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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 21 November 2018

3 pm

Prayers—read by the Lord Bishop of Oxford.

Women's Refuges: Funding

Question

3.07 pm

Tabled by ***Baroness Donaghy***

To ask Her Majesty's Government what steps they are taking to ensure the sustainability of funding for women's refuges.

Baroness Nye (Lab): My Lords, on behalf of my noble friend Lady Donaghy, and with her permission, I beg leave to ask the Question standing in her name on the Order Paper.

The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con): My Lords, since 2014 the Government have invested £33.5 million in domestic abuse services. On 10 November we announced a further £22 million for 2018-20. My department is also conducting a review of how domestic abuse services are locally commissioned and funded across England. We are working closely with domestic abuse key partners to develop future sustainable delivery options for domestic abuse services, including refuges.

Baroness Nye: I thank the Minister for that Answer, but he will know that applications by cash-strapped local authorities far exceeded the money available, which is simply not enough to deliver what the Government have promised, especially in the light of the forthcoming domestic violence and abuse Bill. This also creates a cliff edge in 2020, which threatens the sustainability of services. Will he support calls by Women's Aid, the House of Commons Select Committee, the Home Affairs Select Committee, and others, to make refuge provision a statutory obligation, backed by national ring-fenced funding, and to make long-term sustainable funding a priority in the forthcoming spending review?

Lord Bourne of Aberystwyth: My Lords, it is worth noting that the recent announcement I referred to funded 63 projects around the country, involving 254 local authorities, and has provided not just security for the 25,000 existing beds but an additional 2,200 bed spaces. The noble Baroness is right about the challenges. That is why I referred to the ongoing review of how we fund these services across England. She is also right about the importance of the domestic abuse Bill, which my right honourable friend the Prime Minister referred to in Prime Minister's Questions today, pledging that it would be brought forward in this Session.

Baroness Burt of Solihull (LD): My Lords, across the United Kingdom support for refuges is funded in numerous complex and insecure ways. It is a postcode lottery, and refuges are spending an inordinate amount of time bidding for money to keep going, instead of caring for the traumatised women and children who they have been able to admit. In 2016-17, 60% had to be turned away. Will the Government commit to work with Women's Aid and other organisations to create a new model of sustainable funding for a national network of specialist women's refuges?

Lord Bourne of Aberystwyth: My Lords, first, we do, of course, work with Women's Aid, which is a key partner. It welcomed—with reservations, to be fair—the recent announcement of the 63 projects that I have referred to. We also work with other organisations in the sector—Refuge, SafeLives and Imkaan, for example. I again refer to the ongoing review, which is important—but as things stand we fund quite a range of different ways of providing refuges: it is not one size fits all. This is ongoing work, and that important review is forthcoming.

Baroness Butler-Sloss (CB): My Lords, I declare my interest as set out in the register. May I remind the Minister of the importance of looking after a particular group, the victims of forced marriage, many of whom are under 18 and need rather more specialist care than many refuges can give them?

Lord Bourne of Aberystwyth: My Lords, the noble and learned Baroness is right about the complex needs of victims of forced marriage. They are catered for in those 63 projects, as are other groups with complex needs. The noble and learned Baroness is absolutely right.

Baroness Barran (Con): My Lords, can my noble friend confirm that any plans to fund accommodation-based services will focus not only on emergency provision, such as in a refuge, but on move-on accommodation? There are too many women, particularly in London, who cannot move on from a refuge because of a lack of move-on accommodation, and therefore women who need refuge urgently cannot access it.

Lord Bourne of Aberystwyth: My Lords, my noble friend, who has done much work in this area, particularly with SafeLives, is right about the importance of the range of different ways, which I just referred to, of providing refuge services. She is right about the particular needs that need to be catered for, and we have sought to do that in the current funding round. For example, we are funding a three-borough initiative—Westminster, Kensington and Chelsea, and Hammersmith and Fulham—which is providing a range of different ways of providing protection for victims of domestic abuse. My noble friend is absolutely right.

Baroness Afshar (CB): My Lords, what specific measures are the Government taking in regard to Muslim women? I declare my interest as the honorary president of Muslim Women's Network UK. Not only do they have to be protected from violence; they need specific arrangements and specific spaces which they consider clean for praying, as well as protection from the men in their own families. What arrangements are made for them?

Lord Bourne of Aberystwyth: The noble Baroness is right about the particular needs of that community, which she has just outlined. It was a group specifically identified in the bids that we have just been honouring in the 63 projects. I will write to her on the specifics of that, but the BME and the Muslim communities were identified as being in particular need in those bids.

Lord Kennedy of Southwark (Lab Co-op): My Lords, I refer to my relevant interest as a vice-president of the LGA. Since 2010, specialist refuges have been cut by one-fifth. As the noble Baroness, Lady Burt, said, 60% of referrals to refuges by Women's Aid are refused due to lack of bed space. That means that 90 women and their dependent children are turned away every day. Is the Minister saying that the money he referred to in his earlier answer will replace those cuts? If not, why are the Government not doing more?

Lord Bourne of Aberystwyth: My Lords, I said that there is work still to be done—I think I used those very words. Part of that is, of course, the funding review that is going on at the moment. I also said that an additional 2,200 bed spaces have been created and there have been some specific projects. The noble Lord mentioned women turned away. There is a No Woman Turned Away project which ensures that people have caseworker support. There is still more to be done—I would not argue with that point—but progress has been made on these projects, and progress will be made with the funding review.

Brexit: Economic Effects

Question

3.14 pm

Asked by ***Baroness Quin***

To ask Her Majesty's Government what recent discussions they have had with the Chambers of Commerce and Confederation of British Industry representatives in the United Kingdom's regions and nations about the economic effects of Brexit.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, the Government continue to engage with business groups, including the CBI and the British Chambers of Commerce, on the economic effects of EU exit across the UK's regions. We remain committed to ensuring that the views of business are reflected in our approach to Brexit, and businesses have responded positively to the draft of the withdrawal agreement published last week.

Baroness Quin (Lab): My Lords, the Government announced in the other place on Monday that they would publish an economic and fiscal analysis of the effects of Brexit. In this House the Minister and his ministerial colleague, the noble Lord, Lord Callanan, have also said that there will be updated impact assessments of the effects of Brexit on our regions and nations. In view of the Prime Minister's proposed deal, and also of the continuing concerns of business, can the Minister give us some outline of the timetable for publishing this additional information?

Lord Bates: Yes, I can. The position will be contingent on the outcome of the Council, but if there is agreement there on the proposal put forward in the withdrawal agreement, and also on the crucial element of political declaration on the future partnership, we would expect to produce that analysis and put it in the public domain next week.

Baroness Kramer (LD): My Lords, yesterday the FT City Network—a forum of more than 50 senior city figures—spoke out in favour of a people's vote. Another wave of City members wrote to the *FT* today with exactly the same message. The IoD, to its own surprise, found that a survey of its members produced a majority in favour of a people's vote. Will the Government finally consider a people's vote? For business, while no deal would be a catastrophe, the proposed May deal is so second-rate that it diminishes them.

Lord Bates: Talking to the British Chambers of Commerce, CBI and all the business organisations, I find that the one thing they all want is for a deal to be done. They want certainty. They want to understand where they are so that they can continue to trade and move forward. That is what the Prime Minister has put before us, that is what the Cabinet has agreed, and that is what we hope will be agreed at the European Council next week. That is the best way forward for Britain, and it is the best way forward for business.

Lord Cormack (Con): My Lords, if we want clarity and certainty, all that a so-called people's vote can do is prolong the agony, deepen the division and make it far more difficult to come to a sensible conclusion.

Lord Bates: I agree wholeheartedly with my noble friend.

Lord Davies of Oldham (Lab): My Lords, the Minister's Answer to my noble friend Lady Quin was somewhat elliptical and roseate in hue. When we come to the question of the Commons having to consider the issue of the meaningful vote, is it not the case that the Minister in the Commons confessed on Monday that the economic analysis would of course depend on aspects of withdrawal, but with Britain still a full member of the European Community? How on earth can that prove to be realistic in people's judgment on the withdrawal position?

Lord Bates: That was the decision that Members of the other place came to in the debate on Monday. They introduced Amendment 14 to the Finance Bill, which called on the Government to consider the long-term costs and benefits of moving to a new trading relationship with the EU and the rest of the world. The Exchequer Secretary said:

"I am happy to confirm that the baseline for this comparison will be the status quo—that is, today's institutional arrangements with the EU".—[*Official Report*, Commons, 19/11/18; col. 661.]

So we are doing what we have been asked to do by the other place.

Baroness Lister of Burtersett (Lab): My Lords, in a statement last week, the UN rapporteur on extreme poverty and human rights said that Ministers were treating,

"the impact of Brexit on … poverty",

as "an afterthought". What assessment are the Government making of the likely impact of Brexit on the very high poverty levels in this country?

Lord Bates: Many people looked at the special rapporteur's response, but also at the fact that the number of people in poverty has been steadily falling, that the number of children in poverty has been steadily falling, that employment is at record levels, that growth is on the up, that inflation is on the down, that our exports are rising and that growth and opportunity are there for jobs and education—which are the best routes out of poverty.

Lord Foulkes of Cumnock (Lab): My Lords, can I just clarify something? Is it not the case that people such as the noble Lord, Lord Cormack, and the CBI, are only now cosying up to the deal proposed because they are absolutely scared—I was about to say "something" scared, but I had better not—of the alternative of no deal? The reality is that, all around the country, a momentum—if noble Lords will excuse the word—is growing in favour of a people's vote. In a democracy, three years after a previous referendum, and now that we know what the conditions are and what the whole process involves, what is wrong with giving the people another say?

Lord Bates: In a democracy we had a people's vote, which was the referendum—and the Government were re-elected on another people's vote.

Noble Lords: Oh!

Lord Bates: Both the noble Lord's party and mine stood on a platform of honouring the people's vote that took place in 2016. We are now on the brink of an agreement which can remove the uncertainty so that this country can move forward, and that is why we are supporting it.

Lord Deben (Con): Would my noble friend reconsider that answer? After all, we had an election, and then two and half years later we decided that there was a chance for the people to have another vote on that. So merely to say that we have had a vote is not to say that we should never have a vote again. Is not the problem that the deal that has been done puts Britain into a significantly worse position than we are in as a member of the European Union?

Lord Bates: No, I do not accept that premise. If that were the case, we would not still be the number one location in Europe for foreign direct investments, or judged by *Forbes* to be the number one place to do business in 2018, which we are, and our exports would not be rising. The reality is that people want to remove the uncertainty, and to do that, we need to get behind this deal and get it done.

Lord Mackay of Clashfern (Con): My Lords, if Parliament cannot find a solution to this problem in relation to the European Union, is it necessary to have the delay and likely disagreement of another vote? The last vote was of course a people's vote, and to describe the next one as a people's vote does not seem to be a particularly advantageous description. However, if Parliament cannot solve this problem, surely the next thing to do is to propose a Motion that we stay in the European Union?

Noble Lords: Oh!

Lord Bates: I was with my noble and learned friend all the way until just before the end. There will be a meaningful vote, which we promised and which will happen some time in December, and then this place and the other place can make their views known on the proposed agreement. I very much hope that they will come in behind it and behind the Prime Minister so that we can move on and see it implemented.

Saudi Arabia: Human Rights

Question

3.23 pm

Asked by ***Lord Hoyle***

To ask Her Majesty's Government what is the outcome of their recent talks with the government of Saudi Arabia about human rights in that country.

Baroness Goldie (Con): My Lords, the UK regularly discusses human rights with the Government of Saudi Arabia, including individual cases. Saudi Arabia remains a Foreign and Commonwealth Office human rights priority country, as detailed in the annual *Human Rights & Democracy* Foreign and Commonwealth Office report. The Foreign Secretary travelled to Saudi Arabia to discuss a range of issues, including the murder of Jamal Khashoggi, and we work with international partners to raise issues through the international system.

Lord Hoyle (Lab): I thank the Minister for that reply, but Saudi Arabia continues to detain people without charge for indefinite periods and—as she said, Khashoggi was murdered in the consulate in Turkey—in addition to that, it continues to oppress people in every sense of the word. Why do we continue to dither and pussyfoot about with this aristocratic, reactionary and despicable regime? Why do we not impose sanctions on it?

Baroness Goldie: My Lords, I can understand there is a range of passionately felt views about Saudi Arabia. Certainly, the United Kingdom has always regarded that country as an important ally for reasons that I know the noble Lord will understand. Equally, as with a relationship with any ally or friend, we feel able to express frankly our concerns. The Foreign Secretary, on his recent visit to Saudi Arabia, made very clear his concerns across a range of issues, not least the very distressing situation of Mr Khashoggi's

[Baroness Goldie]
murder. We regularly raise with Saudi Arabia our concerns about human rights, and the noble Lord will be aware that the recent United Nations universal periodic review of Saudi Arabia took place on 5 November. He will know that a very strongly worded letter went from the UK permanent representative with a number of recommendations, all of which had at their heart respect for and implementation of human rights.

Lord Lamont of Lerwick (Con): My Lords, will the Minister confirm that the Government, like the United States Government and the French Government, have actually received the tapes of the recording of Mr Khashoggi's murder in the consulate? What conclusions have they come to about those tapes? Is the Minister aware that the Saudi authorities have named the people whom they think were responsible for Mr Khashoggi's murder? Will the Government monitor the trial of those people to make sure that it is fully transparent and that those people are not executed as a cover-up for somebody else?

Baroness Goldie: In relation to my noble friend's first question, we do not comment on intelligence matters, as I think he will understand. Given the recent disclosures by Saudi Arabia in relation to the court proceedings against 11 people, the United Kingdom Government will monitor carefully how that trial proceeds. It is a sovereign, independent country with an independent justice system, but we will watch carefully what takes place. The noble Lord will be aware that we have said repeatedly that we are totally opposed to the use of the death penalty in any circumstances.

Lord Singh of Wimbledon (CB): My Lords, as revealed in this morning's news, President Trump has made it clear that, as far as he is concerned, considerations of trade are more important than human rights in Saudi Arabia. Can the Minister confirm that our Government do not share the same callous view?

Baroness Goldie: If the noble Lord is suggesting that, for some reason, the UK would prioritise trade over human rights, that would absolutely not happen. The relationships that we build with countries, including Saudi Arabia, through trade and security links and through bringing together institutions such as educational research establishments allow us to make greater progress with those countries on the issue of human rights.

Baroness Northover (LD): My Lords, following that question, is the Minister as sickened as I am by President Trump's position that jobs would be at stake if he held Saudi Arabia to account? Does she see a read-across to the case that we have heard about today of Matthew Hedges, who was jailed for life after a five-minute trial in the UAE? Does she agree that human rights must be defended whatever our apparent economic interest?

Baroness Goldie: Human rights must always be defended, and I have already made clear both in my initial response to the noble Lord, Lord Hoyle, and in my subsequent answers the huge importance that we attach to human rights. This is not just a token importance but an importance underpinned by the actions that we take and the discussions that we have and the things that we attempt to do. We are regarded as being a very prominent global player in that respect. It is absolutely vital that we are proud of what the United Kingdom does in that field. We endeavour, whenever possible, to raise these issues and to do so in a constructive fashion.

Lord Collins of Highbury (Lab): My Lords, yesterday Amnesty International and Human Rights Watch highlighted the torture of human rights activists in prison in Saudi Arabia. Last night, I met representatives from Reprieve, which announced that the death penalties on 12 human rights activists—people standing up for their human rights—have been confirmed. Will the Minister tell us today that the United Kingdom Government will make a public statement condemning those death penalties, which I understand could take place today or tomorrow?

Baroness Goldie: We have been clear about our concern regarding these 12 men; we are extremely concerned about reports that these executions may be imminent. We have raised these concerns with the Saudi authorities as recently as 20 November. As I say, the UK opposes the death penalty in all respects. The other issue that the noble Lord raises is a very distressing one; I think he is referring to the allegations of torture of female activists. Of course we are concerned about these allegations. It is a horrible situation, and we consistently and unreservedly condemn torture and cruel, inhumane or degrading treatment. We have raised these concerns and these cases at ministerial level with the Saudi authorities a number of times, and we will continue to do so following these allegations.

Cyberattacks

Question

3.30 pm

Asked by ***Lord Haskel***

To ask Her Majesty's Government what steps they are taking to protect the United Kingdom's critical infrastructure from cyberattacks.

Lord Young of Cookham (Con): My Lords, ensuring that our critical national infrastructure—CNI—is secure and resilient against cyberattack is at the heart of our 2016 national cybersecurity strategy. The National Cyber Security Centre we established has improved our understanding of the threat and provided a unified source of advice and support. We have also strengthened regulatory frameworks across much of the CNI to ensure that cyber risk is managed in the national interest.

Lord Haskel (Lab): I hear what the Minister says, but I do not think he will satisfy the committee. It defined the Government's current position as,

"long on aspiration and short on delivery".

It says that the Government have failed to match the increasing threat with improved cyber resilience in both the public and private sectors and that it finds a lack of expertise to provide credible insurance. It would like to see a Minister appointed to ensure that there is capacity. Putting this right will require a lot more than money and good intentions. Will the Government take steps to carry out the report's proposals?

Lord Young of Cookham: The noble Lord will be aware that this is a substantial report published two days ago by the Joint Committee on the National Security Strategy, with 22 senior Members of both Houses. It has 10 major recommendations and the Government will want to respond to those in due course. The noble Lord quoted a little from the report and, just to add some balance, may I also quote from it? It said:

"Many of those who submitted written evidence … welcomed the step change in Government approach in the 2016 NCSS, with some describing the strategy—and the activity it underpins—as world-leading. This appears to be borne out by the notable level of international interest in the UK's approach to cyber security".

That gives a somewhat more balanced response than what the noble Lord quoted. There are many recommendations. One is that there should be one Minister; the committee wants what it calls a collective mind—a somewhat Orwellian concept. If we look at the building blocks of national security, we have GCHQ, which is under the Foreign Office; the Home Office, with overall responsibility for protecting the citizen if there is a cyberattack; the Ministry of Defence, which is in charge of offensive cybersecurity; and the Cabinet Office, which is in charge of CNI. It is very difficult to have a collective mind. What is important is having a collective strategy that all the Government agree to, underpinned by substantial resources and supervised by the National Security Council, chaired by the Prime Minister. That is more important than having what the committee calls a collective mind.

Lord Fox (LD): My Lords, in last month's debate on cybersecurity, the noble Lord, Lord Ricketts, in an authoritative speech, mentioned that the former Attorney-General, Jeremy Wright, had made clear that existing international law, including the UN charter, covers the cyber activities of states; this was the view not just of British experts but of Chinese and Russian experts in 2015. In his reply, the Minister outlined some activities round the Commonwealth that sought to exploit this international law but was uncharacteristically undefined about which other institutions the Government are working on. Which other international institutions are the Government working with which are seeking to exploit existing international law to combat this state-sponsored cybercrime?

Lord Young of Cookham: The noble Lord cited the noble Lord, Lord Ricketts. In that debate, he said that Britain is very fortunate to have a world-leading centre of excellence in the National Cyber Security Centre. We believe that the existing legislation is adequate. We co-operate with a range of international partners—Five Eyes and others. I hope the noble Lord will understand that the Government want to reflect on the recommendations in the report and will respond in due course, including to the legal issues that the noble Lord has just raised.

Baroness Couttie (Con): My Lords, what would be the impact of a no-deal Brexit on cybersecurity in this country?

Lord Young of Cookham: The Government have made it absolutely clear that we want to maintain the broadest possible co-operation with our EU partners. We want to continue to share information with security institutions in the EU. We want to go on, with them, to develop cyber resilience so that we can continue to protect our collective security, values and democratic institutions. We believe that it is in their interests, as much as ours, that this should happen, irrespective of what happens to Brexit.

Lord West of Spithead (Lab): My Lords, the Minister will be aware that GCHQ has recently said that it can no longer guarantee the security of UK circuits that have Huawei equipment in them. How are we to take this forward now, bearing in mind that removing all Huawei gear from our systems is almost impossible, as is moving towards 5G without involving Huawei? We need a Minister in the Cabinet Office responsible for this.

Lord Young of Cookham: The noble Lord raises an important issue: how one balances the need for inward investment and to have cutting-edge technology available without jeopardising the security of our institutions. He will know that we have a mitigation strategy to deal with Huawei, which is advised by NCSC—the National Cyber Security Centre. Our approach makes sure that, where we use equipment supplied by overseas countries, our security is not compromised. The mitigation strategy is kept under constant review.

Lord Harris of Haringey (Lab): I declare an interest as a member of the Joint Committee. Further to the noble Baroness's question, in the event of the noble and learned Lord, Lord Mackay of Clashfern, being unsuccessful and our leaving the European Union next year, will we continue to abide by the EU network and information systems directive? If so, how will we continue to make sure that it is kept in line with the situation in Europe? Will we be part of the intelligence system associated with it?

Lord Young of Cookham: The answer to the first question is yes. We implemented the NIS directive in May this year, one of the first countries so to do. We will continue to honour the directive after 29 March next year. On the broader question about the future relationship, I can only refer the noble Lord to what I said a few moments ago about the Government's intention to maintain broad co-operation and that it is in the EU's interests as much as ours that that should continue.

