recognise the value of surrogacy as a means of helping to create new families for a range of people who might not otherwise be able to have their own children. It is in that spirit of inclusiveness and equality that we look to the future and to surrogacy in the UK being updated for the 21st century. We very much welcome the significant steps that are now beginning to be made in that direction.

Wales Bill

Report (1st Day) (Continued)

8.46 pm

Amendment 59

Moved by ***Baroness Morgan of Ely***

59: After Clause 49, insert the following new Clause—

"Rail: franchising of passenger services

(1) Section 25 of the Railways Act 1993 (England and Wales: public sector operators not to be franchisees) is amended as follows.

(2) In the heading, omit "and Wales".

(3) At the end of subsection (2A) insert "or a franchise agreement in respect of services that are or include Wales-only services."

(4) After subsection (2A) insert—

"(2B) For the purposes of this section a "Wales-only service" has the same meaning as in section 57 of the Railways Act 2005."

(5) This section does not have effect in relation to any invitation to tender under section 26(2) of the Railways Act 1993 issued before the day on which this section comes into force."

Baroness Morgan of Ely (Lab): My Lords, this week, with the chaos caused on Southern rail, we have seen how poorly run railways can impact on people's lives. I know this to be true because the shadow Chief Whip has told me to get a move on as he needs to catch a train—a Southern rail train, which is even more difficult.

One of the key ambitions of the Welsh Government is to establish and develop a dynamic economy in Wales. Central to this is the fact that we will need to ensure that it is supported by an effective integrated transport network—including, crucially, the rail network. The question we are addressing in our amendment is: who should be allowed to bid for the franchise to run the railways in Wales?

With ambitious milestones envisaged for the delivery of the public transport network in Wales, such as electrification, the introduction of the South Wales Metro and widespread structural improvements, it is important to make sure that all possibilities are open in relation to who can run our railways. That is essential for the implementation of our ambitious plans for improved passenger services across Wales. We need to ensure that the development of that franchise and the ability of anyone to bid for it are married with the economic ambitions for the area.

The current franchise saw a surge from 18 million annual passenger journeys on the network in 2003 to 29 million journeys by 2013. With the numbers forecast to grow by a further 74% by 2030, it is imperative that we plan for that growth in a more integrated and responsive way. If we leave it to the UK Government, we will be in trouble, because only about 1% of the money spent on rail infrastructure enhancements across England and Wales from 2011 to 2015 was spent on Network Rail's routes in Wales. I repeat: 1%. And we wonder why there is disparity in the way that people respond to government in this country. That has to be addressed, and we want to address it. However, that is not what I want to talk about here. I am sorry but I needed to say that, because I am really angry about the fact that only 1% was spent in Wales. It is important that that is understood.

The Welsh Government are currently undertaking a franchise round to decide who will be responsible for running the Wales and Borders franchise, including the operator for the planned Metro. In theory, we understand that a not-for-profit organisation could have bid for this franchise round. But we would like to see the possibility in a future franchise round for the Welsh Government themselves to be able to bid for the franchise if they wish to do so. This is something that has been allowed for in Scotland and was agreed in the Smith report, but it is being denied to Wales.

Let me underline the absurdity of the situation by telling noble Lords about the current bidders for the franchise. The preferred bidders to build the South Wales Metro and run the next Wales and Borders franchise have just been announced. The choices reflect the injustice of British railway politics. Abellio is a subsidiary of a Dutch state-owned rail company; Arriva forms part of a German state-owned company, Deutsche Bahn; Keolis belongs to the French state-owned rail service, SNCF; and the only truly private bidder is MTR, a Hong Kong-based rail company. It is illogical to allow a foreign state-owned company to run a franchise in Wales while prohibiting public sector organisations from running the Welsh franchise. Wales should not be maintained as another nation's rail colony. It is purely a matter of logic that the Welsh Government should be granted the opportunity to bid if they wish in future to run that railway network.

We understand that the next franchise will run from 2028 but we believe that this is an important matter of principle. We believe that the Government are being ideologically blinkered in their objection to the public sector in Britain being allowed to deliver rail services. I beg to move.

Baroness Randerson (LD): My Lords, I look forward to the Minister's response to this because he is not on a good wicket at the moment. This is not a good week to be defending privately run franchises or arguing that railways run by the private sector are automatically the solution to all our problems. I reassure the Minister that on these Benches, we are not massive fans of nationalisation either—we are fans of what works. As you study franchises across Britain and railways across Europe and the world, you will see that all sorts of configurations work in different circumstances and that similar configurations do not work in other places. There is no one solution.