Centre for Data Ethics and Innovation

Statement

3.38 pm

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde) (Con): My Lords, with the leave of the House, I

[Lord Ashton of Hyde]
shall now repeat a Statement made yesterday in the other place by my honourable friend the Minister for Digital and the Creative Industries. The Statement is as follows:

"Mr Speaker, with permission, I would like to make a statement on the Centre for Data Ethics and Innovation. The UK has a proud history of supporting the use of open data. Indeed, there has been a huge programme of work in recent years to make sure we are promoting the open and transparent use of data. The Government are in a privileged position, as we collect a vast quantity of high-quality data while delivering public services. As the UK moves rapidly towards a data-driven economy, we have an opportunity to improve decision-making in many areas.

The Government have already published over 44,000 datasets. This unprecedented openness has created many benefits. First, it has made the Government more accountable and transparent. Secondly, it can improve the effectiveness of public services. Thirdly, it has created the potential for new businesses to thrive. By making our data available to the public, we have been able to fuel businesses and applications that make life better and easier. All this has paid dividends.

We are now ranked joint first in the world on the open data barometer, an achievement of which we can justly be proud. While open data is something we must aspire to, we also need to use it in a safe and ethical manner. The rise of artificial intelligence-driven products and services have posed new questions that will impact on us all. What are the ethical implications of using technology to determine someone's likelihood of reoffending?

Is it right to use a programme powered by AI to make hiring decisions? Can it ever be right to have an algorithm influence who should be saved in a car crash? These are no longer questions for science fiction but real questions that require clear and definite answers, where possible from policymakers. That is why we have established the Centre for Data Ethics and Innovation, because ethics and innovation are not mutually exclusive. Strong ethics can be a driver of innovation. It is our intention that the centre become a world-class advisory body to make sure that data and AI deliver the best possible outcomes for society, in support of their ethical and innovative use.

Following a consultation over the summer on the activities and work of the new centre, we are pleased to publish our response today. This is the first body of its kind to be established anywhere in the world and represents a landmark moment for data ethics in the UK and internationally. Throughout the consultation, respondents recognised the urgent need for the centre and there was widespread support for its objectives: to advise government on the necessary policy and regulatory action and to empower industry through the development of best practice.

In turn, we can build public trust in data-driven technologies and make the most of the opportunities they present for society. We have announced that Roger Taylor will chair the board. Roger has a background in consumer protection, founded Dr Foster—a healthcare data company—and is a passionate advocate for using data to improve lives. I know that he will do an excellent job. We have today announced the board members who will support Roger in this essential work. The board will include: Lord Winston, a world-renowned expert in fertility and genetics; Kriti Sharma, vice-president of AI at Sage and a leading global voice on data ethics; and Dame Patricia Hodgson, who was chair of Ofcom and brings a wealth of experience of regulatory affairs.

The board will bring together some of our greatest minds and their immense and varied experience to tackle these important issues. Data is the fuel of any digital economy, and trust in that data is fundamental. As a nation we have always been pioneers and advocates of transparency and freedom, and we will keep applying these values as we look at how we can make the most of the data that is multiplying in scale and sophistication.

The great challenge of the digital age is to ensure that data is used safely, ethically and, where possible, transparently. If we do that, we can help to power new technologies that will make life better and solve issues that are currently of grave concern. This is truly within our grasp and if we work together, we can make it happen.

I commend my Statement to the House".

I follow the Statement by saying that I think the House will be pleased to know that, in addition to the noble Lord, Lord Winston, the board will include my noble friend Baroness Rock and the right reverend Prelate the Bishop of Oxford, who were members of the House of Lords Select Committee on Artificial Intelligence, chaired by the noble Lord, Lord Clement-Jones.

3.43 pm

Lord Stevenson of Balmacara (Lab): My Lords, I am grateful to the Minister for repeating the Statement made elsewhere. He was present for part of the debate on artificial intelligence on Monday. On reflection, it is a bit surprising that the Government were not able to accelerate the announcement of this new body. It would have helped a lot in that debate. No doubt the tyranny of the grid is to blame again, but many of us would have felt the benefit had we known, not least, that the membership of the board had been enhanced by those Members of your Lordships' House already referred to.

To go back in history a bit, the Centre for Data Ethics and Innovation came out of amendments we proposed during the passage of the Data Protection Bill, but it was built on excellent work by the Royal Society and others. We should pay tribute to the groundwork that led to today's announcement. Those amendments had a lot of support from around the House and would have gone into the Bill had we been able to push them further, but we could not get them within the bounds of the Bill's framing. We should say clearly that the model we had in mind then was the independent Human Fertilisation and Embryology Authority. In preparing the thinking in this new area of advanced technology and data processing and protection, one needed a carefully balanced body that could regulate in the context of difficult ethical issues raised by research and development.

I will now ask a number of questions about the body itself, and I hope that the Minister will respond, in writing later if not now. The body was originally intended to be an independent statutory body, but it is not because no powers have yet been established. What is the progress on that? The reports I have read suggest that that is still an objective of the Government, although they are making a virtue of the fact that it is an advisory committee in the interim period. In some senses, they will probably be judging its success, which is a bit worrying given that the whole benefit would be that it was independent of government, long-term and able to look without fear or favour at the big issues. If it is an advisory committee of the department, how independent will it be in practice? Is funding secured? Can it spend what it needs to get the research and advice it needs? How much of the original thinking about the HFEA remains? As an advisory committee, can it request information? One problem is the difficulty of extracting information from the behemoths that populate the international information society.

The press release rightly describes the membership as "stellar". Given the names already mentioned here, I think we should recognise that. I confess that my application was weeded out very early in the game. This was unfortunate, because I would have been delighted to be part of that. Having seen the full list and heard why they were chosen, it is clear that the right decisions have been reached and I bear no malice to those responsible—honest. If the membership question comes up later, I am still around.

In the absence of the new centre starting up, we have only two or three areas of activity. We have a statement as a result of the consultations that took place. It talks about the focuses being to provide clear guidance and regulation and to lead debate about how data can be used in the future. But there are still some problems that need to be resolved, and I will be interested to hear the Minister's comments. The AI report we discussed at length in a very good debate on Monday, when there were notable speeches from the right reverend Prelate the Bishop of Oxford and the noble Lords, Lord Reid and Lord Browne, shows the range of issues that are going to be up for discussion. These are very abstruse areas of intellectual activity such as ethics and the nature of machines—whether they are responsible for their actions and, if so, how any redress can be obtained. The noble Lord, Lord Browne, posed questions about intelligent weapons and what controls must be placed on them. It is a very stretching agenda. All we know is that issues currently in the list include data trusts, algorithms and consumer experiences. I do not think there will be a shortage of those. Can the Minister explain what the process will be? I gather an overall strategy document will be revealed.

There are some concerns about the balance between advice and regulatory action. I think the plan would be for advice to be offered to government and regulatory action to be taken by existing or other bodies. Could we have confirmation of that? There is a question about the balance between ethics and innovation. Clearly, innovations are difficult to support if they raise big ethical issues too quickly; they often need to be tested over time and analysed. It would be useful if there were a way forward on that. Of course, there is the whole question of how the Government intend to treat public data, its use and value for money, and the extent to which it will be available.

Lastly, the new centre, which I wish extremely well, enters a rather crowded space with the Information Commissioner's Officer, Ofcom and the CMA, all of which have statutory functions in this area, but perhaps I may counsel that also to come are the Alan Turing Institute, which is now up and running, and the Open Data Institute. Therefore, there will be a need for some time for this whole process to settle down and for leadership from the Government on how it will work.

The responses to the consultation showed a clear public wish for consistency and coherence, and I hope that in that process there will be room for consultation. I do not wish the new body to be a proselytiser for data or indeed for artificial intelligence, but there is a difference between proselytising and being in an explanatory mode, reassuring people and explaining to them the benefits as well as the risks of this new technology. The centre needs to be public facing and fully engaged in that process, and I wish it well.

Lord Clement-Jones (LD): My Lords, I too thank the Minister for repeating the Statement. He was missed in the debate on Monday. I have had the benefit of reading the Government's response to the consultation on the Centre for Data Ethics and Innovation. I share the enthusiasm for the centre's creation, as did the Select Committee, and, now, for the clarification of the centre's role, which will be very important in ensuring public trust in artificial intelligence. I am also enthusiastic about the appointments—described, as the noble Lord, Lord Stevenson, said, as "stellar" in the Government's own press release. In particular, I congratulate Members of this House and especially the noble Baroness, Lady Rock, and the right reverend Prelate the Bishop of Oxford, who contributed so much to our AI Select Committee. I am sure that both will keep the flame of our conclusions alive. I am delighted that we will also see a full strategy for the centre emerging early next year.

I too have a few questions for the Minister and I suspect that, in view of the number asked by me and by the noble Lord, Lord Stevenson, he will much prefer to write. Essentially, many of them relate to the relations between the very crowded landscape of regulatory bodies and the government departments involved.

Of course the centre is an interim body. It will eventually be statutory but, as an independent body, where will the accountability lie? To which government department or body will it be accountable? Will it produce its own ethics framework for adoption across a wide range of sectors? Will it advocate such a framework internationally, and through what channels and institutions? Who will advise the Department of Health and Social Care and the NHS on the use of health data in AI applications? Will it be the centre or the ICO, or indeed both? Will the study of bias, which has been announced by the centre, explore the development of audit mechanisms to identify and minimise bias in algorithms?

[Lord Clement-Jones]

How will the centre carry out its function of advising the private sector on best practice, such as ethics codes and advisory boards? What links will there be with the Competition and Markets Authority over the question of data monopolies, which I know the Government and the CMA are both conscious of? In their consideration of data trust, will the government Office for Artificial Intelligence, which I see will be the responsible body, also look at the benefits of and incentives for hubs of all things? These are beginning to emerge as a very important way of protecting private data.

What links will there be with other government departments in giving advice on the application of AI and the use of datasets? The noble Lord, Lord Stevenson, referred to lethal autonomous weapons, which emerged as a major issue in our debate on Monday. What kind of regular contact will there be with government departments—in particular, with the Ministry of Defence? One of the big concerns of the Select Committee was: what formal mechanisms for co-ordinating policy and action between the Office for Artificial Intelligence, the AI Council, the Centre for Data Ethics and Innovation and the ICO will there be? That needs to be resolved.

Finally, the centre will have a major role in all the above in its new studies of bias and micro-targeting, and therefore the big question is: will it be adequately resourced? What will its budget be? In the debate on Monday, I said that we need to ensure that we maintain the momentum in developing our national strategy, and this requires government to will the means.

Lord Ashton of Hyde: I am tempted to say that I will write, but I will try to answer some of the questions, and I will write regarding some that I do not get around to. I was in at the beginning of the debate on AI and I listened to the noble Lord's speech.

Lord Clement-Jones: My Lords, that is all that he needed to listen to.

Lord Ashton of Hyde: Not everyone would agree with that, but I did indeed listen to it. I have read that AI is a joint responsibility with BEIS, and my noble friend Lord Henley coped more than adequately, so I do not think that I really was missed.

There was a great deal of support for this innovation—the centre—both in the response to the consultation and, as the noble Lord, Lord Stevenson, said, in proceedings on the then Data Protection Bill, so I am grateful for that today, but I accept the very reasonable questions. On the centre's independence as it stands now and its statutory establishment, I say that we have deliberately set this up as an advisory body so that it can consider some of the difficult issues that noble Lords have raised. Policy is the Government's responsibility, so there should not be any confusion about who is held accountable for policy—and it is not the Centre for Data Ethics and Innovation. When this has been established, when we have seen how it has worked and when we have addressed the questions of the crowded space that both noble Lords mentioned, it is our intention to put this on a statutory basis. Then we will see how it has worked in practice. When it comes to putting it on a statutory basis, I have no doubt that there will be lots of back and forth in Committee and things like that on the exact definitions and its exact role.

There are some differences from the Human Fertilisation and Embryology Authority, although of course that was a particularly successful body. One of the main differences was that a lot of those things were considered in advance of the science, if you like, and before the science was put into place. With AI, it is here and now and operating, so we do not have a chance to sit back, think about it in theory and then come up with legislation or regulation. We are dealing with a moving target, so we want to get things going.

As far as I am aware—I will check and write to the noble Lord, Lord Stevenson—the centre has no specific powers to demand information. That is, of course, something that we can look at when it comes to being on a statutory basis.

I am sorry that the application for membership by the noble Lord, Lord Stevenson, was not accepted. There can be only one reason: he spends so much time on the Front Bench that he would not have time, because we expect the directors to spend two to three days a month attending this, so it is a very large work commitment.

As noble Lords will know, the work plan includes two initial projects, which were announced in last year's Budget: micro-targeting and algorithm bias. We expect the centre, in discussion with the Secretary of State, to come up with a work plan by spring 2019. As the noble Lord, Lord Stevenson, mentioned, there is a tension, if you like, between ethics and innovation, but we are very keen that it consider both because we have to be aware of the potential for innovation, which is constrained in some cases. We would not want a situation where the opportunities for AI for this country are avoided. As the report by the noble Lord, Lord Clement-Jones, made clear, there are tremendous opportunities in this sector. We are aware of the tension, but it is a good tension for the centre to consider.

Both noble Lords talked about the crowded space in this area. We expect the centre to produce memorandums of understanding to outline how it relates to bodies such as the AI Council, which has a slightly different focus and is more about implementation of the AI sector deal than considering the ethics of artificial intelligence. We understand that they need to work together and expect the centre to come back on that.

The noble Lord, Lord Clement-Jones, asked about accountability. The centre will be accountable to the Secretary of State for the DCMS. That is clear. He will agree its work plan. Of course, in terms of independence, once he has established that work plan, what the centre says will not be up to him, so there is independence there. We included in our response that the Government will be expected to reply within six months, so there is a time limit on that. It will apply to all government departments, not just the DCMS. The Ministry of Defence and the department of health have obvious issues and the centre can provide advice to them as well.

The noble Lord, Lord Clement-Jones, asked whether the centre, when it considers bias, would include audit mechanisms. It absolutely might. It is not really for us to say exactly what the centre will consider. In fact, that would be contrary to its independence, having been given the subject to think about. In our response we said some of the things that might be considered, such as audit mechanisms.

There is an obvious issue about competition, which the House of Lords Select Committee mentioned. Work is going on. The Chancellor commissioned the Furman review to look at that and we expect the centre to come up with a discussion on how it will work with the Competition and Markets Authority, but obviously competition is mainly to do with the Competitions and Markets Authority.

At the moment, the body is resourced by the DCMS. In the 2017 Budget, it was provided with £9 million in funding over three years. We expect that to be sufficient but, clearly, we will have to provide adequate resources to do an adequate job.

4.03 pm

Lord Harries of Pentregarth (CB): I thank the Minister for the Statement and his responses. I am delighted that one of my successors as Bishop of Oxford has been appointed to the centre's board. I know that with his experience and background he will make a very valuable contribution to it.

Is there an academic moral philosopher on the board? I ask as a former member of the Nuffield Council on Bioethics and the HFEA. It was always thought valuable, particularly with the Nuffield Council on Bioethics, to have a philosopher or two on board. It is not that they will come up with a better answer than anybody else—their judgment is neither better nor worse than anybody else's—but an academic philosopher can tease out unexamined assumptions. So many of these agreements and disagreements on ethics are about the assumptions that need to be teased out and looked at. I have not had a chance to look at the document yet, I am afraid, but perhaps I could ask that question.

Lord Ashton of Hyde: I am glad to say that there will be. Professor Luciano Floridi is Professor of Philosophy and Ethics of Information at the University of Oxford—so another Oxford man.

Lord Maxton (Lab): My Lords, is it not correct that the centre's name is the wrong way round? It ought to be the advisory committee on digital innovation and ethics, because the innovation will drive the ethics rather than the other way round.

Lord Ashton of Hyde: The board of the centre will be able to cope with whichever way round the wording is. It will deal with the balance and the tensions between ethics and innovation—and indeed innovation and ethics.

Baroness O'Neill of Bengarve (CB): My Lords, yesterday evening the British-American Parliamentary Group and Ditchley met to discuss these topics. It was an interesting meeting, but it did reveal how readily innovation drives ethics. I say this as an academic philosopher, and it is quite important. The innovation questions are of great importance, but they are not the only questions, and I hope that steps will be taken to ensure that there is suitable rigour in the analysis of the ethical issues. The debate is full of pitfalls and inadequacies, including phrases such as "communication ethics" and "data ethics", which ultimately mean nothing. Ethics is about what you do: it is not about data and communication. So I hope that there will be room for that sort of rigour on this advisory—and ultimately statutory—body.

Lord Ashton of Hyde: I completely agree with the noble Baroness. In dealing with modern technology, we often forget the very important point she makes. Ethics is about how you live your life and deal with things in a way that has a moral basis. I absolutely accept that, in dealing with modern technology and especially things such as AI, ethics is a very important component. That is precisely why they have also included not just technical people but parliamentarians and professional philosophers, to consider and to make sure that those aspects are given sufficient weight.

Mental Capacity (Amendment) Bill [HL]

Report (1st Day)

4.06 pm

Schedule 1: Schedule to be inserted as Schedule AA1 to the Mental Capacity Act 2005

Amendment 1

Moved by ***Lord O'Shaughnessy***

1: Schedule 1, page 5, line 26, at end insert—

"Part 8 contains transitory provision."

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, before I introduce this first group of what I hope are uncontroversial and technical amendments, I want to express my sincere thanks to all noble Lords who have been involved in a good deal of hard work between Committee and today in order to get the Bill into better shape. When we set out on this process at Second Reading, noble Lords had some concerns about the Bill, which crystallised in Committee. I think we have made a good deal of progress since then, which could not have happened without their contribution. I hope we are able to make similar degrees of progress today.

The amendments in this group straightforwardly make technical changes to the Bill. Amendment 1 reflects that transitory, or temporary, provision related to 16 and 17-year olds will be included in a new Part 8 of the schedule. Amendment 10 inserts a definition of "clinical commissioning group". Amendment 148 removes an unnecessary provision regarding statutory instruments from the Bill. Clause 5(3) reflects that regulations under Clause 5 will be made by statutory instrument. However, Clause 5(7) already provides that regulations under Clause 5 are to be made by statutory instrument, so the words in Clause 5(3) are superfluous. I hope everyone can follow that—I promise it is straightforward and technical. On that basis, I beg to move.

Baroness Thornton (Lab): That is quite right, they are technical.

Amendment 1 agreed.

Amendment 2

Moved by ***Baroness Tyler of Enfield***

2: Schedule 1, page 5, line 33, at end insert—

"(1A) For the purpose of paragraph 2(1)(b), arrangements which give rise to the deprivation of the cared-for person's liberty are those in which—

(a) the cared-for person is subject to confinement in a particular place for a not negligible period of time; and

(b) the cared-for person has not given valid consent to their confinement.

(1B) For the purpose of paragraph 2(1A)(a), a cared-for person is subject to confinement where—

(a) the cared-for person is prevented from removing himself or herself permanently in order to live where and with whom he or she chooses; and

(b) the dominant reason for the deprivation of liberty is the continuous supervision and control of the cared-for person, and not treatment for their underlying condition."

Baroness Tyler of Enfield (LD): My Lords, I draw the attention of the House to my interests in the register. Concern has been raised repeatedly throughout this Bill, both in this House and outside, that there is no statutory definition of what constitutes a deprivation of liberty. That is what this group is about. My amendment is designed to provide practitioners, families and the cared-for person with an agreed interpretation that is unambiguous as to where deprivation of liberty is enacted and a clear sense of understanding of to whom it should actually apply. Including a definition in the Bill would allow guidance and information to be developed for families and practitioners to allow them to make what I would call a real-world assessment of whether the care arrangements they are putting in place when their loved one lacks capacity amount to a deprivation of liberty. In many cases this will allow them to steer clear of depriving someone of their liberty, quite often unwittingly, because the line would be that much clearer.

I welcome the report on the Bill from the Joint Committee on Human Rights which was published on 26 October. It addresses clearly the need for a definition of the term "deprivation of liberty", and of course raised other concerns as well. Unless we have a clear definition which is supported by parents, families will be at risk of the courts interpreting their personal situation in different ways. I know from the many briefings and correspondence I have received that this is strongly supported by the sector. Having looked at the report, noble Lords will be aware that the definition I have proposed is derived from the JCHR report. I believe that in fact two definitions are offered in the report and later we will hear from the noble and learned Lord, Lord Woolf, who is proposing the other definition. I am sure that he will put forward good arguments for doing so, given that he was a very distinguished member of the Joint Committee.

I have gone for the definition that I am proposing because I think it is simpler and easier. I think it best captures the recommendations made by the noble and learned Baroness, Lady Hale, in the Cheshire West case. She was clear that a definition was necessary in future primary legislation. As we have noted many times during the passage of this Bill, the test, which was referred to in the Joint Committee's recommendation, references the case taken by the noble and learned Baroness, Lady Hale, Cheshire West and Chester Council v P in 2014. The key sentence she noted was that the person concerned,

"was under continuous supervision and control and not free to leave".

Unless we have a statutory definition in the Bill, I strongly suspect that the question of what actually constitutes a deprivation of liberty will continue to have to be determined by reference to Article 5 of the ECHR and indeed will continue to come back to court for further clarification.

I shall say briefly that while it would be possible to include a definition in the code of practice rather than in the Bill itself, I do not think that that will satisfy a court. The best form of protection would come from the inclusion of a definition in the Bill itself. We are looking at this issue again in primary legislation partly because recent court rulings, including the Cheshire West case which I have already referred to, have radically changed who deprivation of liberty applies to and, frankly, have substantially increased the number of people it covers; hence the reasons we are here.

I hope very much that the Minister, who has listened carefully and, if I may say, responded constructively to many of the arguments that have been put forward both in Committee and since, will have something positive to say on this point. I recognise that the definition could do with some more work and I am sure that the Bill team could look at it and come back at Third Reading. However, if there are any fears of unintended consequences, my view is that a well-drafted definition will pose considerably less risk than having no definition at all, which leaves patients and practitioners exposed to different legal interpretations and subsequent consequences.

I conclude by saying that without a definition in the Bill, any future interpretation by the courts could lead to a wide range of outcomes for cared-for people and their families which could undermine the very essence of the new LPS scheme. That is what this Bill is all about. It seeks to provide clarity, but without a definition it simply will not do so. I beg to move.

4.15 pm

Lord Woolf (CB): My Lords, I am very grateful for the expectation about my contribution to this debate, which the noble Baroness, Lady Tyler, just referred to. I am only too conscious that I shall disappoint her, but I will do my best.

First, I must disclose an interest. I have a relative whom the Bill may affect. I am also a member of the Joint Committee on Human Rights. The noble Baroness, Lady Tyler, was quite right in everything she said about the committee's report, which has something

useful to say in connection to this. I hope the Minister will agree with that. I see him nodding his head and telling me that it is so.

I shall focus on the second amendment proposed by the committee, which supplements the one moved by the noble Baroness, Lady Tyler. It is designed to limit the unintended harm caused as a consequence of the Cheshire West case, which is not easy. That harm takes two forms: first, it has resulted in a huge increase in the number of people who will be caught by the Bill; secondly, it means that people who do not need the precise benefits normally available to those in their position are dragged into that protection to their disadvantage.

I shall try to describe the persons concerned. They are people who have problems that would fall within the context of the Bill, but are residing, possibly in their home or some other institution, somewhere where they are perfectly content and well looked-after. There is no problem in their case. I do not think it necessary to expand the burdens on the Treasury caused by people in their condition by including them, unless it can be shown that there is a real necessity. Although the language of the amendment proposed by the committee, to which I am speaking, is complex, if one reads it carefully it does not give rise to any difficulties, but it could have the ameliorating effects to which I have referred. For those reasons and those the noble Baroness has given, I commend this amendment.

Baroness Finlay of Llandaff (CB): My Lords, I should like to comment on these amendments. Before I do that, I thank the Minister on behalf of everyone for listening, as well as for his willingness to meet Peers and to move on the things that had caused enormous concern to many of us.

I have a couple of concerns regarding these amendments. I commend the noble Baroness, Lady Tyler, and the noble and learned Lord, Lord Woolf, for trying to get us back to a definition. I completely agree that if we do not have a definition, the matter will go to court and we will end up back in a circle that we do not want to be in. The problem I see is the non-negligible period, which will be really difficult to define. If somebody is in a confined space for even 10 minutes or a quarter of an hour, that could be absolutely terrifying for them and completely unjustifiable. We have a difficulty in trying to use time as a measure, but I understand why it is there as well.

In his amendment, the noble and learned Lord, Lord Woolf, certainly includes the principle of consent, which means that there should be information that the person has capacity and that their care and treatment are voluntary. I was a little worried, however, that his proposed new paragraph 2(1B)(d) in the amendment, which would require two clinicians to confirm in writing, rather ran counter to the principles set out in Part 1 of the Mental Capacity Act itself, Section 1(2) of which states:

"A person must be assumed to have capacity unless it is established that he lacks capacity".

It almost turns itself on its head if you must have somebody to verify that they have capacity.

I note that in his letter to us, the Minister stressed the importance of supporting liberty as much as possible and valid consent wherever possible. Would the Minister be prepared to say that we can work on this between now and Third Reading? If we can reach a definition that seems right by then, we will have done the whole community a great service.

Baroness Thornton: My Lords, I thank the noble Baroness, Lady Tyler, and the noble and learned Lord, Lord Woolf, for bringing forward the amendments. I can see that the Government have a decision to make about which way to go on them.

Listening to the Joint Committee on Human Rights is always a good idea. We discussed a statutory definition during the previous stage of the Bill, when the Minister repeated that he,

"should like to take some time between now and Report to consider the opinion expressed by noble Lords and in the report of the Joint Committee about the benefits of a statutory definition".—[*Official Report*, 5/9/18; col. 1849.]

I understand why the noble Baroness, Lady Finlay, is thanking the Minister already but it may be slightly premature. I know what she means, but let us wait until the end of the next day and a half. It is important that the Minister shares with us now where that thinking has led him.

Lord O'Shaughnessy: My Lords, I am more than happy to do so. I express my gratitude to the noble Baroness, Lady Tyler, and the noble and learned Lord, Lord Woolf, for tabling their amendments and for precipitating this incredibly important debate. As has been set out, Amendment 2, moved by the noble Baroness, Lady Tyler, states that the liberty protection safeguards apply only to,

"arrangements which give rise to the deprivation of the cared-for person's liberty",

when,

"the cared-for person is subject to confinement in a particular place for a not negligible period of time … and … the cared-for person has not given valid consent".

The amendment explains that someone is confined when they are,

"prevented from removing himself or herself permanently … and … the dominant reason for the deprivation of liberty is the continuous supervision and control of the cared-for person, and not treatment for their underlying condition".

Amendment 4, tabled by the noble and learned Lord, Lord Woolf, also states that a deprivation of liberty for the purposes of liberty protection safeguards is where,

"the cared-for person is subject to confinement in a particular place for a not negligible period of time … and … the cared-for person has not given valid consent to their confinement".

The amendment goes on to define "valid consent", stating in particular that valid consent has been given when,

"the cared-for person is capable of expressing their wishes and feelings … has expressed their persistent contentment with their care and treatment arrangements … there is no coercion involved in the implementation of the … arrangements",

and it is,

[LORD O'SHAUGHNESSY]

"confirmed in writing by two professionals, one of whom must not be involved in the implementation of the cared-for person's … arrangements".

The intention behind the amendments is to create a statutory definition of the deprivation of liberty, as has been discussed. I note that the amendments were influenced by the work of the Joint Committee on Human Rights, which I both applaud and welcome. We are aware, and the Law Commission's consultation confirmed, that there is real confusion on the ground over the application of the so-called acid test and determining whether a person has been deprived of their liberty. In some cases, that has led to blanket referrals and applications for authorisations being made where there may be no deprivation of liberty at all.

As the noble Baroness, Lady Thornton, pointed out, I promised to think about this issue and we have given it a great deal of thought. Like other noble Lords, we have reached the conclusion that deprivation of liberty should be clarified in statute. However, we want to get the definition right and make sure that it is compatible with Article 5 of the ECHR. I agree that the aims of the amendments are laudable. As I said, the Government support providing clarity in the Bill. However, as I am sure all noble Lords appreciate, this is a complex and technical issue, and we have to make sure that any amendment is compliant with Article 5.

The noble Baroness, Lady Thornton, pointed out one particular concern around the use of the term "not negligible … time". The point I want to make is much more technical, but it serves to introduce how difficult this issue is. I hope noble Lords will bear with me as I explain it; it is incredibly important. We believe that the amendments tabled by the noble Baroness, Lady Tyler, and the noble and learned Lord, Lord Woolf, would not have the intended effect of defining deprivation of liberty, but would instead limit the application of liberty protection safeguards to those who fall within the respective definitions.

Section 64(5) of the Mental Capacity Act defines "deprivation of liberty" as having the same meaning as in Article 5. The definitions in the amendments would not change this. Deprivations of liberty that fall outside those definitions would still be deprivations of liberty under Article 5, and would still need to be authorised in accordance with Article 5. However, because the liberty protection safeguards would not apply, authorisation would instead need to be sought in the Court of Protection, which, as we know, can be a cumbersome and distressing process for persons and their families, and would have significant cost implications for public bodies and the court system

Furthermore, the amendment tabled by the noble and learned Lord, Lord Woolf, although closely resembling the proposal put forward by the JCHR, also seeks to determine what valid consent would mean, and we are worried that that would not work in the way intended, because the definition is very broad. Its consequence could be that a significant number of people currently subject to DoLS authorisation would be caught by the definition and excluded from the liberty protection safeguard system, and tens of thousands of people might need to seek authorisation from the Court of Protection. Again, I do not believe that anyone would want to see that outcome. I notice that the noble and learned Lord is shaking his head, so clearly there is some disagreement on this point. I use it, however, to illustrate that there is a concern that we get this right.

Lord Woolf: I was shaking my head because I do not want to see what the Minister suggested might be a consequence.

Lord O'Shaughnessy: I will come to that. I am using that technical point to illustrate that there are concerns with the amendments as laid. We recognise the importance of this issue and the strength of feeling on it in the House. As I have said, I see merit in the argument for having this defined in statute, and I am sympathetic to that point of view. I can therefore give noble Lords some assurance, and confirm today not only that we are working on this matter, but that we intend to bring forward an amendment in the Commons to give effect to a definition. We want to work with all noble Lords and other stakeholders, and of course the JCHR, to ensure that we can table an effective amendment that achieves our shared aims and gains the level of consensus that we all want to achieve, and that we shall be able to lay it and have it agreed during the Commons stages of the Bill. I hope that in providing that commitment, I have been able to reassure noble Lords of the strength of our intentions. We absolutely want to do this, and we want to get it right. I still think it will take a bit more time, but I know that, working together, we can achieve that.

Baroness Barker (LD): I thank the Minister very much for his response to the amendments tabled by my noble friend Lady Tyler and the noble and learned Lord, Lord Woolf. I acknowledge that he has listened to the arguments made in this House over the past few weeks. I understand why he cannot make a commitment to come back within the timescale of the Bill in this House. This is an important matter, and many different people have a great deal of expertise, practical knowledge, legal knowledge and so on, to put into the process of coming up with a definition, which will be extremely difficult.

Would the Minister therefore be so good as to write to noble Lords as soon as he can, setting out the timetable of the work the department intends to undertake and the people they intend to involve in discussions, which I hope will include practitioners, stakeholders and academics, medical experts and so on, as well as Members of your Lordships' House who have reviewed the operation of the current law and found it deficient? Could he do that as soon as possible so that, when we come to consideration of Commons amendments when the Bill comes back to this place, we will be able to give this subject the attention it merits rather than the rather perfunctory consideration that we usually have to give to arguments that come back to us within a very technical parliamentary framework?

4.30 pm

Lord O'Shaughnessy: I am happy to give that commitment, bearing in mind that there is always uncertainty about the timing of Bills' progress but, in

terms of the work we will do to come up with the definition, I am more than happy to do that and to include estimates—I see the Chief Whip coming into the Chamber—of the timing of the further parliamentary stages.

Baroness Tyler of Enfield: I thank the Minister for his full and helpful reply. This has been a good and important debate to start this afternoon's debate. I am grateful to the Minister for agreeing to look at this. He has twice confirmed the Government's position, which is that it is important that the definition is clarified and contained in the statute. That was the purpose of my amendment. He is right to say that this is complex and technical and that we need to get it right. I fully understand that that needs a bit of time. Although at one stage I hoped that this might be able to come back at Third Reading, I fully understand why he said that the Government will lay an amendment in the Commons stages, and I support my noble friend Lady Barker in her request for a letter setting out the timescale of the work and who will be involved. I beg leave to withdraw the amendment.

Amendment 2 withdrawn.

Amendment 3

Moved by ***Baroness Meacher***

3: Schedule 1, page 5, line 33, at end insert—

"(1A) This Schedule does not apply to deprivation of liberty processes in a domestic setting, arrangements for which must be undertaken under the Care Act 2014.

(1B) This Schedule does not apply to deprivation of liberty processes where a dominant reason for the deprivation of liberty is the treatment of an underlying condition covered by the Mental Health Act 2007, except in exceptional circumstances."

Baroness Meacher (CB): My Lords, my noble friend Lady Murphy, who added her name to this amendment, apologises because she unfortunately cannot be here as she is not in the country.

Like other noble Lords, I thank the Minister for really listening to the serious points that have been made by noble Lords across the House and for taking things forward substantially since we started this work.

The two issues that I want to raise are, first, that it may be unhelpful to include within the LPS system cases where there may be a deprivation of liberty in a domestic setting and, secondly, that it may be helpful to all concerned if the Bill makes it clear as far as possible—and I know this is difficult—where the boundary lies between the Mental Health Act and the Mental Capacity Act. I will discuss these issues in turn. Their only common feature is that they concern two groups of people whose deprivation of liberty issues might best be dealt with outside this Bill.

Turning to the question of people in domestic settings, we should probably start with the Supreme Court's judgment in P v Cheshire West and Chester Council, which has been referred to many times, which set the acid test of when a deprivation of liberty is occurring. Importantly, it lowered the threshold so that deprivations of liberty can also occur in domestic settings. This is absolutely right. It is perfectly possible to envisage cases where abusive relatives may be depriving a family member of their liberty in an inappropriate, disproportionate and even cruel way. A system to deal with such situations is absolutely necessary—I am not questioning that for one minute—and that system must ultimately have a process involving access to a court to determine disputes. The question is what system is appropriate for such cases and how far it can go to try to avoid references to court wherever possible, because these things can be very distressing for relatives and others involved.

Your Lordships will be aware that some informal carers consider the LPS system to be too expensive and an intrusion on family life. My noble friend Lady Murphy and I are—I was going to say "inclined" to agree with them, but we actually very much agree with them. Which system would provide a proportionate and effective protection of the liberty of people in domestic settings is what this amendment is all about.

The British Association of Social Workers, which represents the best interest assessors and others involved in deprivation of liberty cases at present, proposes that a new statutory definition could exclude home situations and domestic arrangements from a deprivation of liberty, thus removing the current expensive practice whereby the Court of Protection has to authorise these to make them lawful. In this scenario, the safeguarding provisions of the Care Act 2014 would be drawn on to protect people's liberty within domestic settings.

We hope that between the Lords and Commons stages of the Bill—I do not think anything can be done before Third Reading—the Government will consult on this question and come up with very clear amendments to this Bill and to the Care Act 2014 regulations in order to establish a proportionate and effective system to deal with liberty issues in domestic settings. Both will be necessary.

I will give an example to clarify the real importance of proportionality. Under the safeguarding procedures, an 85 year-old caring for her 89 year-old husband with severe dementia, who feels she can manage only if her husband stays in one room, will have a stream of people calling to assess the needs and potential risks which might be involved. Nine different people may be coming to the house—the poor woman does not know who they are or what they are there for. In our view, she should not have to deal with yet more bureaucracy if it can possibly be avoided. It can be avoided if the safeguarding professionals are able to assess the deprivation of liberty issue alongside—and within the same visit as—the other assessments. The Government will need to consider the definition of "domestic setting" and to determine whether this includes supervised living arrangements, which, of course, are not care homes. Again, that is a matter on which we need to defer to the Government to work out between the two Chambers.

I turn now to the dividing line between the Mental Health Act and the Mental Capacity Act, as amended by this Bill. Unlike DoLS, which are always based on

[Baroness Meacher]
the best interests of the individual, LPS may result in a person being deprived of their liberty, primarily where there is a risk of harm to others. In such cases, the best interests of the others who may be harmed must be taken fully into account, even at the risk of limiting the liberty, and indeed the best interests, of the individual who may cause the harm—one wants however to avoid that as far as possible. The two groups who come to mind are those with Lewy body dementia, and a small number of people suffering from autism. Sub-paragraph (1B) of our amendment would result in such cases being assessed under the Mental Health Act apart from in exceptional circumstances—I was persuaded that that was an important sub-paragraph to include within any amendment. These assessments would be done by people with experience of assessing risk resulting from disorders of the mind. They would be well equipped to assess deprivations of liberty and their necessity in these particular cases.

In my discussions with Sir Simon Wessely, who is leading the Mental Health Act review, and quite separately in a meeting with two of Sir Simon's colleagues on the review, I came away clear that it would be helpful to flag up the need for further work on this issue. The Law Commission had proposed that,

"risk of harm to others",

should be an additional possible reason for detention under their "necessary and proportionate" test, and this was explicitly written into their draft Bill. Interestingly, the Government omitted the relevant text from their Bill.

Recently, the Government said in passing that "risk to others" will be a basis for detention, but this will be set out in the code of practice. I hope the Minister will agree that this really is unsatisfactory, unless the code of practice sets out that detention on grounds of risk to others will not be dealt with in this Bill. One could probably do that in the code of practice, but not the opposite. Is that in fact what the Government have in mind?

This is the issue where the outcome of the Mental Health Act review could relate directly to this Bill. The review reports on 12 December, and no doubt the Government will know the conclusions some days before that. I urge the Minister to try to ensure that work is done to produce an amendment to this Bill, clarifying the position of these relatively small groups of people who might best be assessed under the Mental Health Act rather than under this legislation.

The issue of stigma was raised earlier, but even the Royal Family are trying to address stigma with regard to mental illness. One should not put groups of people under the wrong legislation as a method of dealing with stigma, as it will not deal with it.

As the Minister made clear in our meeting, the best interests test is clearly set out in the Mental Capacity Act, and that carries forward into the Bill. That is absolutely right and important, but this is the most powerful argument for excluding "risk to others" as a criterion for deprivation of liberty under the Bill. These two situations—deprivation of liberty issues in domestic settings and deprivation of liberty due to a risk to others—require an appropriate judicial body for determining challenges to authorisations of deprivation of liberty. The judicial body needs to be accessible to enable participation in the proceedings of the person concerned, the speedy and efficient determination of cases, and the desirability of including medical expertise within the panel deciding the cases, when that is necessary—but not when it is not, which is important.

I hope that the Government will consider widening the scope of mental health tribunals to include a limited number of mental capacity cases as discussed here. The tribunals could be named mental health and capacity tribunals. In many cases, the judge of such a tribunal could determine the case on the papers without the involvement of the full tribunal. Sir Simon made the point to me that we do not have sufficient psychiatrists in this country, and we do not want a great backlog to build up simply because there are not the people to do the job. He seems to think that we have an abundance of judges—that would have to be checked; I do not know about that. These two important issues have not been given adequate attention. I beg to move.

Baroness Thornton: My Lords, we on these Benches recognise that the noble Baronesses, Lady Meacher and Lady Murphy, have been persistent in raising these issues throughout the course of the Bill. They are absolutely right that these issues have to be addressed and that they are not covered adequately; the briefings we have had suggest that they are not. The reason that possibly we have not been able to develop enough of a head of steam on this is that we have been focusing on other issues in the Bill, which we will come to. The Minister may not be able to resolve this immediately, but I hope that he will recognise its importance and bring forward a solution.

Lord O'Shaughnessy: I express my gratitude to the noble Baronesses, Lady Meacher and Lady Murphy, for tabling this important amendment. As the noble Baroness, Lady Meacher, pointed out, the effect of the amendment would be to ensure that liberty protection safeguards do not apply to a deprivation of liberty in a domestic setting, and that these should be dealt with under the Care Act. It further states that the schedule does not apply where the dominant reason for the deprivation of liberty of a person is for an underlying condition under the Mental Health Act.

The effect of the amendment as tabled would mean that people deprived of their liberty in domestic settings could not have that authorised through the liberty protection safeguards or the Court of Protection. Instead, their case would fall to be dealt with under the Care Act 2014. I appreciate that the intention is that in most cases deprivation of liberty would be avoided through care planning and safeguarding under the Act. But nevertheless, in some cases there will need to be an authorisation of a deprivation of liberty in domestic settings.

I absolutely sympathise with the noble Baroness's intention to reduce wherever possible intrusions into family life; as the noble Baroness, Lady Thornton, pointed out, that has perhaps not been given sufficient time during the passage of the Bill so far, although it is nevertheless a significant issue. However, we have a

concern with regard to the amendment as laid in that the Care Act does not in itself provide adequate Article 5 safeguards, and to rely on such a process could result in a real risk of incompatibility with convention rights.

4.45 pm

We are also concerned that there might be individuals who would fall through the gaps, as they would be excluded from liberty protection safeguards but not qualified to receive care under the Care Act. These include, for example, those who are receiving NHS continuing healthcare in the community, those aged 16 and 17, people in Wales, where the Care Act does not apply, certain cases of self-funders and those who fall below the national eligibility criteria. We would obviously not wish to be in the position of excluding vulnerable people from Article 5 safeguards. I know that this in part relates to the previous group of amendments in its attempt to provide a definition, and I will come back to this point in a minute.

The noble Baroness also pointed out that the effect of her amendment was to draw a firm line between the Mental Capacity Act and the Mental Health Act. My understanding is that the amendment seeks to achieve this by providing that, where the dominant reason for the deprivation of liberty of a person is their treatment under the Mental Health Act, then the liberty protection safeguards do not apply. In all cases under the Bill as it stands, a person detained in hospital under the Mental Health Act is excluded from the liberty protection safeguards. In other cases, if a person is objecting to medical treatment, they cannot be placed under the liberty protection safeguards. The position set out in the Bill largely replicates the status quo of the existing interface between the Mental Capacity Act and Mental Health Act.

The reason for not reforming the interface, as the noble Baroness knows, is that it is currently being considered by Sir Simon Wessely through the Mental Health Act review. As I promised on the last day in Committee, I have met with Sir Simon Wessely to discuss his review and to talk about the particular issue of the interface. Without going into more detail than I am allowed to about his intentions—and I have not yet seen the conclusions of the review—there seems to be some question about the scale of that interface and how many people would be affected, given his ideas about how to reform the Mental Health Act. That just underlines the importance of waiting and not prejudging the consequences of that review before thinking about how we should address that interface in this Bill. However, because it is intended that the review will be published on 12 December, I am reassured that Parliament will have the opportunity to return to this issue during the Commons stages. I would like to reserve our opinion on dealing with this topic until we have had a chance to consider the conclusions of that review, bearing in mind that this Bill gives us a vehicle to act if we believe that it is the right thing to do to address this particular issue. I think the noble Baroness has signalled that she would be content with that kind of approach, because we are waiting for those conclusions.