I do not think it is necessarily appropriate for the Welsh Government to be trying to run a railway service. However, it is conceivable that the Welsh Government might wish, for example, to enter into a partnership with the private sector on some kind of joint venture, or to set up some sort of novel structure, of which they would be a part, perhaps on a not-for-profit basis. I remind the Minister that Transport for London is a real success story in many respects, and has a structure that quite clearly includes a government element. I also remind the Minister that when the Government were forced to take over the east coast main line from a failing private sector franchise, they did rather a good job of running the railway and saving the situation. Therefore, we support in principle the idea of giving the Welsh Government the freedom to decide what shape of franchise they want and to participate in that process if they wish to do so.

I realise that the Minister will say that there are practical difficulties because the railway runs not just in Wales but in England. If the rail franchise is run by the Welsh Government, it might be regarded as slightly irregular, I suppose, for the service in England, but no more irregular than the private sector franchise being run by the Dutch state railway company, which is what happens in England at the moment. I also realise that we are talking about a long way into the future, because the processes for the next franchise will not be prepared until 2028. For that reason, I hope the

[Baroness Randerson]
Minister will listen and think about this. There is value in playing the long game on the railways and in looking at how we can get the best investment in services in the long term. One thing that would persuade the Welsh Government to invest in railways in Wales would be to give them a little more power and control over them.

Lord Hain (Lab): My Lords, in supporting my noble friend Lady Morgan's excellent speech, I make one brief point. The Welsh Government are not seeking to have their civil servants run the rail franchise—I do not believe anybody thinks that that would be a good idea—but to configure the right package for Wales. We can take the example of Welsh Water. To be precise on this and, I hope, not pedantic, Welsh Water is a not-for-dividend company. It is not a not-for-profit company. It has to make profits to invest. Any entity taking over the Wales rail franchise would have to do the same. But Welsh Water is run much more efficiently than privatised water companies in England because it can raise its capital at a far cheaper rate on the market than private companies—noble Lords can look at the figures—because it does not have to satisfy the shareholders' speculative roundabouts. The amendment would give the Welsh Government the opportunity to invite bids of that kind.

Finally, if the Minister is serious about his support for devolution to Wales, why does he not respond to the Welsh Government's specific request to have this amendment carried into statute?

Lord Hunt of Wirral (Con): My Lords, I have a great deal of sympathy with the amendment and the wise words of the noble Baroness, Lady Randerson. Having listened to the discussions on the Bill, however, I strongly support a step-by-step approach. I can see the arguments on either side and recognise that the Silk commission recommended devolution. My recollection is that it recommended that the executive responsibility for the Wales and border passenger rail franchise be fully devolved. But it did so with a number of conditions and safeguards. The Government confirmed in the St David's Day Command Paper that they would consider which non-fiscal parts of the Smith commission agreement might be implemented for Wales, including the commitment to amend Section 25 of the Railways Act 1993 to permit public sector operators to bid for rail franchises, for which Scottish Ministers are responsible.

As I understand it, the commitments that have been made have now caused the two Governments to work together on the detailed arrangements for the next franchise, including how cross-border routes could be procured and managed and signalling the likelihood that services primarily serving English markets would be transferred to other franchises for which the Secretary of State is responsible, all of which is welcome. I suppose my main question for the Minister is: can he please give us an update on exactly where we are because I would not want us to accept the amendment if it flies in the face of the careful consideration between the two Governments of how this could all be brought into effect in time for the next franchise, but in particular during the course of next year?

9 pm

The Parliamentary Under-Secretary of State, Department for Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con): My Lords, I am very grateful for the build-up from the Benches opposite. I thank noble Lords who have participated in the debate on the railways. Perhaps I may say first, although I do not think the noble Baroness, Lady Morgan of Ely, referred to it, that although Amendment 91 is in this group, I would like to return to it on the second day of Report, in the new year. I see that the noble Baroness is content with that.

I turn to Amendment 59 moved by the noble Baroness, Lady Morgan of Ely. She is seeking to press the Government to a decision on a matter that we committed to consider in the St David's Day Command Paper, as my noble friend Lord Hunt of Wirral has just indicated. That matter is whether to legislate for Wales in a similar manner to the provision in the Scotland Act 2016 regarding the powers of Scottish Ministers as committed to in the Smith commission agreement to enable Welsh Ministers to invite UK public sector operators to bid for rail franchises for which they are the responsible franchising authority. Let me deal first with the point about not-for-profit and not-for-dividend organisations. They are currently able to bid and there is no proposal to alter that, so the likes of Dwr Cymru, as I indicated in Committee, would be able to bid in relation to this.

I know the Welsh Government are keen to have this power, but I have to tell noble Lords that we have no proposal in this area, particularly given that it will be 2028 before it could kick in. I think that by common agreement the current border franchise contract will be agreed in 2018. We do not propose to permit public sector bidders in the interim because we do not see any urgency about this. On that basis, I cannot give the reassurance that is sought.

Baroness Morgan of Ely: I am very disappointed with the Minister's response. I do not understand why we cannot have the same rights as Scotland for the public sector to be able to bid for the franchise. We are not asking to be given it; we are asking for the right to submit a proposal, which, as the noble Lord suggested, is allowed in the Smith commission agreement. It is a double standard to allow German, Dutch and French state-owned companies to bid for the franchise but not Welsh state-owned companies. The noble Lord will understand that when talking about railways you need a long-term approach. That is why we do not think it is premature to be pushing this. I am afraid I am not convinced by the arguments put forward by the Minister and I would like to test the opinion of the House.

9.03 pm

Division on Amendment 59

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9.14 pm

Amendment 60 not moved.

Clause 51: President of Welsh Tribunals

Amendment 61

Moved by ***Lord Bourne of Aberystwyth***

61: Clause 51, page 42, line 40, leave out "Wales public" and insert "devolved Welsh"

Amendment 61 agreed.

Clause 56: Provision of information to the Office for Budget Responsibility

Amendment 62

Moved by ***Lord Bourne of Aberystwyth***

62: Clause 56, page 47, line 1, leave out "Wales public authority" and insert "devolved Welsh authority within paragraph (a) or (b) of section 157A(1) that is"

Amendment 62 agreed.

Clause 60: Consequential provision

Amendment 63

Moved by ***Lord Judge***

63: Clause 60, page 49, line 5, at beginning insert "Subject to subsection (2A),"

Lord Judge (CB): My Lords, I shall not speak to Amendments 63 or 64, but I shall speak to Amendment 65. As the noble Lord, Lord Wigley, reminded the House, I had the privilege of being Lord Chief Justice of Wales for some time and I regard this as a constitutional question. I also recognise that at this time of the night, a speech like that of Welsh-born Henry V before the Battle of Agincourt—or before the walls of Harfleur—will not do very much for anybody, so I will confine myself to a few choice words, but maybe more than I intend.

I make this speech because this provision is simply a constitutional aberration. Here we are in the mother of Parliaments, an institution where the principles so movingly crafted by Abraham Lincoln on the blood-soaked field of Gettysburg, about government for the people by the people and of the people—democracy—is embodied. Yet we are to provide a Minister of the Crown with powers to amend, repeal, revoke and modify—perhaps I can use the word "disapply" to cover all those—any primary or secondary legislation. We do it all the time in what are called Henry VIII powers and we all let it happen. We should not, but we do—so let us face the fact that there are Henry VIII powers in this provision.

Secondary legislation can overrule primary legislation, but this is the malevolent ghost of King Henry VIII wandering through the valleys of Wales because, at least in the provision as it stands, if the primary legislation of this Parliament is to be overruled there are going to be regulations which would empower this House to overrule it. I disagree with the process but it is up to Parliament, and Parliament provides it. The necessary regulations are subject to parliamentary approval or annulment, but—this is the crucial but—the regulations that would empower the Minister to disapply legislation of the National Assembly for Wales are not subject to the equivalent control by that Assembly. We seem to have been discussing this legislation all day yet any part of it—primary, secondary, tertiary or whatever it may be—can be wiped out by a Minister without any consultation with anyone at the National Assembly for Wales. In other words, we would wipe out the enactments of a democratically elected Parliament that we call the National Assembly.

If I may say so, I find a ministerial diktat that is given such powers quite astonishing. It is astonishing that it is considered here in the mother of Parliaments. There is not a scintilla of control of the Executive envisaged in these provisions, which is why I describe them as a constitutional aberration. I am sorry to use strong language and I know I am not before Harfleur, but it is an insult to the democratic process which this Parliament created when the National Assembly for Wales was created. That is my prime concern, but I am concerned, too, about the legislation itself.