Nevertheless, returning to the point about domestic settings, as I committed to in the last grouping, we will bring forward an amendment to address the issue of the definition of a deprivation of liberty when the Bill moves into the other place. I will make sure that the process of defining and the amendment give proper consideration to the consequences of a deprivation of liberty in a domestic setting. I hope it reassures the noble Baroness that we will explicitly consider this. I know that this will be a topic of great interest in the House of Commons, where there will be individual MPs whose constituents are writing to them on these issues. It is clearly going to be a hot topic when we come to that point. Therefore, as we move forward with a programme of work that I am going to set out in letters to noble Lords, I will ensure that the issue of deprivation of liberty in a domestic setting is considered through the process of defining a deprivation of liberty.

I hope that with that reassurance, as well as the reassurance that we will be able to consider the consequences of Sir Simon Wessely's review, the noble Baroness will feel adequately reassured that these issues are being actively considered and that we will have the opportunity to do something about them. I hope that she will therefore feel able to withdraw her amendment.

Baroness Meacher: My Lords, I thank the noble Baroness, Lady Thornton, for her helpful comments and the Minister for his considered and careful response and for his commitment to give really serious consideration to both of these issues in the gap between the deliberations of this House and those of the other place. I sincerely want to thank the Minister for all that, and on that basis I beg leave to withdraw the amendment.

Amendment 3 withdrawn.

Amendment 4 not moved.

Amendment 5

Moved by ***Lord O'Shaughnessy***

5: Schedule 1, page 6, line 2, leave out "18" and insert "16"

Lord O'Shaughnessy: My Lords, as we move on to this group of amendments, which deals with the extension of liberty protection safeguards to 16 and 17 year-olds, I thank all noble Lords for reminding us from Second Reading onwards of the absence of this provision when compared with the Law Commission's report. Of course, we had accepted in principle that we wanted to move on this issue, but we needed to resolve some complexities about how it should apply. We have now done so and have brought forward amendments. I am grateful to all noble Lords, stakeholders and others who have contributed to this process.

Let me just outline in more detail what these specific amendments cover. Amendment 5 extends the liberty protection safeguards system to 16 and 17 year-olds.

Amendments 20 and 22 take into account the different legislative arrangements already in place for cared-for people aged 16 to 17. This group of young people are likely to have either an education, health and care plan—an EHCP—in England, or an individual

[Lord O'Shaughnessy]
development plan—an IDP—or statement of special educational needs in Wales. Amendment 21 provides that, for those cared for in the community, the same local authority that maintains their plan will act as the responsible body for liberty protection safeguards. If the person has neither of these plans, the responsible body will be the local authority that is providing accommodation for the person, or otherwise named in a care order; in any other cases, it will be the local authority for the area in which the arrangements for that young person are mainly undertaken. This provision aims to provide continuity for the person and to make the process less burdensome for them and their family. The local authority in these cases will know them best and have more knowledge of their circumstances and will therefore be able to make sure that the arrangements are the most appropriate.

Those aged between 18 and 25 and in the scope of LPS may also have an education, health and care plan or an individual development plan. Amendment 19 clarifies the responsible local authority for this group. Amendments 7 and 18 state that the responsible body for those aged 18 to 25 should be the same local authority that maintains the education, health and care plan or individual development plan. This will provide clarity and consistency in their arrangements too.

Amendment 22 has the effect of clarifying who the responsible local authority is if none of the other specific provisions applies for those aged 16 and 17. Those 16 and 17 year-olds who are cared for mainly in hospital settings will have the same responsible body as those who are 18 or over, which is the NHS trust, local health board or CCG.

Amendment 23 defines education, health and care plans and individual development plans.

Amendment 134 makes provision in Wales for the transition to the new system, to support children and young people with special educational needs or additional learning needs. We are continuing to consider, in conjunction with the Welsh Government, whether all the cohorts in Wales are captured under the current amendments. If there is a need to do so, we will come forward with new amendments in the other place in order to capture other cohorts, if they are identified.

Although liberty protection safeguard authorisation records will be stand-alone documents, we have listened to advice from noble Lords and will make it clear in the code of practice that information in the LPS authorisation that is relevant to meeting a young person's special educational needs or additional learning needs should be included in their EHC plan or IDP—sorry for the acronyms.

Over recent months, we have worked together across government and with stakeholders to develop these amendments so that the new system complements and strengthens existing safeguards for 16 and 17 year-olds who lack capacity and who must be deprived of their liberty for care and treatment purposes. I hope that these government amendments address the concerns raised by noble Lords. I thank them again for raising them and for contributing to the development of these amendments. I beg to move.

Lord Touhig (Lab): My Lords, we have had some very useful and, more often than not, constructive engagement with the Government during the passage of this Bill. The success of our collaborative working is certainly demonstrated in these amendments extending the provisions to 16 and 17 year-olds.

In the very early days of its thinking on this point, the Law Commission commented on the poor knowledge among health and social care professionals about how the Mental Capacity Act 2005 applied to 16 and 17 year-olds. A subsequent report stated:

"There are likely to be a range of issues that are specific to young people that will need to be included in guidance and/or codes of practice".

The report went on to argue the need for dedicated training for professionals working with this age group and highlighted areas such as children's services, mental health services, children and adolescent mental health services and adult mental health services, as well as schools. As an aside, my noble friend Lady Massey of Darwen is currently writing a report for the Council of Europe addressing the health needs of adolescents in Europe, and I look forward to reading it.

On this very important matter, the Minister and his team should be congratulated on recognising that 16 and 17 year-olds are vulnerable to slipping through the gaps that the Bill would create for them if they were not included. This is a vitally important change to the Bill—many of the stakeholders consulted listed this as one of their main concerns. Extending the age to cover 16 and 17 year-olds will ensure that some of the most vulnerable young people can access adequate help and be empowered. On this side, we strongly support the amendments.

Amendment 5 agreed.

Amendment 6

Moved by ***Lord O'Shaughnessy***

6: Schedule 1, page 6, line 4, leave out "is of unsound mind" and insert "has a mental disorder"

Lord O'Shaughnessy: My Lords, the amendments in this group have been tabled to remove the references to "unsound mind" from the Bill. As was made very clear in discussions at Second Reading, in Committee and outside this House, we all agree that the expression "unsound mind" is outdated and, as the noble Baroness, Lady Murphy, reminded the House, it is not clinically relevant. Noble Lords have made it clear that they want to change this language and that it should not be used in the Bill.

It is worth remembering that "unsound mind" is the language used in Article 5 of the ECHR. It was included in the Law Commission's draft Bill and we brought it over to our Bill because we were concerned about creating a gap in which some people who were entitled to Article 5 safeguards would not have access to the liberty protection safeguards and would have to have their arrangements authorised in the Court of Protection. The Government took the view that it would be unfair to deny people access to the protections provided by the liberty protection safeguards, particularly

as we know court processes can be cumbersome for them and their family. However, noble Lords and the Joint Committee on Human Rights recommended that further thought be given to replacing "unsound mind" with a medically and legally appropriate term and this is what we have done.

The Government have reflected on the debate in this House, particularly the expert legal insight provided by the noble and learned Lord, Lord Woolf—who is not in his place at the moment—whom I thank. Having done this, we are comfortable that we can use alternative language that is unlikely to create a significant gap. If people do fall out of this definition, they will still have recourse to the Court of Protection to authorise deprivations of liberty, although we expect the number of these cases to be very few. To achieve this, Amendment 6 removes the reference to "unsound mind" from the arrangements to which the liberty protection safeguards apply and replaces it with "mental disorder". Amendment 12 provides that "mental disorder" has the same meaning as under Section 1(2) of the Mental Health Act which is,

"any disorder or disability of the mind".

This is also consistent with the approach under the current DoLS system and is therefore well understood by practitioners.

We considered other approaches, such as using the definition of a lack of capacity in Section 2 of the Mental Capacity Act, which refers to an,

"impairment of, or a disturbance in the functioning of, the mind or brain".

However, we concluded that this definition was too broad for the purposes of Article 5(1)(e), which permits the deprivation of liberty only on the basis of unsound mind. For example, the Section 2 definition could mean that people who are unconscious or have a brain injury, without psychiatric symptoms, might be able to be deprived of their liberty under the liberty protection safeguards scheme.

Amendment 12 removes the definition of "unsound mind" from the Bill. The noble Baronesses, Lady Thornton and Lady Jolly, have tabled Amendments 25 and 50, which instead use the phrase,

"has disorder or disability of the mind".

These words are also taken from the definition in the Mental Health Act and I believe the amendments are intended to have the same effect as the Government's. Now that the Government have moved on this, I hope they will feel that to be the case. Finally, Amendments 14, 26, 51, 131, 132 and 133 update other parts of the Bill to reflect the removal of "unsound mind" and the substitution of "mental disorder".

I end by thanking noble Lords for the robust debate on this issue. I have very much had my mind changed on this and give reassurance that people will not fall through the gap. We have got to a good position, which provides the kind of protection that we want while also getting rid of a phrase with connotations that none of us is happy with. On that basis, I beg to move.

5 pm

The Deputy Speaker (Baroness Garden of Frognal) (LD): My Lords, I need to inform the House that, within this group, Amendments 25 and 26 appear to be alternatives. Amendment 26 will be moved only if Amendment 25 is withdrawn or disagreed to.

Baroness Tyler of Enfield: My Lords, I support this group of amendments. One or two offer a slightly different definition or slightly different words but the key point for me, having moved a similar amendment in Committee, is that we have now removed the phrase "unsound mind" from the Bill. I know this is welcomed here and will be hugely welcomed by many in the sector. It means we will get rid not only of a very old-fashioned and stigmatising term but one on which there were also concerns—as I understood from my conversations with the Royal College of Psychiatrists—that it had no real clinical meaning. The term "mental disorder"—or the few more words added by other amendments—not only brings us in line with the Mental Health Act, which is good, but I am advised that it will also help to provide diagnostic clarity. That has to be a good thing too. I support this group of amendments.

Baroness Watkins of Tavistock (CB): My Lords, I support this group of amendments and I am delighted that the Minister has had his mind changed. Not using this phrase will change how people feel about their relatives who may be suffering from mental disorders. I am also optimistic that, in the longer term, using such modern nomenclature will make mental health professions more attractive to young people.

Baroness Finlay of Llandaff: My Lords, I also welcome these amendments; removing "unsound mind" is a major step forward. I have a couple of questions for the Minister and I hope he can clarify. I may have misheard him but I understood him to talk about head injury. It would be helpful if he could clarify that he was referring to acute head injury—or acute brain impairment of any sort—as opposed to long-term damage such as frontal-lobe damage, which can happen when you have had a major brain injury. This can result in very long-term problems and difficult behaviours, which may mean that people currently need to be assessed as subject to deprivation of liberty. Could he clarify that we are not discounting a whole group of people who, it is generally felt, benefit from being properly assessed and safeguarded?

I would also like confirmation from him on another group. In January 2015, the then Mental Capacity Act deprivation of liberty safeguards policy lead in the Department of Health wrote out quite widely. There had been a concern about people who were nearing the end of life, including palliative care patients and patients in hospices. It was made clear in this letter that if somebody had consented to a care package and then went on—as part of their disease process when they were dying—to need some restrictions, and possibly to be moved to another place of care, that would not fulfil the acid test as such; neither would it in the case of people who were being nursed in a side room who

[Baroness Finlay of Llandaff]
were not under continuous supervision and control. The reason was that, in palliative care cases, there is often a time when the family cannot cope as the patient becomes unconscious, is moved to a hospice or develops another condition that had not been anticipated. It would be an inadvertent consequence if this letter from January 2015 no longer stood. It has been important and has made care easier. It was following this letter that we were able to change the regulations for what had to be referred to a coroner. That made a major difference, because families found it terribly traumatic to find a relative subject to a deprivation of liberty safeguard having to be referred to a coroner. I simply seek clarification on those two issues, but I in no way question the importance of removing "unsound mind" from the Bill. I hope this is the beginning of us seeing the end of that term, which is stigmatising.

Baroness Hollins (CB): My Lords, I welcome the replacement of "unsound mind", but I ask the Minister to consider adding a safeguard to ensure that no one has their liberty denied because of a mental disorder without first being seen by a qualified doctor. It is essential that individuals are assessed for a mental disorder and not another condition presenting as a mental disorder, such as delirium or the side-effects of medication, which are common among older people. It is important that consideration is given to whether the disorder can be managed without depriving the person of their liberty. This requires assessment not only of their mental state but of their past and current physical health and medication. The assessment is a core part of this process. It has great significance because it relates to the deprivation of a person's liberty. Who can carry this out should be stipulated in the Bill rather than in a code of practice. I ask the Minister to reconsider bringing forward an amendment to add this requirement to the Bill.

Lord Hunt of Kings Heath (Lab): My Lords, I support the noble Baroness on the assessments. The Minister's amendment is very welcome, but clearly the assessment is crucial. My understanding is that in previous debates, as the noble Baroness suggested, he said that the code of practice will set out which competencies will be needed to carry out this assessment. Like the noble Baroness, I ask him to consider, perhaps between now and Third Reading, whether this might be better put in regulations than in the code of practice. I always worry a bit about the use of "competencies". It is a word now used in many recruitment processes, but what exactly does it mean? Will it be done by a registered medical practitioner with sufficient expertise in this field? If not, what is the justification? The change the Government have made is enormously welcome, but it is very important that we are confident the assessment will be carried out appropriately.

Lord Touhig: My Lords, this group of amendments is most welcome. The term "unsound mind" is offensive in the extreme and historically has been used as a form of abuse to demean the dignity of the person to whom it is applied. These amendments mean that this old-fashioned term will no longer be in the Bill and that a phrase with no clinical meaning is rightly removed. Using the same term as the Mental Health Act, "mental disorder"—this link is explicitly made by the Government in Amendment 12—provides better diagnostic clarity.

Amendments 25 and 50 in the names of my noble friend Baroness Thornton and the noble Baroness, Lady Jolly, change "unsound mind" to,

"any disorder or disability of the mind".

The Minister responded to those points in his opening speech. This is the language currently used under the DoLS in the Mental Health Act and it is to be welcomed.

Perhaps I may share with the House my personal experiences. My late mother suffered two nervous breakdowns in her life. One occurred before I was born, when she was put into an institution, where I do not think she was well treated. Later, she suffered a further breakdown when I was 16 and I had to take the lead, coping with and co-ordinating help and support for her, my father and our family. The consequences of her breakdown that I witnessed were traumatic not only for my mother, who was a loving, kind and thoughtful individual, but for our family, who witnessed times when she seemed to grow away from us.

My mother made a recovery and we all came through it, thanks to the devotion and understanding of our family doctor, our wider family and friends. However, our family experience has given me an understanding of some of the consequences of mental illness for individuals and their families. Families who experience what mine went through need support and understanding to cope, which is why I welcome the amendments.

I have said that the term "unsound mind" is used to cover many things. It is one that personally I find offensive, and I rejoice that those words are being removed from the Bill.

Lord O'Shaughnessy: I thank all noble Lords for their support for these amendments. I also thank the noble Lord, Lord Touhig, for sharing with us that story. It brings into sharp perspective the consequences of language and culture in the way that people are treated. We are trying to move to a more compassionate and comprehensive system of helping people who reach mental health crises. I appreciate him sharing that story, which was very moving.

Perhaps I may deal quickly with the questions raised by noble Lords. The noble Baroness, Lady Finlay, asked whether long-term brain injuries would be included. The answer is that they would. The reference that I made was to the potential short-term impacts, which we would not necessarily want to capture in this definition. On her question about palliative care, my understanding—I will certainly confirm it, as I have not seen the letter—is that it still applies. I think that is the reassurance she was hoping to get.

In relation to the question raised by the noble Baroness, Lady Hollins, and the noble Lord, Lord Hunt, about the assessment of a condition by a doctor, case law requires that such an assessment should be carried out by somebody who has objective medical expertise. In practice, that means a registered physician. Therefore, that reassurance already exists in jurisprudence, but I accept the importance of the point raised—that, perhaps except in an incredibly rare emergency, that kind of diagnosis should always be made by somebody

with that level of competence or skill qualification, however you want to define it. I will write to noble Lords explaining the position as it stands in law and why we think that it gives the protection and reassurance they are looking for. We can then perhaps follow that up with a discussion if there are any remaining concerns. I certainly agree that this is an important issue.

I hope that I have dealt with noble Lords' questions and I thank them again for their support and the challenge that has got us to this point of moving forward.

Amendment 6 agreed.

Amendment 7

Moved by ***Lord O'Shaughnessy***

7: Schedule 1, page 6, line 42, after second "arrangements" insert ", in relation to a cared-for person aged 18 or over,"

Amendment 7 agreed.

Amendment 8

Moved by ***Lord O'Shaughnessy***

8: Schedule 1, page 6, leave out line 45 and insert "care home arrangements,"

5.15 pm

Lord O'Shaughnessy: My Lords, we now come to the largest group of amendments on the issue that has perhaps taken up most of our attention in the progress of the Bill so far, and quite right too.

The government amendments in this group relate to ensuring that care home managers have an appropriate role in the liberty protection safeguards system that we are seeking to implement. You would have to have had ears of cloth not to have heard the concerns raised by noble Lords and stakeholders throughout the passage of the Bill about the proper role of care home managers. I agree that we must be absolutely clear at this stage in legislation about what is the right role for those care home managers. I also agree that there should be no scope for any conflict of interest—not when we are talking about the safety and care of very vulnerable people—and that we should ensure that all assessments are completed by those with the appropriate experience and knowledge. Furthermore, people should always have confidence that they will have access to independent support and representation.

I will shortly address the specific amendments in this group. Before I do so, I would like to draw noble Lords' attention to other germane government amendments, which we will deal with on the second day of Report but which are important to consider in the round with the amendments in this group. Those include proposals that we have made to ensure that only responsible bodies can arrange the pre-authorisation review and that care home managers will be explicitly excluded from completing the pre-authorisation review. This is important because pre-authorisation should not confirm poor care planning or perpetuate a system where someone is receiving care in an inappropriate setting. The amendments that we have laid and which we will deal with on the second day will counteract any incentive the care home manager might have to ensure that a resident stays in a care home inappropriately. We are also determined to make sure that the care home manager cannot act as a gatekeeper to the IMCA appointment, and we have laid amendments accordingly.

There has been a great deal of discussion about the role of care home managers in authorisation. I have strongly and deeply considered noble Lords' concerns in the context of what we know works now in the current system. There is a desire to make sure that the liberty protection system that we intend to introduce builds on what works and changes what does not. Under the current DoLS system, care home managers have the role of identifying that someone may lack capacity and need restrictions as part of their care. In practice, they must complete form 1, which brings together all of the current assessments for a person. This is then sent to local authorities, which appoint a best-interest assessor to conduct a further assessment ahead of providing the authorisation. This is an appropriate role for care home managers to undertake, and is the role we are proposing and clarifying through our amendments.

Amendment 30 requires the responsible body to make a decision on whether it is content that it is appropriate for the care home manager to carry out the relevant functions prior to authorisation, including arranging assessments and carrying out consultation. Amendment 90 applies this decision to reviews as well. This is an important change because it provides additional protections in cases where there may be concerns about a particular provider and its capability for conducting its role, and it allows responsibility to take on all the relevant functions in these cases. There may also be cases where there are no concerns about quality of care, but there may, for example, be particularly strong social worker involvement and it may make sense for them to take on those functions.

This power to remove the care home manager from the process can be enacted at any point, and we would expect it to be done at the earliest possible point, particularly if there are concerns. We will use the code of practice to set out the detail so that it is applied consistently by different local authorities, with clear criteria for the responsible body to make a decision on whether to retain responsibility for the relevant functions. In the case of care home residents, this significantly strengthens the role of local authorities in terms of oversight, intervention and supporting the quality of the operation of the scheme. If the responsible body has decided that the care home manager should be responsible for providing the statement and carrying out the other functions, the care home manager will bring together the information, evidence and assessments needed for the responsible body to make a decision on whether to authorise the liberty protection safeguard. In many cases, this will bring together recent valid assessments that can be used for this purpose.

As has been said previously, care needs change over time. We recognise that putting hard and fast rules on the validity and timeliness of assessments would not recognise the reality of what happens. That is why we

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will set out in the code of practice what we would expect to see in terms of valid and up-to-date assessments. The Bill also enables the responsible body to step in, if they are not confident in the validity of the assessments, by refusing to authorise the arrangements. Let me be clear that all the assessments would involve consultation with the person. In addition, the Bill will require the care home manager, or the responsible body, to complete the consultation with the person and other interested persons.

Some noble Lords have stated their concern that there is a potential conflict of interest if care home managers were to conduct assessments. The Government agree that there is a potential financial conflict if care home managers were to complete assessments for people in their own care homes, particularly when it comes to considering whether there are less restrictive alternatives. Amendment 52 explicitly excludes care home managers or others from undertaking the assessments if they have a specified connection to the care home, in particular if there is a financial connection. This will be set out in regulations. We will use the regulations to ensure, in England, that care home staff are not able to conduct assessments where they have a potential financial conflict of interest and the Welsh Government will have the power to do the same. Doing this in regulations allows us to provide the necessary detail, given the complexity of the care home sector, to ensure that there are no loopholes. For example, we would not want someone who works in another care home run by the same company to conduct the assessments.