Can we just remember that this is open to question as a piece of legislation? Clause 60 as it stands is inconsistent with the spirit and arguably, I suggest, with the precise language of Clause 2. If Parliament is normally precluded—as it would be for the reasons we have discussed this afternoon—from legislating about devolved matters without the consent of the National Assembly, why on earth should a Minister or the Executive, not Parliament, be given wide-ranging powers, including powers to disapply primary legislation of the Assembly by secondary legislation without any consent, without so much as a "by your leave"? There may be political consequences, but in law that is what we are being asked to consider.

I know that the Minister, who has dealt with me with the greatest possible courtesy, will no doubt point out that that is what happens in Scotland. So it does. We should be embarrassed that we allowed it to happen. The fact that it happens in Scotland does not alter the fact that it was an aberration there and will be an aberration here. I beg to move.

Lord Wigley (PC): My Lords, I am delighted to follow the noble and learned Lord, Lord Judge, in his excellent opening statement on Amendment 63 and the amendments grouped with it. I shall speak to my Amendments 64 and 71 and to Amendment 65, to which I added my name.

Amendment 65 may be the most effective amendment in this group. The amendments seek to ensure that the National Assembly for Wales has primacy when it comes to secondary legislation in areas of devolved competence and to removing Westminster's powers to undermine Welsh devolution through what are known as Henry VIII powers. It is worth reading out the amendment:

"Page 49, line 7, at end insert—

'(2A) The Secretary of State may not make regulations under subsection (2) unless the National Assembly for Wales has passed a resolution approving a draft of the regulations"'.

That seems a very reasonable thing to do. When these points were put forward in Committee, I found the Minister's response, particularly to the points raised by the noble and learned Lord, Lord Judge, to some extent disappointing and perhaps a little misleading. The Minister argued that Acts of Parliament and Acts of the Assembly should be treated equally in areas of devolved competence. The Minister characterised the argument as being about equality, although no one appeared to be using that word to describe the intentions of these amendments. It is not a matter of equality; it is about establishing the supremacy or primacy of laws created by the Assembly in Wales for Wales. The Minister argued that a number of Welsh Assembly Acts require amendments to Westminster Acts and that a statutory provision to create more accountability for secondary legislation would shift the balance too far in favour of the Assembly. However, as my noble friend Lord Elis-Thomas highlighted, we are talking about two very different scenarios. The Assembly is simply amending Westminster Acts, which are the legislative framework on which Welsh law has been built for centuries. In contrast, unwanted attempts by Westminster to amend Assembly Acts are simply interventions in what should be an area of unquestionable

authority for the National Assembly for Wales. It therefore seems quite a misnomer to say that any attempts to use Henry VIII powers to undermine Welsh law are a matter of equality. The issue is about ensuring that Welsh Assembly Acts have the respect and legal standing that they deserve.

I shall also briefly address a further point raised by the Minister. He argued that Clause 53 will be used to address "minor" or "consequential" issues only. It was argued that any wholesale changes to this process would create unnecessary complexities for these necessary but uncontentious pieces of secondary legislation. He will be able to see from Amendment 64 that by including the word "minor" in the appropriate line of the clause, I have addressed that issue. I hope he will acknowledge that and perhaps accept the amendment.

I understand that, as with primary legislation, AMs are afforded the right to vote on a consent Motion for any changes to Westminster orders and regulations which infringe into areas of devolved competence. This is called Standing Order 30A and is referred to by the abbreviation SICM for statutory instrument consent memorandum. However, this is only agreed to by convention, and recognised only in Assembly standing orders. It has absolutely no legal standing—even less than the somewhat pathetic standing given to the Sewel convention by including the word "normally" in the Bill.

The Assembly cannot rely on the kindness of Westminster to ensure that it can continue to exercise the powers we have fought so hard for it to have. Will the Minister therefore accept the advice of so many legal and constitutional experts and recognise that it is no longer acceptable to have these arcane and undemocratic clauses in the Bill—or, for that matter, in any Bill of this nature? A way out of this totally unnecessary mess would be to require the National Assembly's agreement to the use of any statutory instrument by Westminster. At a stroke, that would resolve the issue. If the matters are as uncontentious as the Minister claimed them to be, there would be no difficulty in getting that Assembly agreement.

As things stand, I can well see this matter becoming a dominant one, which could well lead to the National Assembly refusing to pass a legislative consent order in relation to the Bill. If that were to happen, it would be a direct consequence of the Government refusing to apply even-handed common sense and instead running terrified of upsetting the Scots by giving Wales this additional power. We have been told time and again that just because something is appropriate for Scotland, it is not necessarily appropriate for Wales. In this instance, the boot is on the other foot, and for the sake both of the self-respect of our National Assembly and of the even-handed resolution of disputes between Westminster and Cardiff Bay, I urge the House to accept this amendment.

Lord Thomas of Gresford (LD): My Lords, Clause 60 is an example of the encroachment of the Executive on the privileges of Parliament that has increasingly come to the forefront in the last two or three years. It is necessary to look at the provisions of that clause very carefully. In subsection (2), it says:

> "The Secretary of State may by regulations make such consequential provision in connection with any provision of this Act as the Secretary of State considers appropriate".

Parliament passes primary legislation, and a Secretary of State introduces regulations. The control that Parliament has is by way of statutory instrument—sometimes by the affirmative procedure, sometimes by the negative procedure. This is an issue that has troubled the Delegated Powers and Regulatory Reform Committee, of which I am a member, for some time. Every time this provision appears, a statement is made which the Government have, in the last two or three years, ignored. Subsection (3) says that "Regulations under subsection (2)" made by the Secretary of State "may amend, repeal"—and these are the important words—

> "revoke or otherwise modify … an enactment contained in primary legislation, or … an instrument made under an enactment contained in primary legislation".

That is the Henry VIII clause which permits a Minister to bring forward a statutory instrument to amend an Act of Parliament passed by Parliament.

There are two ways of doing that, as I have already indicated: by affirmative resolution, whereby the amendment does not take place unless the instrument has been laid before, and approved by a resolution of, each House of Parliament; or by the negative procedure, whereby a draft is produced and subject to annulment in pursuance of a resolution by either House of Parliament. Your Lordships are familiar with the bringing forward of Motions in the House to seek to annul regulations that are subject to the negative procedure. However, this clause, at subsection (6), says:

> "A statutory instrument containing regulations under subsection (2) that includes provision amending or repealing any provision of primary legislation may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament".

That is the affirmative procedure, but the words are "amending or repealing". It is not necessary to have an affirmative resolution if the purpose of the regulations is to revoke or otherwise modify the Act of Parliament that is under consideration. So whereas subsection (3) refers to amending, repealing, revoking or otherwise modifying, an affirmative resolution is required only if the provision amends or repeals. If it revokes or otherwise modifies an Act of Parliament, the negative procedure is enough, according to this clause.

9.30 pm

As I have said, the Delegated Powers and Regulatory Reform Committee is faced with this problem all the time; we were faced with it this morning in relation to the Higher Education and Research Bill that was debated in your Lordships' House last week. As I say, we make recommendations on this issue. The Government used to comply with the committee's observations but for the past two or three years they have ceased to do so. Your Lordships are dealing with something that is very serious—Henry VIII powers that are being exercised by negative resolution. Noble Lords will know that for the negative resolution to be introduced into the House requires a Member actually to raise the issue of his own volition and make the Government respond, as opposed to the Government coming here and asking for permission to amend the Act of Parliament. This is

[Lord Thomas of Gresford]
an important constitutional issue that this Government should take on board. For that reason, I support the amendments that have been tabled.

Lord Rowlands (Lab): My Lords, I support the amendments, which are similar to those that I had the pleasure of moving in Committee. Since then, we have had a most interesting and informative letter—yet another Bourne letter, I may say; the collected correspondence of the noble Lord, Lord Bourne, is becoming voluminous—that is extraordinarily revealing. It appears that if we have bad habits, other Assemblies, including the Welsh Assembly, are now catching them. The letter tells us:

"In 2015 and 2016, eight out of the twelve Acts passed by the Assembly included a power for Welsh Ministers to make consequential amendments to Acts of Parliament"—

that is, our Parliament—

"without any role for Parliament to scrutinise such secondary legislation".

It turns out that the Assembly is doing exactly what we are threatening to do. It is bringing in legislation, including Henry VIII powers, that will then be used to amend legislation, primary and secondary, that this House has passed. That is a constitutional absurdity and we have to put a stop to it at both ends.

In fact, not only has the Welsh Assembly taken these Henry VIII powers in eight of its 12 Acts, it has exercised them already. In three cases it has amended our primary legislation without our knowing or being consulted. I do not know who was asked. I ask the Minister to elaborate on this, because it is all in his letter. Another four pieces of secondary legislation have been made by the Assembly that amend SIs made by the UK Parliament. So there are three pieces of primary legislation and four secondary that have been amended by the Welsh Assembly, using their Henry VIII powers, without either this House or the other House knowing.