Noble Lords have rightly asked questions about who undertakes the assessments and in particular why there were no clear requirements on the expertise of those who undertake capacity and medical assessments. That refers tangentially to the issue raised by the noble Baroness, Lady Hollins, before. Although that is already provided for in binding Article 5 case law, I have been persuaded that more clarity is needed. Amendment 52 clarifies that capacity and medical assessments must be carried out by someone with appropriate experience and knowledge. Capacity assessments should be completed by a registered professional such as a nurse, social worker or occupational therapist, and medical assessments must be completed by a physician. We will set out in the code of practice the experience and knowledge that we would expect to see for those undertaking assessments.

On the point about experience and knowledge, Amendment 53 tabled by the noble Baroness, Lady Finlay, would have the effect of requiring that the person who conducts the assessment has the appropriate skills and knowledge. The noble Baroness is absolutely correct that the person who completes the assessment should have the necessary skills to be able to conduct the assessment. Amendment 52 already provides for that within the description of experience and knowledge and we would expect that to cover the necessary skills. We will define that in the code of practice so that it explicitly describes the skills, using the term "skills" and describing the kinds of skills that ought to be required of the person carrying out assessments.

There are also some minor amendments that clarify definitions of care home manager and responsible bodies. Amendment 8 updates the definition of care home manager. Amendment 9 corrects the definition of care home manager in Wales. Amendments 11, 15 and 24 set out a definition of English and Welsh responsible bodies. Amendment 17 removes the definition of local health board as it is now superfluous.

I hope that noble Lords have had a reasonable chance to examine all the government amendments in this group. They have been carefully crafted to reflect to the best possible extent all the concerns set out by noble Lords at Second Reading and in Committee to remove any concerns about conflict of interest and make sure that care home managers are not, to coin a phrase, marking their own homework. They have an important role in organising assessments, but it is effectively an administrative function with proper oversight, and assessments will be carried out by those with the proper qualifications, expertise, skill and knowledge. I beg to move.

Baroness Finlay of Llandaff: My Lords, there is a tone of disappointment because I welcome all the government amendments, but the role of my amendment to government Amendment 52 was twofold. First, I am disappointed that speech and language therapists were not in that list read out by the Minister, because we had a debate about the importance of communication skills. When communication is impaired, particularly with disorders that affect any part of the speech or throat cycle, it is very difficult to assess someone's capacity.

I included skills because I worry that experience and knowledge are sometimes just not enough. If the Government insist on "skills" going into the code of practice, I hope that the Minister will be able to confirm that the skills will be assessed and reviewed at appraisal, and that they demonstrate an understanding of the impact of fear—being frightened—on the way the person behaves.

The assessors must have a high level of communication skills and awareness of all the different ways that communication can be enhanced. I hope that they would also have an awareness of the impact of different types of medication on someone's capacity, because sometimes changing the medication can really improve a person's ability to make a decision for themselves.

Amendment 53 links to Amendment 74, which is in my name and will come up later. I am concerned that, without strong reassurance, some of these issues could slip by and we could inadvertently end up having superficial assessments of some people and not the thorough and in-depth ones they deserve. The whole principle of the Mental Capacity Act is to empower people to make their own decisions, and we are talking about trying to have the least restrictive option so that we can enhance a person's liberty as much as possible. If that assessment is not meticulous with the appropriate skills, the wrong judgments could end up being made.

Lord Hunt of Kings Heath: My Lords, I realise that in the last group I mentioned general medical practitioners. I ought to inform the House of my forthcoming appointment to the General Medical Council.

We have had a lot to read in the last few days, and are clearly going to have to take a lot of this on trust, but the thrust of the amendments is welcome, and I am grateful to the Minister for tabling them. As he said, they strengthen the role of local authorities and give them a clear remit to intervene where they feel that, for one reason or another, the care home manager cannot discharge the responsibilities given in relation to the authorisation application appropriately.

In the letter that the Minister sent to a number of noble Lords, he set out factors that might be considered by the local authority as a responsible body. These would be:

"Whether the person has a care plan with the responsible body … local intelligence about a local provider of care homes",

which would suggest that the responsible body takes over the process;

"insight from local commissioners or concerns about performance … sustained absence of a registered manager"—

or presumably when the turnover of managers is high, as it can be; and—

"an increase in concerns raised by residents, their carers or families … a new service or category of care provision, and/or … provision of poor or incomplete statements".

To me that sounds very comprehensive and welcome.

What arises from this is that the responsible body will have to make a considerable judgment and, to make it, will need a very clear understanding of the care homes in its area. Could the Minister say a little about how he thinks that local authorities might be supported in that role? Clearly, they now have a major role which they have found it hard to discharge, for reasons that have been discussed. It is important they are able to do this in a consistent way.

The Minister mentioned the code of practice. It is a statutory code of practice, which I think means that it must be followed unless the local body has very good reason not to do so. It would be interesting to know what plans the department has for checking with the local authorities—not in a heavy-handed way—how well it is going after time and implementation, and seeing whether there is consistency across the country as a whole.

Baroness Barker: My Lords, I too welcome the Government's change of mind. They started with a very different understanding from ours of the current roles of care home managers, local authorities, best-interests assessors and DoLS assessors. I think we still have a difference of opinion about how life works in practice, but these amendments show a considerable movement, if not complete agreement on that part, and therefore we welcome them. I feel it is right to remind the Minister that when the Select Committee of your Lordships' House did the post-legislative scrutiny on the Mental Capacity Act and its workings five years after its implementation, there was an overwhelming lack of information and data both in local authorities and throughout the health service. I rather think that we have been perhaps unnecessarily preoccupied in this Bill with who carries out a particular function rather than looking at the way those functions could possibly be streamlined and better audited.

I do not think that the work of a local authority best-interests assessor or a DoLS lead, however they may be termed under the new scheme, is actually going to change that much, but I welcome the attempt here to meet us half way, and I thank the Minister for that. Well, perhaps it is more than half way in terms of our assessment that what was being asked of care home managers was beyond their capacity to deliver. Big questions still need to be asked about their role in the overall scheme. If we had not spent quite so much time on this, we might have been able to look more closely at greater efficiencies in terms of reporting and so on. For the moment, however, I welcome these amendments.

5.30 pm

Lord Touhig: My Lords, I too welcome the amendments and I thank the Minister and his team for the meeting we had earlier this week. He will recall that I raised my concern about different regimes operating in different parts of the country. A responsible body in my borough might decide that it alone would take responsibility for putting together applications, while in the next-door borough the care home manager and so on might be involved. I wanted to look at how we could get to a common approach right across the country. The Minister has helpfully sent us an excellent letter in response to the points I and others raised. In it he states:

"We wish to work with a wide range of stakeholders on developing the code of practice".

Is he yet in a position to tell which stakeholders he will be consulting? Perhaps he could write and tell us at a later stage, because it would be awful if we left someone off who could make a valuable contribution to this work. The Minister goes on to say:

"We are beginning to develop a programme for the new Code of Practice for the Liberty Protection Safeguards, working alongside the Ministry of Justice. The MoJ is also about to start a project to review the Code of Practice for the wider Mental Capacity Act too, so we will have the opportunity to work on both".

How does he plan for the two departments to consult between them with stakeholders when looking at the code of practice? Will he consider whether it would be worth setting up a group of interested parties who could act as a sounding board? As the code is developed, similar to what we have done with the Armed Forces covenant, we could bounce ideas off a group which might have an interest and make a contribution. Perhaps we could do something along the same lines. That might ensure that when in the end we get the code of practice, it will have widespread support and be of great benefit to those who we are concerned about.

Baroness Thornton: My Lords, I am grateful to the Government for tabling this suite of amendments which, as they say, change the position of care home managers from the original proposal to give them a significant role in applying the liberty protection safeguards—the scheme that is to replace DoLS in care homes. As the Minister said in his comprehensive introduction of this large group, they are a combination of technical amendments and others which are very important indeed. The amendments headed by government Amendment 30 are particularly relevant because they give the responsible body the ability to

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decide in certain circumstances to take over the authorisation functions in care homes in certain settings. The Government have said that they will set out the details in the code of practice. I shall return to the issue of the regulations and the code of practice in a moment.

Government Amendments 52 and 66 are equally important because they deal with conflicts of interest. The Government have said that the regulations will set out in detail the prescribed functions. I just want to ask a technical question. We do not quite understand why Amendment 78 has been severed from Amendment 73, which it seems to sit with; they are kind of twins and need to be taken together. I realise that we will be dealing with Amendment 73 next week, but they are very important amendments which give regulation-making powers, allowing the appropriate authority to make provisions about what constitutes a connection with a care home. They are also about conflicts of interest.

Amendment 90, as the noble Lord has said, gives the responsible body the ability to decide on the renewal of authorisation functions in care home settings. Listening carefully to what the Minister said when he introduced these amendments, one of the issues they raise is what goes in regulations and what goes in the code of practice. This has been a theme that we have discussed all the way through. It seems to me very important—and I seek reassurance from the Minister on this—that what goes in regulations is matters relating to powers and protection of the individual, and what goes in the code of practice is how those are carried out. Both are very important documents and it is important to address this, so that the right things go in regulations and the issue is comprehensively covered.

It is clear from the debates we have had throughout consideration of the Bill that we welcome the change of heart on policy. Some clarification and explanation will still be required as we move forward, but this suite of amendments does address the important issue of conflicts of interest in the powers of the care home manager and puts the interests of the cared-for person at the heart of the Bill, as they should be. It was clear from the beginning that this issue is of huge concern to all stakeholders on the Labour Benches, as well as across the House. That is why we submitted the suite of amendments early after Committee—strong amendments which addressed and fundamentally changed the role of the care home manager.

Noble Lords will see that the next group of amendments in the list are mine and are supported by the noble Baronesses, Lady Jolly and Lady Watkins. I thank them most sincerely for their support very early in this process. We went through the Bill and removed reference to, or significantly changed the role of, the care home manager. This group starts with Amendment 13, which I would like to assure the Minister, as I did the Bill team, I will not be moving today. These amendments were designed to specify the responsibilities of what we called the "nominated body"—in other words, a qualified body nominated by the responsible body in relation to the authorisation of care home arrangements. That suite of amendments makes it clear that the care home manager's role is to co-ordinate the required information, determinations and assessment, rather than to carry them out. I am very glad that the Minister used almost exactly those words. What we call the nominated body will be designated by the responsible body. All the subsequent amendments in this group take powers away from the care home manager and replace them.

I was in the Minister's place many years ago. Seeing these amendments coming down the track with support from across the House—and, indeed, the amendments tabled by the noble Baroness, Lady Finlay, which were sometimes even more radical in their intent—the Minister, the Bill team and his advisers were very wise to take a second look when one considers that all the stakeholders took the same view, without exception, I think. I agree with the noble Baroness, Lady Barker, in that I regret that we met such obduracies, which is what they felt like from our point of view, from the Government in the early stages of the Bill about the role of the care home manager. That meant that we did not spend enough time on other issues that we should have addressed. We did not spend enough time on CCGs, the NHS and the place of local councils in delivering the new arrangements, as my noble friend Lord Hunt mentioned. We did not spend enough time examining the funding and resourcing of the new arrangements. The Minister got off quite lightly on those issues; I am sure that my honourable friends in the Commons will make up for where we lack in this area.

The test of the amendments is whether they fulfil the aims of the suite of amendments we tabled all those weeks ago. We are applying that test today. Can the Minister confirm that the government amendments would give the responsible local authorities the option of giving these roles to the care home manager or taking the responsibilities on themselves and, most importantly, that the care home manager will no longer be responsible for notifying the responsible body whether an IMCA should be appointed in any case? In Amendment 78, it seems that care home managers would not be able to commission anyone with a prescribed connection to the care home. That is to be welcomed.

As far as we are concerned, these amendments are lacking on the issue of—is it the AMPS?

Lord O'Shaughnessy: The AMCP.

Baroness Thornton: Thank you. I always get those initials wrong. We will discuss that issue tomorrow. As far as we are concerned, the amendments go a long way to meeting the issues that we have raised throughout the previous stages of the Bill. I am grateful for that and I offer them our support.

Lord O'Shaughnessy: I am grateful for noble Lords' support for this group of amendments. I might say that I recognise a juggernaut when I see one coming, but this was about not just the force or number of the amendments—or, indeed, the length of them—but the force of the argument. During this process, we have established the critical point that the care home manager has an important role in the new system, because we want to provide a more proportionate and flexible system, but equally that cannot put them in a position

where they have too much power. That would compromise the rights of the people being cared for, who are obviously very vulnerable. The amendments in the names of the noble Baronesses, Lady Finlay and Lady Thornton, gave us some idea of where noble Lords were headed and gave us some sense of shape and direction about where we ought to go to. We have made great progress, and I thank noble Lords for not just their input but their patience throughout this process. It has been trying and challenging for all of us at times, but we have made some great changes that will put the system on a much better footing.

I want to deal with the specific issues raised by various noble Lords. The noble Baroness, Lady Finlay, asked about speech and language therapists. In describing the amendments, I talked about professions "such as" those; she is right that I did not name them specifically. We need to consider which professions are included; clearly, we will want to consult relevant groups and noble Lords on that. Of course, we will make sure during that process that such professionals have the knowledge, skills and expertise that the noble Baroness is looking for. On skills, I recognise that she is disappointed; I hate to disappoint her. I think that this is an issue of semantics. Offline, I can provide assurance on what she is looking for, which is not a superficial case of whether these professionals have a certain degree or are a member of a certain professional body so that boxes can be ticked and we can go ahead. That should be avoided because it will not serve us very well.

The noble Lord, Lord Hunt, asked about the role of local authorities. In the amendments, we have made it clear that the local authority has a prior role in making a judgment about the providers in its area. That was not clear in the Bill before—the noble Baroness, Lady Thornton, asked about that role as well—and it is an incredibly important judgment, because local authorities will need to be in a position to look across their provider network and see who they are clear and confident will be able to make such decisions and who will not. To take up the point made by the noble Lord, Lord Touhig, that will be set out in the code of practice. I will come to his point about stakeholders later. The most important thing is that this is a prior power, to be exercised by the responsible body.

5.45 pm

Clearly, we are working out with the LGA, ADASS and others what this would mean in practice, but I think that local authorities, not least because of their responsibilities under the Care Act 2014, have a good sense of their local provider network. They have judgments, and we also have objective quality judgments now, through the CQC, and other data. Local authorities will therefore be in a position to make a prior judgment about whether a care home, and particularly a care home manager, should be able to exercise that power. Equally, they will have the power to intervene if something changes—if there is a long-term vacancy or a change in CQC rating, for example. We need to think specifically about how this will work, and we will have to continuously review the objectivity of the criteria and the consistency of application. Putting that prior power in the hands of the responsible bodies is an important change, which I know the noble Lord was keen to see, as he raised it on Second Reading and in Committee.

As for the point about stakeholders made by the noble Lord, Lord Touhig, when I respond to the question asked by the noble Baroness, Lady Barker, about the timetable for consultation on definition, I might expand that response to cover the wider consultation with stakeholders on the code of practice. That will give us a sense of the range of stakeholders and the timelines. When I share that information with noble Lords, that will not be the finished product; obviously we will then be amenable to suggestions. As the noble Lord would expect, we will work closely with the MoJ to co-ordinate the reviews; it would be nonsense to have two separate reviews of similar territory. I rather like his idea of setting up a standing stakeholder group to provide advice and a sounding board. We have done that on an ad hoc basis over the past few weeks and months anyway, for this particular issue and this part of the mental capacity review. I take that as a positive suggestion, and will do something about it.

The noble Baroness, Lady Thornton, asked why Amendment 78 had been severed from Amendment 73. It says in my notes that Amendment 73 is about conflicts of interests and assessments, whereas Amendment 78 is about the same issue but in pre-authorisation reviews. I do not know whether that answers the question or not—but they are very similar provisions and we would expect them to be addressed in a single set of regulations. Why they have been grouped in that way I do not know: the mystical workings of the Whips Office are beyond me. But they will be dealt with in a single set of regulations, so we will be able to ensure that the interplay is there.

As for the noble Baroness's final point about the IMCA, we shall come to that under a future grouping on the next day of Report. That is why I raised it at the beginning of my statement: it is clearly germane to what we are discussing now. The issue was raised, and it does get into conflict of interests territory, but we shall consider it separately. As the noble Baroness will know, we have laid amendments to ensure that care home managers do not have that gateway role. I hope that provides her with the reassurance that she, and all noble Lords, were looking for.

I thank noble Lords sincerely for the huge amount of effort that has gone into making these improvements. As a consequence, things are in a much better state than when we started.

Amendment 8 agreed.

Amendments 9 to 12

Moved by ***Lord O'Shaughnessy***

9: Schedule 1, page 7, leave out lines 4 to 6 and insert—

"( ) in relation to Wales, the person who manages the care home service, within the meaning of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2), at the care home, by virtue of regulations made under section 28 of that Act;"

10: Schedule 1, page 7, line 7, at end insert—

""clinical commissioning group" means a body established under section 14D of the National Health Service Act 2006;"

11: Schedule 1, page 7, line 7, at end insert—

""English responsible body" has the meaning given by paragraph 10A;"

12: Schedule 1, page 7, line 13, at end insert—

""mental disorder" has the meaning given by section 1(2) of the Mental Health Act;"

Amendments 9 to 12 agreed.

Amendment 13 not moved.

Amendments 14 and 15

Moved by ***Lord O'Shaughnessy***

14: Schedule 1, page 7, leave out lines 21 and 22

15: Schedule 1, page 7, line 22, at end insert—

""Welsh responsible body" has the meaning given by paragraph 10B."

Amendments 14 and 15 agreed.

Amendment 16

Moved by ***Baroness Barker***

16: Schedule 1, page 8, line 10, at end insert—

"(aa) if the arrangements are carried out in an independent hospital, the designated NHS trust;"

Baroness Barker: My Lords, following our previous discussion, we turn to an area that has not received sufficient attention because we were so focused on care homes and care home managers. My Amendment 16 addresses the position of independent hospitals. I think independent hospitals in Wales might in part be addressed in Amendment 16A, tabled by the noble Baroness, Lady Thornton, and grouped with my amendment.

In the process of talking to stakeholders over the past few weeks, it became clear that many of the concerns that we have expressed over conflicts of interest for care homes also apply to independent hospitals, and therefore it seemed to us important to state in the Bill that where a person is deprived of their liberty and is in an independent hospital, the CCG or the local health board is the responsible body as, as we have discussed in great depth and tortuous detail over the past few weeks, is the parallel case for care homes and local authorities.

It is unfortunate that we missed this and have not discussed it as much as we should have. People deprived of their liberty in independent hospitals perhaps have the worst of both worlds. They do not have the protection of the Mental Health Act and they are perhaps less likely to come to the attention of an external body, such as a local authority, because their care is unlikely to have been through the care planning process. Therefore, they could be at a greater point of vulnerability. They may also be more likely to be deprived of their liberty because the deprivation may be something to do with medication. That is why I tabled this amendment, so that we could perhaps return to this at Third Reading. It is important that the Government make clear their intention that there should be clarity about the position of people held in these establishments, and that they do so swiftly and in sufficient detail. I beg to move.

The Deputy Speaker: My Lords, Amendments 16 and 16A appear to be alternatives, so Amendment 16A will be moved only if Amendment 16 is withdrawn or disagreed to.

Baroness Meacher: My Lords, I put my name to this amendment and I very strongly support it. Having been a Mental Health Act commissioner for many years and having visited independent hospitals as well as NHS hospitals and other establishments, I remember those independent hospitals as being the most alarming environments that I ever visited. Very often, the biggest problem was indeed the conflict of interest. People would get into those hospitals and be treated, and that was all good, but whereas in an NHS hospital the pressure all the time, from the day of arrival, is to plan the exit and aftercare in the community, once those hospitals had got the person better they had a lovely ride. The patient was there and was no trouble, no longer had symptoms and was miles—maybe hundreds of miles—from their family. They did not get visits. The conditions in which those people were held were shocking, and the degree of the deprivation of liberty was often deeply shocking. Did they go out in the grounds? Probably not. Did they go out for walks? Probably not. Any kind of a sense of liberty could be lost, not just for days, weeks or even months, but for years. We would do our tiny best, but the fact was that we might get round to one of those hospitals every two years. It was inadequate to say the least. I therefore urge the Minister to take this very seriously. We are worried about care homes, which are probably local and have the family nearby, if there is one. They can be a problem, but this is on another scale and of another degree of severity, so I strongly support this amendment and urge the Minister to consider it.

Baroness Finlay of Llandaff: My Lords, I, too, have put my name to this amendment. My noble friend Lady Meacher has laid out very clearly some of the problems and conflicts of interest that can arise. One of the difficulties is deciding which will be the responsible body. If the place where somebody is treated is quite a long way from whoever commissioned their care, it can create real problems for a local authority or a clinical commissioning group, which might be funding outside the range of common care for somebody to be some distance away. That is why we have to decide which is to be the responsible body, and that responsible body must take those responsibilities seriously. The advantage of the responsible body being a designated NHS trust is that the private hospital is likely to have consultant-level staff who are likely to have an NHS contract somewhere at another trust, which may be nearby, or if they are part of a specialised group they will be subject to a degree of oversight, appraisal and so on within that specialist area. They are less likely to have local GPs who would be answerable to clinical commissioning groups. One just does not know. They have to go to one or the other. The most dangerous of all would be to have what one might term a mixed economy of a responsible body in some situations and a clinical commissioning group or local health board in another.

In Wales, things are a little different because the local health board covers the hospital sector and the community, so we have clearly defined geographical boundaries with much easier lines of answerability. My feeling is that we need to plump for one. I hope that the Government will, and I can see that there may, on balance, be advantages in saying the designated NHS trust is the responsible body.

Baroness Thornton: My Lords, I shall speak to my amendment, which is in this group. The noble Baroness, Lady Finlay, said that the Government need to opt for something here to solve this problem. Mencap, in particular, and VoiceAbility have been very exercised by this because, as noble Lords have said, there is a conflict of interest when an independent hospital can be responsible for authorising deprivation of liberty for people in the hospital for the purposes of assessment and treatment of a mental disorder. My amendment names the CCG or local health board as the responsible body to remove that conflict of interest.

Since the Winterbourne View learning disability abuse scandal in 2011, the Government have been trying to reduce the number of people in these settings but, it must be said, largely without success. There remain 2,350 people with a learning disability and/or autism in these settings who in many cases could, with the right support, be in the community, but half of them are in independent hospitals. The independent hospital sector is expanding—to the horror, it must be said, of very many people. The average cost of a placement in an assessment and treatment unit for people with a learning disability is £3,500 a week. It can be as high as £13,000 a week. The average stay is of five and a half years. This is really not acceptable. Many noble Lords may have seen the excellent piece by Ian Birrell in the *Mail on Sunday*—not a newspaper I would normally read—which looked at the companies and the significant profits they make from these very lucrative contracts. The article details two giant US healthcare companies, a global private equity group and a Guernsey-based hedge fund, as well as two British firms and a major charity. The point is that these bodies are responsible for deprivation of liberty, and that can neither be acceptable, nor indeed what the Government intended. The Minister needs to provide us with some solution to this problem.

6 pm

Lord O'Shaughnessy: My Lords, I first thank the noble Baronesses for tabling their amendments and giving us the opportunity to debate, as the noble Baroness, Lady Barker, pointed out, an incredibly important issue. We have heard examples of individuals and institutions where there have been tragic cases of people deprived of their liberty in independent hospitals, and these amendments have given us the opportunity to think about the best way forward to make sure there is proper oversight and authorisation in such cases.

Amendment 16, tabled by the noble Baronesses, Lady Barker, Lady Finlay and Lady Meacher, makes the designated NHS trust the responsible body in independent hospital cases. The amendment tabled by the noble Baroness, Lady Thornton, would make the CCG or local health board the responsible body where a person is accommodated in an independent hospital for the assessment of mental disorder.

As the noble Baroness, Lady Barker, and other noble Baronesses pointed out, stakeholders have raised this issue on many occasions. They have raised concerns about the level of scrutiny in these independent hospital cases. The Bill, as it stands, provides that in most cases the managers of independent hospitals are responsible bodies, meaning that they authorise arrangements carried out mainly in hospitals. The amendments seek to address this by changing the responsible body, and I have great sympathy with their intention.

We know that those in independent hospitals often have particularly complex needs, especially those being assessed or treated for mental disorders. The noble Baroness, Lady Thornton, said we need a solution, but I think there is a different solution, which could improve—if I dare say so—on the amendments tabled by the noble Baronesses. Rather than changing the responsible bodies, it would be even better if we required an AMCP to complete the pre-authorisation review in such cases. We know that the AMCP is a registered professional, accountable to their professional body, and that they would meet the individual, and any other interested parties, in person. The Government believe that independent hospitals would benefit from AMCP involvement, and therefore our intention is to bring forward an amendment, or amendments, as required, in the Commons to deal with this issue and make sure that there is such a role for the AMCP in all deprivation of liberty cases.

Baroness Thornton: If I might set this in the vernacular, one of the reasons that we have been so concerned about the conflicts of interest and powers for the care home manager is that we wonder how anyone can be sprung, as it were, from the situation in which they find themselves. How would an AMCP do that? How could they be liberated from the situation they are in if the deprivation of liberty power remains with the chief executive or manager of the private hospital?

Lord O'Shaughnessy: The reason is that although the deprivation of liberty would take place in that institution, every single case would be examined by an AMCP. The pre-authorisation review and scrutiny would be carried out by the AMCP. They would have the ability to examine the case, to speak to the person and all other relevant interested persons, and to challenge, if necessary, the circumstances of the deprivation of liberty or the care that had been put in place.

To take the hierarchy of decision-making in a care home, for example, the arrangements are made by, but not carried out by, the care home manager. They are referred to the responsible body for preauthorisation review, and if there are concerns of a problem at the level of the responsible body—an objection on behalf of the person or on behalf of somebody who cares for or is connected to them—it would go immediately to the AMCP. In a sense, this vaults the decision-making process beyond the responsible body and, as the noble Baroness, Lady Finlay, pointed out, there are particular

[Lord O'Shaughnessy]
issues over which body ought to take responsibility and go straight to, effectively, the last port of call before the Court of Protection. It provides that degree of oversight and challenge in these cases.

Baroness Meacher: A concern is that a lot of these people lose touch with their communities and families—they are often a long way from them. Is the assumption here that if somebody objects, then the AMCP would get involved, but that otherwise the hospital management might remain responsible?

Lord O'Shaughnessy: That is a perfectly reasonable question, but the AMCP would absolutely look at every case. There would not need to be an objection raised. I was just explaining the hierarchy for non-independent hospital cases. It would be, in a sense, going to the second-highest port of call for scrutiny that we are considering in other cases to highlight the seriousness of it. There would not be that gatekeeper point which the noble Baroness is worried about.

Baroness Finlay of Llandaff: How would we be clear that we knew about all the people who had a deprivation of liberty, if we are depending on that independent hospital to notify and call in an AMCP? That AMCP may be one with whom they end up having an uncomfortably close or cosy relationship. How could there be a degree of independence, when the person signing it off as the responsible body would still be the one with a vested interest in keeping their beds full and their income going, which was the very thing that concerned us about the care home? Is the Minister prepared to meet us and discuss this outside? I understand the intention to have everyone assessed by an AMCP, but I am worried that if we leave it to go to the Commons, some of the concerns that have been raised here may not get carried over.

Lord O'Shaughnessy: Absolutely—I would be more than happy to do so. I have tried to demonstrate our intention to deal with the issue, but we remain open-minded about the best way to do it. We have concerns with the amendments as laid—we were trying, if anything, to turbo-boost the approach. I recognise that the noble Baroness is concerned about an overfamiliarity between individuals, which she is trying to make sure that we avoid. There may be other concerns with the model that we are considering. I am more than happy to take that offline, and that would be a very fruitful discussion.

Baroness Barker: I am grateful to the Minister for his response, which I will need to think about long and hard. One thing that noble Lords will have to take into consideration is whether an AMCP would have the power to refer a case to the Court of Protection if they felt it necessary. That would be a big factor. I listened very carefully to the Minister, who used the term "hospital manager". He will know that it has a particular meaning in the Mental Health Act. I have no crystal ball, and neither do other noble Lords, but were the role of the hospital manager in the Mental Health Act to be something on which the forthcoming review sought to make a decision, then would this not be another case for our looking in detail at the synchronisation between this legislation and the Mental Health Act? I welcome the Minister's response. There is a bit more work to do, and considerable constructive welcome for continued work. With that assurance, I beg leave to withdraw.

Amendment 16 withdrawn.

Amendment 16A not moved.

Amendments 17 to 24

Moved by ***Lord O'Shaughnessy***

17: Schedule 1, page 9, leave out lines 9 to 11

18: Schedule 1, page 9, line 12, after "authority"" insert ", in relation to a cared-for person aged 18 or over,"

19: Schedule 1, page 9, line 12, at end insert—

"(za) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;

(zb) if there is an individual development plan for the cared-for person—

(i) the local authority responsible for maintaining that plan, or

(ii) if the plan is not maintained by a local authority, the local authority whose area the cared-for person is in;"

20: Schedule 1, page 9, line 13, after "if" insert "neither paragraph (za) nor paragraph (zb) applies and"

21: Schedule 1, page 9, line 32, at end insert—

"(4A) In paragraph 6(c), "responsible local authority", in relation to a cared-for person aged 16 or 17, means—

(a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;

(b) if there is an individual development plan for the cared-for person—

(i) the local authority responsible for maintaining that plan, or

(ii) if the plan is not maintained by a local authority, the local authority whose area the cared-for person is in;

(c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person is being provided with accommodation—

(i) under section 20 of the Children Act 1989, or

(ii) under section 76 of the Social Services and Well-being (Wales) Act 2014 (anaw 4),

the local authority providing that accommodation;

(d) if none of paragraphs (a) to (c) applies and the cared-for person is subject to a care order under section 31 of the Children Act 1989 or an interim care order under section 38 of that Act, the local authority that is responsible under the order for the care of the cared-for person;

(e) if none of paragraphs (a) to (d) applies, the local authority determined in accordance with sub-paragraph (5)."

22: Schedule 1, page 9, line 33, leave out "and (4)" and insert ", (4) and (4A)(e)"

23: Schedule 1, page 9, line 46, at end insert—

"(7) In this paragraph—

"Education, Health and Care plan" means a plan within the meaning of section 37(2) of the Children and Families Act 2014;

"individual development plan" means a plan within the meaning of section 10 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (anaw 2)."

24: Schedule 1, page 9, line 46, at end insert—

"10A_ "English responsible body" means—

(a) a hospital manager of a hospital in England;

(b) a clinical commissioning group;

(c) a local authority in England.

10B_ "Welsh responsible body" means—

(a) a hospital manager of a hospital in Wales;

(b) a Local Heath Board;

(c) a local authority in Wales."

Amendments 17 to 24 agreed.

Amendment 25 not moved.

Amendment 26

Moved by ***Lord O'Shaughnessy***

26: Schedule 1, page 10, line 7, leave out "is of unsound mind" and insert "has a mental disorder"

Amendment 26 agreed.

Amendment 27

Moved by ***Baroness Barker***

27: Schedule 1, page 10, line 8, after "necessary" insert "to prevent harm to the cared-for person"

Baroness Barker: My Lords, I have good news for the Minister. After all these weeks, I have finally accepted his argument that the best-interests principle in the Mental Capacity Act remains and applies to all decisions made under the Bill. I now agree with him that it is therefore not helpful to reiterate the term "best interests", as we suggested in previous amendments at a previous stage. The even happier news is that the noble Lord, Lord Hunt of Kings Heath, agrees with me on that.

However, I am afraid that peace and harmony may not have broken out completely. Noble Lords will recall from previous debates that we have argued that the requirement that an arrangement be "necessary and proportionate" seems to be a weakening of the protections for an individual, sitting as it does with no direct connection back to those earlier best interests. We all agree that deprivation of liberty is a very important matter, and the law needs to be in compliance with Article 5. That is why we think the Bill contains a deficiency, because lawful detention is not considered directly in relation to best interests. Therefore, through these amendments, which relate both to the authorisation and the determination, we have attempted to reiterate the current wording of the DoLS legislation regarding a determination being necessary and proportionate in relation to harm to the person. In other sets of amendments and at previous times, we have had discussions about whether decisions are taken on the basis of harm to the person whose liberty is being deprived, or of harm to others. We have tabled this amendment to make it clear that it is harm to the person, and that the proportionality relates to the potential harm to that person if they are not deprived of their liberty.

Much of today's discussion about deprivations of liberty in domestic settings originates in the failure of many professionals, in making judgments, to remember the part of the safeguards which states that deprivations of liberty must be the "least restrictive option". It is not wrong to deprive somebody of their liberty, but it must be the least restrictive option to avoid harm to that person. We have therefore concluded—again, in discussion with stakeholders—that this amendment to the Bill would lead to greater clarity.

I can hear the words "code of practice" coming to the fore. One point on which we have never had an agreement is reliance on the code of practice. Very few pieces of legislation have a code of practice, and in health there are only two: this Act and the Mental Health Act. Anything which resides in a code of practice rests upon statute in order to be lawful. When there are arguments about whether a deprivation of liberty is lawful, those arguing the case, particularly judges, do not go to the code of practice but to the statute. What is contained in the statute may be minimal, as this is; we are simply talking about a sentence which says that that action must be "necessary and proportionate" with regard to the harm to that person. A code of practice can go on for pages and pages and include numerous examples, as it should, so that practitioners know where they are. But it does not and never will carry the legal force which comes from the wording in the Act.

6.15 pm

Therefore, I make it clear to the Minister that we have thought long and hard about how to deal with this issue, which we have argued back and forth over the past few weeks, in a way that offers the greatest legal clarity and assurance to people who will be subject to this law, to their families and to practitioners who have to interpret it. With that in mind, I beg to move this amendment, and I have to say that at this point, reassurances about anything in a code of practice will not suffice.

Baroness Finlay of Llandaff: I endorse the comments of the noble Baroness, Lady Barker, in moving this amendment. One of the reasons that it should be in the Bill is that we have been trying to have the cared-for person at the heart of our deliberations, and the wording here is completely compatible with other parts of the Mental Capacity Act.

There is a terrible tendency when people look at the least restrictive option to also think about what might be convenient for them. The least restrictive option might not be the easiest, and might mean that staff have to behave in quite a different way. By wording these two amendments in this way, we are looking at the risk of harm to the person specifically, and are

[Baroness Finlay of Llandaff]
keeping the person at the heart of this. There always will be a risk that decisions will be contested in court and will need to go to court, and an application to the court may be judged specifically against that test, because it is in the Bill. If it is in the code of practice, there is a real danger that it could be downgraded.

Baroness Thornton: I put my name to this amendment, and we on these Benches very much support the intention behind the amendments in this group.

I bow to the fact that the noble Baroness, Lady Barker, has lived and worked with this for a very long time indeed, has reviewed the Mental Capacity Act and was very influential in the way it was formed. There has been a lot of discussion with stakeholders about this group of amendments and how we can best express "necessary and proportionate" in a way that will strengthen the Bill and prevent harm to the cared-for person. These amendments do that, providing clarity. Again, as I mentioned in the previous debates, because this is to do with protection and powers, it has to be in the Bill and not the code of practice. I hope that the Minister will agree to the amendments, because it is probably the best way forward, and that he will end this discussion in harmony and agreement.

Lord O'Shaughnessy: As the noble Baroness knows, I am all for harmony and agreement.

I thank the noble Baronesses for laying these amendments, and I accept the point made by the noble Baroness, Lady Barker, about her gracious acceptance of the role of the best-interests test. I recognise that she has some serious concerns about this legislation, which I take seriously. I have been determined to work closely with her, and I am grateful for her reciprocation in that process as we have moved ahead.

These amendments seek to specify that the necessary and proportionate assessment must be undertaken by reference to whether an authorisation is needed explicitly to prevent harm to the person. We know that an assessment of whether the arrangements are necessary and proportionate is key to ensuring that liberty protection safeguards will afford people their protections and human rights, and is a requirement of the European Convention on Human Rights. There are many factors which would need to be considered in the necessary and proportionate assessment, including the wishes and feelings of the person, whether any less restrictive measures can be put in place and the risk of harm. That is the issue that is the subject of these amendments.

Importantly, these amendments raise the issue of considering risk of harm to the cared-for person during the assessment by including that expressly and explicitly in the Bill. However, my concern is that that may be at the cost of other factors that ought to be properly considered during the assessment process. If these amendments are passed, one of the factors which may not be properly considered in the assessment process is the risk of harm to others, which the Law Commission said should be explicitly considered within a necessary and proportionate assessment, as well as risk to self. There are cases currently under the DoLS system where the risk of harm to others is an important factor in the justification for deprivation of liberty, such as a person with Lewy body dementia who may need restrictions in order to prevent harm to people in the community.

Furthermore, ensuring that no harm could come to a person is in some cases intertwined with ensuring that no harm comes to others. For example, there could be a retaliatory attack as a result of harm caused by a person to someone else. These amendments would mean that by focusing solely on harm to self in the Bill, it could be more difficult for assessors to make those balanced decisions. I therefore have some concerns about the amendments tabled by noble Baroness, as they could perpetuate the current confusion surrounding cases that involve some degree of harm to others. They could also lead to an increased use of the Mental Health Act, since the liberty protection safeguards might be interpreted as being ruled out in all harm-to-others cases. We would not want to see the Act used in this way.

Therefore, in the spirit of consensus and moving forward, I have carefully considered whether the Bill should be amended—or whether the Government could support such amendments—to explicitly set out inclusion of the risk of harm to the person. I am afraid I am going to disappoint noble Lords by saying that it would be better set out in the code of practice. I emphasise that we have considered the issue in detail, and we believe that the code of practice has sufficient force. On that basis—although I know that she will not do so—I encourage the noble Baroness to withdraw her amendment.

Baroness Barker: I thank the Minister for his reply. The problem that I have is that it leaves the guidelines for decisions to deprive people of their liberty because of harm to others in a code of practice, not the legislation. I do not believe that that is the right place in which to make that law. I absolutely accept that it is sometimes necessary to make a decision about a deprivation of liberty, and that part of that decision-making might be about the risk the person poses to others. However, that should not be determined in legislation fashioned on a set of principles and practices that are about harm to self, which is what the Mental Capacity Act is all about. A substantial judgment that will impact on people's lives is buried away in a place where it is very unlikely ever to rise sufficiently up the scale of legal concerns or ever to be tested in court. That is my problem; that is what I think is wrong. It is therefore important that we in this House make a statement now to the Government about the importance of this issue, so I would like to test the opinion of the House.

6.24 pm

Division on Amendment 27

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Amendment 27 agreed.

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Amendment 28

Moved by ***Baroness Barker***

28: Schedule 1, page 10, line 8, at end insert "in relation to the likelihood and seriousness of harm to the cared-for person"

Amendment 28 agreed.

Consideration on Report adjourned.

Yemen: UN Security Council Resolution

Statement

6.41 pm

Baroness Goldie (Con): My Lords, with the leave of the House, I shall now repeat in the form of a Statement the Answer given by my right honourable friend the Foreign Secretary. The Statement is as follows:

"I am grateful to the honourable Lady for raising this vital issue. The conflict in Yemen has escalated to become one of the worst humanitarian disasters in the world. Today, 8 million people—nearly one-third of the population—depend on United Nations food aid. Starvation and disease have taken hold across the country. More than 420,000 children have been treated for malnutrition and 1.2 million people have suffered from a cholera epidemic. In total, about 22 million people across Yemen—nearly 80% of the population—are in need of help. Yet the bare statistics cannot convey the enormity of this tragedy. What we are witnessing is a man-made humanitarian catastrophe, inflicted by a conflict that has raged for too long.

Britain is one of the biggest donors of emergency aid, providing £170 million of help to Yemen this year, bringing our total support to £570 million since 2015. But the only solution is for all the parties to set aside their arms, cease missile and air attacks on populated areas, and pursue a peaceful political settlement. Last week, I conveyed this message to the leaders of Saudi Arabia and the United Arab Emirates, which lead the coalition fighting to restore Yemen's legitimate Government, when I visited both countries. On Monday, I said the same in Tehran to the Foreign Minister of Iran, which backs the Houthi rebels. On the same day, I instructed our mission at the United Nations to circulate a draft resolution to the Security Council urging a 'durable cessation of hostilities' throughout Hodeidah province, and calling on the parties to 'cease all attacks on densely populated civilian areas across Yemen'.

This draft resolution also requires the unhindered flow of food and medicine, and all other forms of aid, 'across the country'. The aim of this UK-sponsored resolution is to relieve the immediate humanitarian crisis and maximise the chances of achieving a political settlement. Martin Griffiths, the United Nations envoy, is planning to gather all the parties for peace talks in Sweden in the next few weeks.

Amid this tragedy, the House will have noticed some encouraging signs. Last week, Saudi Arabia and the United Arab Emirates paused their operation in Hodeidah, although there was a further outbreak of fighting yesterday. The Houthi rebels have publicly promised to cease their missile attacks on Saudi Arabia. Martin Griffiths is meeting all parties as he prepares the ground for the talks in Sweden. Britain holds a unique position as the pen holder for Yemen in the Security Council, a leading humanitarian donor and a country with significant influence in the region, so we will make every effort, and use all the diplomatic assets at our command, to support the United Nations envoy as he seeks to resolve a crisis that has inflicted such terrible suffering".

6.44 pm

Lord Collins of Highbury (Lab): My Lords, I thank the Minister for repeating the response to that Urgent Question and welcome the resolution, despite the fact that the United Kingdom had been sitting on a draft for two years. I also welcome the fact that it covers the five areas identified by Mark Lowcock on 23 October. In the debate in this Chamber last Thursday, I expressed the hope to the Minister, the noble Lord, Lord Ahmad, that other vital issues would be covered in any draft resolution, particularly the need for accountability for war crimes and human rights violations.

In the other place, the Foreign Secretary said that this is not the last word but the beginning of the process. He said that the priority is to build trust, but trust can only be sustained in the knowledge that no party can act with impunity. Jeremy Hunt said that he gave a tough message on the need to investigate war crimes. Was it in the draft which he discussed in Saudi Arabia with the Crown Prince? If it has been removed, how does the United Kingdom intend to ensure that the tough message it has already given holds and is implemented in the future?

Baroness Goldie: I thank the noble Lord for his question and for referring to last week's extremely well-informed and useful debate in this House, which raised important points. I think the noble Lord will understand that there is a delicacy in the diplomacy which is about trying to ensure that as many parties as possible are encouraged to group round the resolution. As he is aware, the draft has been circulated at the United Nations. My right honourable friend the Foreign Secretary detailed, in the other place, a summary of what is in the motion. I reassure the noble Lord that the underlying purpose of a change in language from previous resolutions has been to try to build a consensus. We recognise that that is the best way of trying to find some form of agreement, if not to bring this dreadful catastrophe to an immediate close then at least to introduce the prospect of better conditions for people in Yemen. That is why, as he will be aware, the draft motion is constructed around getting in aid and humanitarian help; getting a ceasefire; and getting some movement on a political settlement. Very importantly, and at the behest of Martin Griffiths, the special envoy, it is about getting the parties to Sweden, hopefully later this month or, if not, in early December, to sit round a table.