I have the privilege of serving on two committees of this House that spend a lot of time on secondary legislation, as well as the Joint Committee with the Commons. They are most impressive committees. An enormous amount of effort is taken and thorough, diligent work is done by the legal advisers and the members of the Committees. We pore over our draft statutory instruments and report if there is any special reason—if we need to draw attention to defective drafting, in the case of the Joint Committee on Statutory Instruments, or to vires issues or broader issues in the case of the Secondary Legislation Scrutiny Committee.

I am astonished that we spend all this time making sure that we bring to this House statutory instruments that are fit for purpose, yet I now find that another Assembly—the Welsh Assembly—has amended the statutory instruments that we have so carefully prepared. I do not know how it has amended them; I do not know the nature of the amendment—I will press the Minister to explain in a minute—but this is the sort of situation that we get into. It is a sort of inter-ministerial legislative stitch-up: "You can amend it in your legislation—it is sufficient, it saves time and it is convenient". Neither House should be interested in ministerial convenience. It is our job to be inconvenient at times, and I believe we should be in this case.

Will the Minister now tell us, based on the letter he has sent us, which sections of which Acts of Parliament—primary legislation—the Assembly has amended? I do not have a clue; none of our committees seems to have found out about it. Secondly, which statutory instruments have been amended by the National Assembly and which paragraphs of our statutory instruments have been changed? We have to put a stop to this; we have to put our foot down. I will read the last paragraph of the letter:

"There was no requirement for Parliament to scrutinise any of this legislation".

It appears that Parliament was not party to any of this legislation, only Ministers. That is not true. Acts of Parliament and statutory instruments belong to this Parliament as much as they belong to Ministers; they are as much our constitutional property as they are that of Ministers. We need to put our foot down and find ways and means to ensure that this will not happen again. It is now happening to us, as we threatened to do it to National Assembly legislation. Let us put a stop to it, please.

Lord Elystan-Morgan (CB): My Lords, I wholeheartedly agree with the submissions made by everyone who has spoken on this matter. If I may say so, my heart swelled with pride at the wholly magisterial and superb condemnation of the situation by my noble and learned friend Lord Judge.

This provision has no place in the mores or principles of the 21st century. It is a remnant of a monarchical diktat. Although it does not seem to have been abused by government at all in recent years, but used only for something utterly mechanical, it is still the letter of the law—a law that, I submit, is indefensible. I hope the Minister will not seek to defend the indefensible when he replies.

In Committee, I cited a book written by a former Attorney-General, Sir Gordon Hewart, in the late 1930s, entitled *The New Despotism*. He was worried about the powers being exercised daily by Ministers in such a way as to circumvent Parliament. He was not dealing with this problem but with positive powers allowing Ministers to make regulations in a wide field. What he would have said of this, I just do not know. It is an anachronism that we must get rid of, because it has no place whatever in the fundamental basis of our parliamentary system in the 21st century.

My name is down to Amendment 68, which covers this situation and goes a little further. It deals not just with the Cardiff Assembly but Westminster. I appreciate there is a distinction between them, as my noble and learned friend pointed out, but I thought it proper to include both for this reason. Most of the legislation that affects Wales and creates devolutionary powers for Wales does not come from Cardiff—it comes from here. For that reason, I should have thought it entirely proper to include it in the condemnation, which should be regarded as utter and absolute, of these Henry VIII powers.

I therefore ask the Minister to say yes. It may well be that there is no abuse of these powers and that no modern Government would dream of abusing them, but that is the letter of the law. It is a dangerous law and one that has no place in our day. Let us get rid of it as soon as possible.

Lord Murphy of Torfaen (Lab): My Lords, I support the amendments. The noble and learned Lord, Lord Judge, referred to Henry V as a Welshman; indeed, he was a Monmouthshire man like myself. Of course, Henry VIII was a Welshman too, and he was less benign to Wales than the other Henry, just as the situation described by noble Lords is not benign.

Over the past 20 years, the way in which legislation has been made in Wales has developed enormously. When it started in the late 1990s, the Welsh Assembly was effectively a big county council, and all it could legislate on initially was secondary legislation. Then my noble friend Lord Hain introduced the 2006 Wales Act, under which we had a sort of hybrid situation with legislative competence orders. Now, as the House knows, primary legislation can be, will be and is being made by the National Assembly for Wales. Those of us who live in Wales are subject to the laws of two parliaments and the diktats of two sets of Ministers.