On the other aspect to what has been happening in Yemen and whether that constitutes war crimes or contraventions of international humanitarian law, that would be a matter for determination once we have restored more order to the ground in the country. There is such disorder at the moment—it is a very fractured country—that it is very difficult to obtain reliable information about what has been happening. I think that everyone would regard the absolute priority to be trying to improve the desperate and distressing situation for so many people in Yemen.

Baroness Northover (LD): My Lords, I too thank the Minister for repeating the Answer to the Urgent Question. She is absolutely right that the situation in Yemen is truly appalling. What progress is being made to secure the Security Council resolution to which she referred? When will this be put to a vote and why has it taken so long to get to this stage, given the United Kingdom's lead in this area? There are reports that Saudi Arabia and its allies have been hindering this. Can she cast any light on that? Does the United Kingdom support a nationwide ceasefire? What is proposed at the moment is much more limited than that. The US Government have stopped refuelling coalition planes. Germany, the Netherlands, Norway and others have stopped arms sales. Surely we should be doing the same.

Baroness Goldie: I thank the noble Baroness for her question. Part of my answer echoes what I already said to the noble Lord, Lord Collins, in that I would dispute her assessment of feet dragging. Britain has been at the forefront in trying to engage with partners at the United Nations and, as my right honourable friend said, to broker a solution. What has been done skilfully is to try to find a form of language which, instead of deterring and deflecting people who genuinely want to do something to help, brings them into the tent and invites them to be participants on that ultimate road to finding help.

On the question of arms sales, many people have strongly held views about this but, as she will be aware, this country operates a very strict check on our arms exports to any country, whether to Saudi Arabia or anywhere else. It is very clear—I believe the noble Lord, Lord Hannay, raised the specific point in the debate last week—that the continued test is this: is there a clear risk that those items subject to licence might be used to commit a serious international humanitarian law violation? If that were the case, we would not agree to the exports being made. We constantly monitor the situation. The assessment process is very robust. It is a combination of DIT, FCO and MoD, and we certainly try to ensure that any exports could not possibly be used for malign purposes.

As to the progress of the draft resolution at the United Nations, the noble Baroness will be aware—and we should pay tribute to Karen Pierce—that there has been a very energetic diplomatic endeavour for the UK. That should be recognised and praised. There is diplomatic activity going on to try to engage people with the draft resolution, attract support for it and try to ensure that the Swedish meeting can take place. People are hopeful that that might provide an opportunity, away from the area of conflict, for people to begin to talk constructively about the way forward.

Lord Cormack (Con): My Lords, I am sure we would all want to endorse what my noble friend has just said about the efforts that are being made, but does not this ghastly human tragedy bring sharply into focus the need for more adequate peacekeeping from the United Nations? Could we not, as a nation and a permanent member of the Security Council, try to initiate some form of in-depth discussion on how much better the United Nations could become at peacekeeping? There was a concept some years ago called "Shield", which called for a rather more international army than exists at the moment. Millions of people have suffered in recent years, especially in the Middle East. If there were more-adequate peacekeeping from the UN, that might not have happened.

Baroness Goldie: I thank my noble friend; he makes an interesting point which I am sure will be noted and reflected upon. My observation in relation to Yemen is that the ability of any group to achieve peacekeeping is only as good as security on the ground. Unfortunately, we have seen in Yemen a turbulent, unpredictable environment—a fractured country with huge security risks. That is why the priority at the moment has to be finding a ceasefire and a political settlement.

Lord Campbell of Pittenweem (LD): My Lords, I associate myself with the observations of the Minister about Karen Pierce. She is an outstanding public servant who has much experience at the United Nations. I understand that consensus is the objective, but if consensus cannot be achieved, is it not necessary to press this resolution to a vote so as to expose those who are opposing humanitarian relief?

Baroness Goldie: I thank the noble Lord for his comments. Things are at a delicate stage. It is perhaps prudent in the circumstances, given the progress that has been made, to allow a little time to elapse to see if the diplomatic endeavours can bear fruit. They may very well do that. If not, we certainly want the talks in Sweden to happen and to progress, but there is no doubt that a careful eye will be kept upon the progress of the draft resolution at the UN. The noble Lord is quite correct: we shall have to review the position depending on what is happening.

Police, Fire and Crime Commissioner for North Yorkshire (Fire and Rescue Authority) Order 2018

Motion to Regret

6.55 pm

Moved by ***Baroness Pinnock***

That this House regrets that the Police, Fire and Crime Commissioner for North Yorkshire (Fire and Rescue Authority) Order 2018 has been brought forward despite the constituent councils, the North Yorkshire Police and Crime Panel, and North Yorkshire Fire Authority being opposed to the proposals; further regrets that no detailed assessments have been undertaken by the Police and Crime Commissioner's Office as to the impact of the proposals; and expresses serious concern that the proposals could severely impact on the fire services' capacity to serve residents across York and North Yorkshire (SI 2018/970).

Baroness Pinnock (LD): My Lords, the policy objective in the Policing and Crime Act 2017 was to enable police and crime commissioners to take over the control and oversight of fire authorities. The aim was to achieve greater collaboration and collocation of these two services which respond to emergencies. That objective is not challenged in this Motion; the means to achieve that outcome are, we contend, in the case of North Yorkshire, fundamentally flawed.

The North Yorkshire police and crime commissioner, Julia Mulligan, published a report in October 2016 in support of a single leadership model by the PCC for both police and fire services. A business case was developed to support the proposition, and this was assessed on behalf of the Home Office by CIPFA. The CIPFA report is revealing. It looked at the consultation undertaken by the PCC. Three models were proposed. These were labelled: "representation", "governance", and "single employer".

From the outset, the consultation was skewed to get support for a PCC takeover. The public—who will be barely aware that a PCC exists and probably also not aware that the commissioner is a single elected politician—opted for the so-called governance model. Why was it not described as it is—that is, as a commissioner model? Was it deliberately or inadvertently designed to mislead? The CIPFA conclusion on this consultation was that the choice between a councillor-led representation model and a single elected politician governance model was a political issue outside of its remit.

The CIPFA report then proceeded to assess the PCC's business case on the basis of economy, efficiency and effectiveness. Currently the joint expenditure for the police and fire services in North Yorkshire is £169 million. On the measure of economy, which is minimising the cost of resources used, the CIPFA conclusion was that,

"there is an absence of quantified benefits",

in relation to any reduced costs of these inputs.

On efficiency savings, the business case assessed that £660,000 at net present value can be saved per annum. This is achieved largely by joint appointments of senior staff and, crucially, includes one-off benefits of capital receipts from the sale of sites and buildings, which could well be achieved under the existing models. Of course, many smaller local authorities have used this route for so-called back-office savings for several years, and this has been done without compromising the status of the individual authorities. Indeed, the police and fire services in North Yorkshire have already been developing collaboration via a collaboration committee, which is already proving to be an effective way to secure improvements, with agreement by both services and without the disruption of a significant change in governance model. The overall CIPFA conclusion paints a more balanced picture, that efficiency savings lead to a net cost reduction per annum of a mere £36,000. Is it for this that the Home Office is allowing such upheaval?

On the effectiveness measure, the CIPFA assessment stated that:

"Proving a direct link between the governance model and effectiveness is a subjective process",

but that, "On balance", it,

"has the potential to have a positive impact".

I contend that that is hardly a resounding endorsement. CIPFA concludes that,

"the Governance Model will be in the interests of efficiency. However, the savings directly attributable to the change are modest".

That is the understatement of the year.

7 pm

It is therefore hardly surprising that all the constituent councils in North Yorkshire—the county council, the City of York Council, the North Yorkshire police and crime panel and the North Yorkshire fire and rescue authority—all opposed the takeover by the PCC. All political parties in North Yorkshire are of one mind on this, and the PCC, a Conservative politician, has completely failed to garner the support of any of her locally elected Conservative colleagues. The decision to move from a multi-member, multi-political party model to a single politician is an affront to local democracy.

Accountability is a further area of consideration that was not tested either in the PCC's business case or, consequently, by the assessor. A police and crime panel scrutinises the PCC but has very limited powers to call the PCC to account for wrong—or even wrongful—decisions. It is the epitome of the toothless tiger. It can scrutinise the precept and the PCC's policing plan, but that is about it. Even where there are challenges to PCC decision-making, there are no means of redress. Public accountability for funds raised through taxation ought not to be regarded in such a frivolous fashion. When poor decisions are made, where will the public look for answers and accountability? It is risible to claim that the election of a PCC every four years—an election that excited a mere 22% of the electorate in North Yorkshire in 2016—is evidence of democratic accountability.

The geography of North Yorkshire has not been mentioned once in any of the reports I have read. The North York Moors and Yorkshire Dales are indeed glorious, but transport across those moors and rolling landscapes is not easy. The geography demands more service points than the PCC business case assumes.

In the conclusion to the report, the government assessor stated that "modest savings" could be achieved by the proposal. The report was too kind; meagre savings is a more accurate description. The impact on vital public services has, astonishingly, not been assessed. Savings, even under the heading of efficiency and effectiveness, can have a cost. That cost has been completely ignored in an unseemly grab for power. Politicians reject it. The business case offers only modest savings and efficiencies. The impact on vital public services has been ignored. I ask the Government to reconsider the decision. I certainly regret it. I beg to move.

Baroness Harris of Richmond (LD): My Lords, my contribution to this regret Motion will necessarily be rather more targeted, as the area in question is my area of North Yorkshire, the largest single rural county in England. I was a county councillor there for 20 years and chaired its police authority for a number of those.

The Minister certainly knows my firm opposition to the introduction of police and crime commissioners. Indeed, some of your Lordships will recall that, with help from many of your Lordships, I defeated the coalition Government's proposal—one of David Cameron's ideas—to bring in a single police commissioner in place of the 17 or 19 members of police authorities. As we see, it was a pyrrhic victory. Nevertheless, the concerns many of us from across the House expressed have been well and truly realised across the country, not least in North Yorkshire.

Our PCC has been embroiled in an unseemly and unprofessional case of bullying some of her members of staff. She was hauled before her police and crime panel, which did a superb forensic job of getting to the bottom of the complaints and asking her to consider her behaviour. I am told her response to them was arrogant in the extreme: she denied the complaints and then tried to complain about the way she had been treated by the panel. She was found guilty of bullying behaviour, and I understand more complaints are in the pipeline.

This is a PCC who wanted to put a new police headquarters on a piece of land in the middle of a field in a small rural village. This is a PCC who auctioned off the contents of silver cabinets and much else from the old police headquarters without first asking if former officers would like to bid on any of the contents, in which many of them had a particular—and, in some cases, personal—interest. This is remembered with much anger and bitterness.

She treats people who disagree with her with utter contempt. She certainly treats members of the PCP like that. It does not stop there. All the local political parties in North Yorkshire, as we have heard from my noble friend, were opposed to her taking on the running of the fire and rescue authority. No one I have spoken to thinks she is a fit and proper person to undertake such a responsibility. The fire and rescue service in North Yorkshire certainly does not want it, but that has now been foisted on it by government decree. All the consultation the PCC says she has undertaken to establish her business case went by the board. She took absolutely no notice of anyone.

Our fire and rescue authority was not underperforming in any way. Indeed, I was a member of it many years ago, and there was always a good collaborative relationship between partner agencies. Why should the PCC want to take it over? It was running perfectly well. She says she can save a lot of money by doing so. The report in the *Press* in York says that she is already, just a few days into her new job, contemplating slashing the fire service. She claims the independent report she received said that the service was in an unsustainable financial position and that she would have to identify savings and set an emergency budget. She says that, as North Yorkshire's PCC, she has saved thousands of pounds since taking over from the old police authority. I find this hard to believe. When I helped set up our first police authority in North Yorkshire, we had a clerk, a secretary and a clerical assistant. She has at least 14 members of staff. I cannot imagine that her wage bill is less than mine was, even accounting for the remuneration of police authority members.

Indeed, it appears that she has led North Yorkshire Police into its worst financial crisis since the millennium. There is a £10 million shortfall this financial year, which may come as a surprise to the people of North Yorkshire as there has been no public acknowledgement of this gathering storm. It is strange to compare that with how widely her takeover of the fire service has been publicised. She promises a proper, transparent plan for dealing with this. I wish her luck with the Fire Brigades Union.

Unfortunately, it is the Government's idealistic policy that has brought us to this point. No proper scrutiny by anyone with any experience or knowledge of the fire and rescue service was brought in to assess her business case. The CIPFA report even acknowledged that there was no overwhelming case for change, yet the Government decided to back this politically ambitious woman, who has absolutely no experience of the fire and rescue service.

York, which has world heritage status, is fearful that some of the PCC's proposals for saving money will reduce even further the funding of the fire and

[Baroness Harris of Richmond]
rescue service. Local councillors, who know their area best and who would have had input into any suggested changes to fire service provision, will have no say whatever from now on. York already suffers from being among the worst funded places in the country for public services, per resident, so their concerns are well justified.

Can the Minister tell me what contingencies will be put in place if all does not go according to plan and there is a major fire in the county? She will remember the devastating fire which engulfed part of the glorious York Minster some years ago. It was noted worldwide, such is the importance of that historic building. Indeed, all North Yorkshire firemen who helped to put out the fire on that fateful morning received a specially struck St William's Cross for their bravery in tackling the blaze, and they are still worn on their ceremonial uniforms to this day. Reducing the number of engines and personnel in the fire and rescue service will do nothing to assuage the concerns of the people of York, who also rely heavily on them to deal with the severe flooding that York suffers from regularly.

In conclusion, I am very concerned that the PCC for North Yorkshire has been allowed to take over the fire and rescue service while still having further charges of bullying brought against her. The Minister, in an Answer to a Written Question about the police and crime panel's power to hold the PCC to account, which I am grateful for, simply stated:

"Police and Crime Panels have the appropriate powers to effectively scrutinise the actions and decisions of Police and Crime Commissioners and enable the public to make an informed decision when voting".

Well, the PCP did, but it has absolutely no power to hold the PCC to account or to correct her if necessary. It can do barely more than disagree with her. PCPs need proper teeth, as we urged the Government to give them during the passage of the Police Reform and Social Responsibility Bill back in 2011. PCCs can get rid of chief constables on a whim, it seems; no one can get rid of a PCC except the electorate, and they have to wait for an election to do so.

Therefore, I again ask the Minister: when will the Home Office give police and crime panels enough power to hold PCCs properly to account for their behaviour and, further, enable them to enforce any recommendations they might have? Until this PCC can understand that leadership means listening to people and taking them with her, rather than bullying them, she is not suitable to hold such a vital office.

Lord Harris of Haringey (Lab): My Lords, it is, as ever, a pleasure to follow the noble Baroness, Lady Harris. However, I am slightly concerned that the reputation that I may have in your Lordships' House of sometimes being rather blunt and trenchant will be sidelined by what the noble Baroness has just said.

I am not going to talk about North Yorkshire at all—I appreciate that that is perhaps not in the spirit of this debate—but I want to pick up just one point from what the noble Baroness has said. When police and crime panels were set up as a sort of safety net in respect of police and crime commissioners, they were very much a governmental afterthought. Very little thought was given to their composition or how they could be made effective, or indeed to the powers they might have. After six or seven years, now might be a good time for the Government to review the role of police and crime panels, how they might be made more effective and useful, and how they might effectively hold police and crime commissioners to account.

However, my reason for speaking in this short debate—I will do so fairly briefly—is to ask some questions about Home Office policy on police and fire mergers. The Home Office was extremely enthusiastic about this at first, but I get the sense that Ministers have rather gone off the idea: it is proving to be rather more complicated and is not demonstrating quite the benefits that they had hoped for. Therefore, I wonder whether the police and crime commissioner for North Yorkshire is not being hung out to dry on this issue, in that she no longer has quite the same enthusiastic support and facilitation that the Home Office might offer to make this policy work. I would be grateful if the Minister told us whether the Government's commitment is still as intense as it was when this power to bring together police and fire was first introduced.

While she is answering that question, perhaps the Minister can tell me where we are with the role of police and crime commissioners in the areas they represent and the wider criminal justice organisation. Areas of synergy between the police and fire services are rather limited. There are a few, although not quite as many as people think; it is not just that people wear a uniform and go out and help people. There are far more synergies between the policing role in a local area—particularly in relation to the objective of reducing crime—and some of the other criminal justice responsibilities. For example, bringing together responsibility for oversight of the police and responsibility for oversight of the probation services—in particular, the monitoring of ex-offenders and those who have been through the courts—might produce far more savings for the country at large and the criminal justice system as a whole.

I wonder where the Government's thinking is on that. If I remember correctly, there was a clause that said rather vaguely that this could be looked at at some stage in the future, but the Ministry of Justice was not very keen, so it did not get any real teeth in the original legislation. However, the Home Office ought to be directing its attention to delivering real savings, to turning people away from crime and to reducing the crime figures. I would be very interested in knowing what the current Home Office policy is on that matter.

7.15 pm

Lord Paddick (LD): My Lords, I strongly support my noble friend Lady Pinnock. The whole reason for establishing police and crime commissioners was supposed to be to increase the democratic accountability of the police service. In fact, as we have heard, the only way that PCCs can effectively be held to account is through the ballot box, and then only at four-yearly intervals. As we know, in most parts of the country, votes for the PCC are usually cast along established party-political lines and are not a referendum on the performance of the PCC at all.

As my noble friend Lady Pinnock said, police and crime panels, allegedly designed to hold police and crime commissioners to account, are in fact a toothless Singapura, let alone a toothless tiger, as the noble Lord, Lord Harris of Haringey, said. My noble friend Lady Harris of Richmond provided an example from North Yorkshire of how powerless the panels are.

This supposed increase in local democratic accountability of the police is being extended so that PCCs can take over fire and rescue services—something that we on these Benches opposed when the legislation came before this House. PCCs already have a very big job on their hands, being responsible not only for the delivery of policing services in their area but for commissioning and co-ordinating other services to reduce crime and disorder. The Government may be in denial about it, but the level of crime and disorder is increasing, and violent crime in particular is reaching alarming levels across the country. PCCs already have enough on their plate.

This so-called experiment in local democracy can result, as it has here, in local democratically elected representatives of all parties—who have wider responsibility for the delivery of local services, not just the police service, and have the "big picture" in terms of their local areas and the funding of all local services—being totally ignored. The very body that is supposed to hold the local PCC to account also opposes what this PCC proposes to do. How can the Government maintain that the PCC taking over the fire and rescue service in North Yorkshire is in the best interests of local people when the benefits are questionable, or meagre, as my noble friend said, and the constituent councils in North Yorkshire—the county council, City of York Council, the North Yorkshire police and crime panel and the North Yorkshire Fire and Rescue Authority—all oppose this move?

Whether it is the police service or the fire and rescue service, multi-party, multi-member authorities will always be able to take a more balanced, more accountable and more democratic approach than a sole individual, who, among other things, can raise the police precept locally without any consideration of the overall burden on local council tax payers and without taking any account of other pressing local priorities. The economic, efficiency and effectiveness benefits can nearly always be secured by the emergency services more collaborating without the PCC taking over control of the fire and rescue service. This is all pain and no gain. This move is very much to be regretted.

Lord Rosser (Lab): My Lords, we agree with the terms of the regret Motion. I do not wish to make any specific comments about the police and crime commissioner concerned since I know nothing about the police and crime commissioner in that area. Suffice it to say that my information too, not surprisingly, is that the North Yorkshire police and crime panel has rejected proposals for the commissioner to take on responsibility for both the fire service and the police—or at least what at that time were proposals—and that the panel had urged the commissioner to reconsider what she was seeking in favour of a model that would retain the current fire authority and give the commissioner a voting place at the table. Likewise, as has already been said most eloquently, the local authorities and the fire and rescue authority expressed a clear preference for the representation model. Indeed, the information that I have received—to put it diplomatically—is that the police and crime panel has a difference of view with the police and crime commissioner over the running of her office in relation to issues of bullying and a hostile environment.

I make no comment on the rights or wrongs of it because I personally know nothing about it. I was told that the police and crime panel intended to write to the Home Office to highlight its concerns. I do not know whether it has done so or whether the Home Office has received any such letter. Clearly there is not a very happy relationship between the police and crime commissioner and the police and crime panel in North Yorkshire. One would have thought that, to get to the bottom of it, the Secretary of State would have wanted to know rather more than perhaps he does about working relationships between the two organisations, since that surely must be a consideration in whether you are going to extend the power and authority of the police and crime commissioner. Maybe the Minister will tell us that the Home Secretary has already done that, and that he is satisfied that the police and crime commissioner is in the right and that the police and crime panel has got the wrong end of the stick; I will wait and see what the Minister has to say on that.

I refer to the independent assessment on which the judgment was made that the criteria of economy, efficiency and effectiveness have been met, and indeed of public safety. On economy, in the section headed "Our Overall Assessment", the report says:

> "Our overall view on economy is that it has received little attention in the LBC"—

the local business case—

> "and there is an absence of quantified benefits in relation to any reduced costs of inputs".

Later in the paragraph, having referred to other issues, it goes on to say:

> "On that basis we are unable to reach an objective conclusion on whether the proposal will meet the specific criterion of increased economy".

Then, looking at the issue of efficiency, the independent assessment says:

> "As we noted above nearly all of the savings in the LBC arise from efficiency savings".