Over the past two decades, the relationships between the two Governments and the two parliaments have themselves developed. At times, it has been very difficult, as my noble friend Lord Hain and I as Welsh Secretaries knew only too well. But now my noble friend Lord Rowlands has revealed—and the Minister himself revealed it in his letter to Members of this House—that a deeply unpleasant and unconstitutional situation is growing that allows Ministers in one Government to change the laws of another assembly or parliament. That is very wrong.

I rather suspect that the Minister will say that these amendments should not appear in the Bill for various reasons—not least of which is "It doesn't happen in Scotland", but that was a major oversight when the Scotland Bill was going through. In previous constitutional Bills, very often a Minister has indicated in the House what the consultation process can be. If the Minister cannot assure us that such provisions will appear in the Bill, perhaps he can reassure the House that there will be proper consultation between the two Governments and the two assemblies and parliaments, whenever the changes are made. That is not as good as putting changes in the Bill, but at least it would be something.

Baroness Morgan of Ely: My Lords, we have heard how Clause 60 allows for consequential provisions on Assembly Acts to be made by the UK Secretary of State. In other words, if there is a need for a tweak to be made to a new law introduced, or if there is a need to change a different government Bill as a result of the introduction of a new Bill, it could be done without going through the whole rigmarole of a full-on legislative parliamentary procedure.

We can all see the sense that now and again that is necessary. That is not an unusual state of affairs; it is not unusual for a Minister to be able to make consequential orders in relation to laws made and enacted in the United Kingdom. However, as we have heard, if a consequential law were to be introduced in Westminster, there would be that opportunity for both Houses to approve such changes before they could be enacted. If I may say so, I think that this House carries out that role very well; it is the House that really takes that seriously. As has been underlined, the major difference in relation to Wales is that the opportunity to approve consequential changes is not available to the Welsh Assembly on laws that affect it. That has been criticised vehemently by the Delegated Powers Committee.

My amendments would limit a requirement that statutory instruments would have to be approved by the Assembly so that it applied only if they related to provisions that would be within the Assembly's competence or would amend the Government of Wales Act 2006. So it is a restricted responsibility. The Assembly would not be trying to grab power in any way—it is just making sure that the Assembly is able to do the work that it has responsibility for.

9.45 pm

As the noble Lord, Lord Rowlands, said, the Minister responsible for this Bill has been very good in keeping us informed. He has sent us reams of letters, which have been very useful for knowing how the Bill is developing. In his letter of 2 December, the argument that he used was that this happened in the Scotland Bill. I said earlier today that that was because the SNP was not awake—it was not keeping an eye on things—but that does not make it right, just because the Welsh are on the ball. It is important that you should listen to us. Two wrongs do not make a right.

The Minister went on in that letter to suggest that,

"given the consequential changes that will need to be made in relation to local government elections in Wales in this Bill, consequential changes to existing secondary legislation will need to be made in relation to electoral registration".

What are the Government afraid of? The Welsh Assembly is not going to block consequential amendments proposed by the UK Government that are in its interests. Why cannot the Assembly, like both Westminster Chambers, in matters affecting its powers have the right to an affirmative vote, as is done here?

The second argument that is marshalled, as the noble Lord, Lord Rowlands, pointed out, is about the fact that the Welsh Government are starting to use the power. The noble Lord made a valid point—again, two wrongs do not make a right. We need to calm both Governments down in terms of introducing so many Henry VIII clauses. This is about parliamentary scrutiny; it is very important.

I do not expect the Minister to roll over when I, an opposition person, call something a constitutional aberration, but I would advise him to listen very carefully when the former Lord Chief Justice of England and Wales, the noble and learned Lord, Lord Judge, says that something is a "constitutional aberration". I ask the Minister to think very carefully on this matter.

Lord Bourne of Aberystwyth: My Lords, I thank noble Lords who participated in the debate on the amendments in this group relating to Clause 60. First, I understand the points made on the powers that are being brought in, specifically in relation to legislation that is having an effect beyond the particular legislature. Secondly, as a general point, I am grateful for the acknowledgement of the reams of letters that noble Lords are receiving, but I fear that probably more attention is being paid to the letters than to the debates,

[Lord Bourne of Aberystwyth]
because the situation as regards the Assembly's power was something that I made great play of in Committee. So the letter was not saying anything new—I mentioned this issue in Committee, so that particular point should not have taken noble Lords by surprise, as it appears to have done.

Lord Rowlands: But the Minister was not capable of telling us that, in fact, the Assembly had actually exercised these powers and actually had amended primary legislation and statutory instruments. He was not able to tell us that in Committee.

Lord Bourne of Aberystwyth: I am grateful to the noble Lord—indeed, I did go further in the letter, that is true. There would have been little point in sending it otherwise. But I was underlining the point that I thought that noble Lords were saying that I had not mentioned this in Committee, which I had.

On the situation, I can say this—and I hope that it will meet with general approval—and pick up particularly the points made by the noble Lord, Lord Murphy. I am very grateful for his wise words in developing some way forward in relation to this matter. I have spoken to my right honourable friend the Secretary of State for Wales, who has written to the First Minister and the Presiding Officer—I think significantly—in the National Assembly, to give two assurances. First, any intention to exercise the power in Clause 60 in respect of legislation made by either the Assembly or Welsh Ministers would be discussed between officials well in advance of regulations being laid. I think that this is common practice in any respect and, in relation to the particular point made about elections, this is something that is already happening. I think that sometimes noble Lords do not realise the good will that exists between officials, and indeed between the Administrations, in taking things forward.

Secondly, the Secretary of State will write to the First Minister and Presiding Officer, informing them of any intention to make regulations which affect legislation made by the Assembly or Welsh Ministers and to do so at the earliest stage before regulations are laid. It will then be for the National Assembly to act as it considers appropriate in relation to that information. I will be urging my right honourable friend the Secretary of State to seek some assurance that the Welsh Government will act in the same way in relation to matters that are decided at the Assembly which affect our legislation. It seems to me that this is only fair and deals with the issue that the noble and learned Lord, Lord Judge, was referring to in reverse. I do not think that, in essence, there is any difference between the two practices.

I hope that this will give the reassurance that is being sought in relation to the practice. I recognise the points that are being made and I think that this deals with them in that it alerts people at the earliest reasonable opportunity. I thank noble Lords for contributing to the debate. I understand the points that are being made but, in relation to that undertaking of some institutional underpinning at National Assembly level, I hope that noble Lords would accept these assurances and not press their amendments.

Baroness Morgan of Ely: Before the Minister sits down, I thank him for the suggestion that there will effectively be some kind of early warning system. But he suggested that it would allow the Assembly to act appropriately. What does he mean by that? What would the Assembly acting appropriately mean?

Lord Bourne of Aberystwyth: My Lords, I am too old a hand at devolution to suggest what would be appropriate for the Assembly; that would be a matter for the Assembly in the particular circumstances of the case. I do not think that I can second-guess what it would want to do; it would depend very much on the circumstances and the view of the Assembly on a particular matter, not to me as Minister at the Wales Office here.

Baroness Morgan of Ely: What tools are available for the Assembly to use in order to act appropriately? What tools does it have?

Lord Bourne of Aberystwyth: Again, the noble Baroness is a Member of the National Assembly; I am not. I would expect her to have a better idea of that than I do.

Lord Rowlands: Could they possibly be subject to legislative consent Motions, for example?

Lord Bourne of Aberystwyth: My Lords, I appreciate the point that the noble Lord is making, and indeed the point that the noble Baroness is making, but I suspect that this would be part of the response of the Presiding Officer to the Secretary of State now that she has the letter—or hopefully has the letter, because it has only just been sent. That would be a matter for dialogue between the Presiding Officer, First Minister and Secretary of State.

Lord Wigley: Before the Minister sits down, can he address one point that I raised with him? If the matters under consideration for the use of these orders are generally small, consequential, almost trivial sortings-out, why on earth is it not possible to have a consent order in the Assembly for any orders being made here and vice versa, so that everybody is built in? If they are not controversial there would be no difficulty in getting them.

Lord Bourne of Aberystwyth: My Lords, again, I do not want to second-guess what will happen in the discussion subsequent to the letter being received. It is a fair point, but I suppose it does raise the question of when something may be minor to one person but not another. I think that it may be easy to identify but more difficult to define what is minor. I take the point but, sometimes, there may be a need to act with great facility. The point here is that the approach that I have suggested—indeed, the approach that we are carrying forward—involves a dialogue between the National Assembly and our own Parliament, through the Wales Office, which can hopefully drive this matter forward. That is what I have been seeking to do and I hope that noble Lords will accept this as a way forward in relation to what could otherwise be a difficult issue.

Lord Judge: My Lords, I thank the Minister. I think that the proposals that he has put forward are politically very wise but, legally—and I mean this with no discourtesy—they are completely irrelevant. But I beg leave to withdraw the amendment.

Amendment 63 withdrawn.

Amendments 64 to 72 not moved.

Consideration on Report adjourned.

House adjourned at 9.55 pm.

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