I am not reading out the full paragraph, but it states that:

> "The only savings which can be attributed directly to the Governance model are those arising from changes in the structure of the OPCC and the FRA"—

the office of the police and crime commissioner and the fire and rescue authority—

> "i.e. those savings referred to as Direct Governance Benefit",

in the local business plan.

As has already been said by the noble Baroness, Lady Pinnock, the report goes on to say that:

> "This leads to a net cost reduction of £36K p.a. from 2019/20 or a total of £204K, net of implementation costs, over the 10 year period of the LBC".

[Lord Rosser]

As has already been said, the independent assessment says:

"However, the savings directly attributable to the change are modest".

That is probably one of the understatements of the year, if you are talking about savings as low as that; and it is based on the figures that have been put forward by the police and crime commissioner and the assumptions being made proving to be correct.

Turning to effectiveness, the report says:

"Proving a direct link between the governance model"—

which is what the police and crime commissioner wants—

"and effectiveness is a subjective process".

It ends—it is debatable whether you think this is an endorsement—by saying:

"On balance our view is that the proposed change in governance has the potential"—

I emphasise "potential"—

"to have a positive impact on effectiveness".

In other words, the independent assessment could not produce the evidence that the change would have a positive impact on effectiveness; it would have only the potential to have a positive impact on effectiveness.

In the next paragraph—I am not reading out the whole paragraph—the assessment says:

"Having reached that conclusion we would add that there is no overwhelming case for change and that most of the proposed changes could be achieved under the other three options, subject to the willingness of all the stakeholders to work together".

The assessors were also asked to comment, I think, on the issue of public safety, and their comment was,

"this is a very subjective area to assess".

They concluded by saying:

"On that basis we have concluded that there is no increased risk to public safety due to the proposed change in governance"—

that is a relief—

"and that there may be benefits in the future".

If that is a ringing endorsement of the PCC's plan, I think the Secretary of State has got it all wrong, because, as I understand it, it is on the basis of that independent assessment that he has agreed the proposal. Subject to what the Minister may say in response, he does not seem to have taken much account of working relationships—for example, the PCC's relationship with her police and crime panel, and perhaps with other people as well, including her own staff.

In concluding, I simply say that if the independent assessment is deemed sufficient to meet the criteria of economy, efficiency and effectiveness, it is very unlikely that any future proposal from a PCC to take over a fire and rescue authority will ever be anything other than approved by this Secretary of State.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, I thank all noble Lords who have taken part in this debate, particularly the noble Baroness, Lady Pinnock, who secured it. As noble Lords will know, the Policing and Crime Act 2017 helps to make collaboration far more commonplace than it was hitherto. It placed a new duty on the police, fire and rescue and emergency ambulance services to keep collaboration opportunities under review and, where it is in the interest of their efficiency and effectiveness, to put those opportunities into practice. Let us not forget the rationale for a broad and non-prescriptive duty. It is for those with clear, local accountability to accelerate local emergency service collaboration.

As noble Lords will be aware, the Act also enables PCCs to take responsibility for the governance of fire and rescue services to drive that greater collaboration between policing and fire, which is what we are discussing this evening. Sir Ken Knight's 2013 review of the fire and rescue service concluded that PCCs,

"could clarify accountability arrangements and ensure more direct visibility to the electorate".

His findings were clear. The patchiness of collaboration across the country—I can attest to that myself—will not begin to change consistently without more joined-up and accountable leadership.

The directly accountable leadership of PCCs can play a critical role in securing better commissioning and delivery of emergency services at a local level. I pay tribute to the noble Lord, Lord Bach, for the work that he is doing to this end, and of course to Greater Manchester and the excellent work done in that area.

I have visited the police authority and seen the current PCC in action and I can certainly attest to the more visible model that PCCs represent. They are directly elected by the communities they serve, and it is the public who hold PCCs to account in the most powerful way—at the ballot box. I know the noble Baroness, Lady Pinnock, questioned the visibility of the PCC but, even though I was on a police authority, I am not sure I could name every member. However, everyone in Greater Manchester knows the PCC.

Last month marked a year since the first police, fire and crime commissioner was established in Essex. Roger Hirst set out a raft measures—

7.30 pm

Lord Harris of Haringey: I just wanted to correct the Minister. There is no PCC in Greater Manchester; there is an elected mayor.

Baroness Williams of Trafford: I beg your pardon. I am sorry—I was making a point about visibility and I knew that the noble Lord would pick that up the moment I said it.

A public consultation on Roger Hirst's fire and rescue plan, outlining the fire and rescue service's priorities over the next five years, will soon go live. Staffordshire's police, fire and crime commissioner, Matthew Ellis, is also beginning to make real headway. For instance, a shared occupational service is providing readily accessible mental health support for all police and fire staff. I know noble Lords will join me in commending such a worthwhile service.

Last week, we saw the third police, fire and crime commissioner established in North Yorkshire, which is the subject of this debate. I am grateful to all those who have taken part. I have listened very carefully to the noble Baroness and her concerns, but I say with

great respect that I disagree with the assertions levelled in her Motion. She expressed concern about the lack of assessment undertaken by the PCC. I regret that this betrays a misunderstanding of the robust process that is in place before a governance transfer is approved. Before a proposal is submitted to the Home Secretary, the police and crime and commissioner must publicly consult with all relevant local authorities, local members of the public and those employees who may be affected by the proposal. Commissioner Julia Mulligan duly undertook a public consultation to garner views on her proposal. The consultation ran for 10 weeks and received over 2,500 individual responses from residents, local businesses, employees from the police and fire service and local authorities.

Opposition to the proposal was not widespread, as the noble Baroness maintained. It is clear that the status quo in North Yorkshire had not been aiding collaboration across the emergency services. All local stakeholders agreed that some change in governance was needed to aid collaboration. The North Yorkshire branch of the Fire Brigades Union supported a governance change and the PCC's consultation resulted in over half of respondents supporting the PCC's proposal to take on responsibility for the fire service.

I accept that that means that some respondents did not support the proposal, but such views were in a minority. These views have been considered very carefully. North Yorkshire County Council and the City of York Council did not support the proposal, as the noble Baroness, Lady Harris, said, and the noble Baroness, Lady Pinnock, highlighted that the fire and rescue authority disagreed with the proposal.

As a result of the objections from North Yorkshire County Council and City of York Council, the Chartered Institute of Public Finance and Accountancy, as noble Lords mentioned, was commissioned to undertake an independent assessment of the proposal. CIPFA is independent, has substantial public sector finance expertise, and experience of working in both the policing and fire sector. Importantly, CIPFA discussed the proposal with local leaders, including the chief fire officer and his senior management team, the leader of North Yorkshire County Council and the leader of City of York Council.

CIPFA concluded that the PCC had conducted a wide-ranging consultation, with public events held on market days, and allowed adequate time for responses, especially taking account of the holiday season. CIPFA also noted that there is,

"no increased risk to public safety due to the proposed change in governance and there may be benefits in the future",

as other noble Lords noted. On that point, I make clear that maintaining public safety is a core part of the fire and police service's role. Its commitment to public safety will not be compromised.

The Home Secretary had due regard to CIPFA's assessment and the PCC's proposal alongside the consultation and representations made. In June, the Home Secretary was satisfied that the proposal was in the interests of economy, efficiency and effectiveness and did not have an adverse effect on public safety. I reassure noble Lords that the distinction between policing and fire will remain: this is not an operational takeover. I recall the very firm arguments to that end that were made in this Chamber when we discussed the Bill.

The new police, fire and crime commissioner will be subject to robust scrutiny between elections. The police and crime panel has a range of appropriate powers to scrutinise the decisions of commissioners that affect their communities. The Act makes it clear that the functions of the police and crime panel will be extended to include the fire service. The panel will need to ensure that it has the right skills and knowledge relating to fire and rescue, as well as crime and policing. To support this process, a grant uplift has been issued to North Yorkshire County Council, in respect of the North Yorkshire police, fire and crime panel.

Following this Government's reforms, the North Yorkshire Fire and Rescue Service will also be subject to inspection, which is a key pillar of the reform agenda. I hope that gives the noble Baroness some comfort as to some of the work going forward. I am sure she will be looking forward to the outcome of the inspection.

I am confident that the changes to fire governance in North Yorkshire will take collaboration between North Yorkshire police and fire services further than has been the case to date. The police, fire and crime commissioner, Julia Mulligan, will further develop her plans, as we would expect, but I welcome the emphasis, in particular, on streamlining senior management posts, collaboration on back-office support services and sharing buildings between the two services.

Lord Jopling (Con): Has it crossed my noble friend's mind that this whole debate is far more about the parties opposite preparing for the next election of police commissioners in North Yorkshire than about the amalgamation of fire and police services in North Yorkshire?

Baroness Williams of Trafford: My noble friend makes a very interesting point because this measure was not prayed against. Noble Lords opposite are expressing their feelings in a regret Motion slightly after the event. I share my noble friend's cynicism.

Noble Lords: Oh!

Baroness Williams of Trafford: Well, I do. Much of this was debated when we examined the Bill. Many of the issues around scrutiny were debated and I thank noble Lords for the time they took in scrutinising the Bill to make it far more robust in terms of the scrutiny that went on. I see that the noble Lord, Lord Shipley, is in his place; he was one of the people who were absolutely adamant about scrutiny.

The noble Baroness, Lady Pinnock, noted that the savings directly attributed to the proposal were modest and the noble Lord, Lord Rosser, backed that up. CIPFA was of the view that the savings associated with the direct governance benefits were reasonable and that savings for the shared estates and support services were not unreasonable. CIPFA reported that the PCC's proposals set out estimated net savings of £6.6 million at present value over the 10 years and the noble Baroness pointed that out. CIPFA also highlighted that, in its experience, benefits can be obtained by

[Baroness Williams of Trafford]
better procurement and the realisation of the benefits of purchasing on a larger scale, and that it would be reasonable to expect benefits to arise in this area. I do not think any noble Lord could dispute that there are further streamlining processes that could be achieved. There will be some implementation costs associated with the transfer, but many other benefits such as increasing the pace and scale of collaboration, which can have substantial benefits for local communities.

The noble Baroness, Lady Pinnock, questioned the accountability of the panels, saying that they are a bit toothless, and the noble Lord, Lord Harris of Haringey, asked whether they were an afterthought. They were very much the recommendation of your Lordships' House. Again, the noble Lord, Lord Shipley, was very keen that such scrutiny should take place. The panels enable the public to hold them to account as well and, crucially, they conduct the majority of their business in public—which is not something we could say for previous police authorities.

Noble Lords: Oh!

Baroness Williams of Trafford: They did not have the public-facing role that—

Lord Harris of Haringey: My Lords, the Minister has, unfortunately, said something quite outrageous. I chaired the Metropolitan Police Authority for four years, and the number of times we went into private session was extremely small. Most of those meetings were held in public with television cameras and most of the national press present. That was the balance.

Baroness Williams of Trafford: The noble Lord is absolutely right; it was the case in London. Elsewhere it most certainly was not.

Baroness Harris of Richmond: Certainly, when I chaired my police authority, we went all around the county and everybody was welcome; we had lots of people there. So what is happening now?

Baroness Williams of Trafford: The noble Baroness pinpoints the issue. The public were welcome to attend. The public did not attend.

Noble Lords: Oh!

Baroness Williams of Trafford: Well, not in great numbers. Anyway, that is a moot point. In Greater Manchester they did not attend.

Lord Shipley (LD): My Lords, the Minister has mentioned my name even though I have not taken part in this debate at all, although I share the concerns of those who have moved this regret Motion. She may be confusing my concerns on scrutiny of the structure and governance of the combined authorities with the statements I made at the time of the passing of the Bill in relation to police and crime commissioners. As I recall, I never felt that the proposal was robust or that the scrutiny arrangements were adequate, because the powers given to the panels in my view were nothing like strong enough.

Baroness Williams of Trafford: I apologise to the noble Lord if I am conflating or confusing combined authorities with the PCC role. He certainly was very vociferous on the role of scrutiny in terms of the combined authority.

The noble Lord, Lord Harris of Haringey, asked about the Government's view on police and fire mergers in terms of the wider role; he referred to justice. I shall go back and ask what future plans are, because I confess that at this point I do not have up-to-date information on that.

Noble Lords asked about claims of bullying and whether the Home Office had received any representation. I confirm that the PCP in North Yorkshire has written to the Policing and Fire Minister regarding those allegations of bullying and harassment levelled at the PCC from members of her own staff. I also confirm that broader questions regarding the scrutiny role of PCPs have surfaced. PCC Mulligan has apologised for the impact that her behaviour may have had on the complainant and is already addressing many of the areas that the panel identified in its recent report.

Lord Rosser: I am talking about this in general terms. Is the ability of a PCC to work with those around her—for example, the police and crime panel and her own staff—a factor that is taken into account in considering whether she or he should also have responsibility for the fire and rescue service?

7.45 pm

Baroness Williams of Trafford: I do not know whether personal qualities or characteristics are taken into account and I do not feel that I am in a position to opine on this, given that I do not know the detailed circumstances of the complaint. However, the PCC is receiving support from the Association of Police and Crime Commissioners, which is providing a mentoring function. I probably cannot go further than that.

The noble Lord, Lord Rosser, also implied that PCCs seeking to take on governance of their local fire and rescue service should be prevented from doing so where that would have a negative impact on public safety. Public safety is of course the absolute core element of the role of the fire and rescue service, so we would not expect the Home Secretary to approve a transfer where that was compromised.

If I have not answered all the questions that were put to me, I will write to noble Lords in due course. Having heard the Government's case, I hope that the noble Baroness will be content to withdraw her Motion to Regret.

Baroness Pinnock: I thank all noble Lords who have contributed to the debate, which has got more interest than I anticipated, and I thank the Minister for her very considered and careful response, as always. I want to highlight three points that the Minister has made.

The first is about collaboration. I said right from the outset that that is not in question here. As far as I am concerned, the point is well made. There ought to be collaboration between the emergency services, and

efforts are being made in North Yorkshire without this change having been imposed on the authority. My second point is about the CIPFA independent assessment, which was underwhelming in its endorsement of the business case put by the North Yorkshire PCC. It could not have been more tepid if it tried. For that reason, we ought not to take into account that the CIPFA report was in favour of this. It found no supporting evidence for the case that was made. The third point I want to make is about the one that the Minister and others have made in the reports that I have read: "It is great to have visibility; we know who the PCC is". We know who dictators are, actually, and we know that they are transparent in their decision-making, but they are not accountable and neither is a PCC.

For these reasons, the whole situation in North Yorkshire is becoming very difficult indeed, especially when we think that these are emergency services on which people's lives depend. This is not a game being played, although it has seemed to be by the PCC. This is important stuff. To just say that it will lead to visible decision-making—no, it will not. Decision-making has to be thoughtful, considered and right.

The last comment I want to make is about accountability. The panels that are set have no powers at all to really call anyone to account. It is a single person who makes these vital decisions on emergency services, and the panels can do little or nothing. As we have heard, they have had to write to the Home Office to see if they can sort something out about the collapse in relationships in North Yorkshire.

I respect the Minister and the work she does, but I am afraid that in this instance I am not happy with her responses for the reasons I have given. Given that, I wish to test the opinion of the House.

7.50 pm

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Motion disagreed.

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Crime and Courts Act 2013 (Commencement No. 18) Order 2018

Motion to Approve

8 pm

Moved by ***Baroness Vere of Norbiton***

That the draft Order laid before the House on 13 March be approved.

Relevant document: 25th Report from the Secondary Legislation Scrutiny Committee

Baroness Vere of Norbiton (Con): My Lords, I thank the noble Lord, Lord Thomas of Gresford, for giving me the opportunity to return to this important topic. I should also like to thank all noble Lords for their contributions as we move on.

Electronic monitoring using radio frequency technology has been used nationally as a key element of our criminal justice system for almost 20 years. It has proved to be an effective tool to manage offenders' compliance with curfew requirements. In any one year, 60,000 people are so monitored and at any one time there are around 11,000 subjects monitored on curfew. For those released on prison licence, legislation also allows for the subject's location to be monitored either to support a requirement of the licence or to monitor an offender's whereabouts. The latter is referred to as a stand-alone location monitoring requirement; that is, it is not linked to another requirement.

Furthermore, legislation already exists to permit location monitoring to be used as part of court bail or a community sentence to monitor compliance with a requirement such as an exclusion zone. The order before your Lordships' House today, which has already been debated in the Moses Room, seeks to commence legislation that will allow courts to impose a stand-alone location monitoring requirement as part of a community sentence when it is considered to be appropriate, proportionate and necessary to do so. Using an electronic GPS tag, an offender's location will be tracked by satellite using technology similar to that of a satnav. The ankle tag will record the offender's position and, at frequent intervals, send that data to a monitoring centre via a mobile network. The location data will be retrospective.

The case for stand-alone location monitoring has been supported by two pilots, the first of which was run by the Ministry of Justice and the second by the London Mayor's Office for Policing and Crime, or MOPAC. The first pilot ran for 18 months across Bedfordshire, Cambridgeshire, Northamptonshire, Nottinghamshire, Hertfordshire, Leicestershire, Staffordshire and the West Midlands. Of the 586 subjects that were tagged, 161 were given a stand-alone location monitoring requirement. Of those, 107 also had an electronically monitored curfew. The tagging was considered to be necessary and proportionate by a court, or a prison governor, having due regard to advice from probation practitioners. The remainder of the subjects had location monitoring imposed to monitor compliance with another requirement; for example, an exclusion zone.

The second, smaller-scale pilot run by MOPAC in the London area was initially intended to run for 18 months, but has now been extended for a further 18 months and will conclude in September 2019. As at the end of October, 100 of the 104 community-sentenced subjects in the MOPAC pilot have been given a stand-alone location monitoring requirement by courts and more are expected. This indicates that decision-makers recognise the benefits of using stand-alone location monitoring in the right circumstances. Indeed, criminal justice boards in the areas included in the first pilot were very keen to see a continuation of location monitoring in general and wrote letters of support.

This has been mirrored by feedback received from offender managers and some offenders during both pilots. That feedback indicates that stand-alone location monitoring provides offender managers with more information on offenders' movements, allowing for constructive conversations to take place regarding their behaviour, helping to manage the risk of reoffending, aid rehabilitation and help those they supervise to lead law-abiding lives. It can motivate subjects to engage in their rehabilitation, attend addiction therapies, turn up for work or training and to stay away from those people and places that would have a negative influence on their lives. In some cases, it could also provide enough assurance to enable courts to impose a community sentence as an alternative to custody, thereby reducing prison numbers. Let me read to you a comment received from one offender:

"It's the fact that you can continue to provide support for the people that you care for and you can still work, you can still be around, you can still be a brother, a friend, you can still be a dad. You can still be all those things whilst on GPS that you can't if you're in custody".

This feedback is supported by the independent evaluation of the first pilot, conducted by NatCen Social Research, which will be published shortly. One of the key findings is that partner agencies, probation, police, prisons and courts were keen to use location monitoring to help monitor and manage compliance with bail, sentence and licence conditions. The report highlights that location monitoring was felt to support the effective management of offenders in the community in four key ways: supporting offender rehabilitation; facilitating risk management; helping to inform decisions about whether a wearer should be recalled to custody or court; and providing evidence either to exonerate them or to link them to a crime.

Lessons have been learned from both this pilot and that of MOPAC, as well as from MOPAC's ongoing pilot, to inform the implementation of the new electronic monitoring service. Those lessons have been incorporated into the ministry's programme for delivery. For example, subjects reported issues with keeping the tag charged. As a result, the tag will come with a portable charger and subjects will receive alerts when their tag's battery needs charging. The new service will have an initial phased release at the end of 2018 in the north-west and the Midlands, which will start to introduce at scale the availability of GPS tags. That will be augmented by a further release in the summer of 2019, providing greater functionality for service users, including a portal where updates and alerts can be viewed online.

This order builds on legislation which is already in place regarding electronic monitoring. The pilots have worked well and are working well, and we look forward to seeing GPS tagging in the right circumstances as soon as it is appropriate. I beg to move.

Amendment to the Motion

Moved by ***Lord Thomas of Gresford***

To move, as an amendment to the above motion, at end to insert "but that this House regrets that the Order provides for a new type of standalone electronic monitoring requirement for community orders and suspended sentence orders before the results of the ongoing pilot schemes are known".

Lord Thomas of Gresford (LD): My Lords, my original objection to this statutory instrument was based upon the fact that its purpose was to introduce a major difference in the use of electronic tags which affected the liberty of the subject without awaiting the results of the pilot schemes which were then being carried out in two major areas in the country. I believe in evidence-based policy and I thought that the Government took the same view.

As the Minister said a moment ago, electronic tags have been used within the criminal justice system for some 20 years since 1988, but only to monitor offenders' compliance with a curfew. It was possible to confirm whether an individual was at a particular address at a particular time. The introduction of GPS monitoring differs considerably. The tag remotely captures and records information on an individual's whereabouts at all times. Signals are received from satellites and are communicated via a mobile phone network to a case management system.

There was a pilot scheme in Greater Manchester, Hampshire and the West Midlands between 2004 and 2006. It was not a complete success. One of the modes of tracking was called hybrid tracking, which involved the delineation of geographic exclusion areas: if the offender moved into an exclusion area, a signal would be sent to the case management system immediately. This was the sort of tracking that is now envisaged in this statutory instrument. The conclusion of the 2006 report said:

"Although there may be a role for this form of hybrid tracking in providing an added layer of protection for victims assessed as particularly at risk, the limited use to which it was put during the pilots meant that no firm conclusion could be reached. On the other hand, if the main purpose of satellite tracking is to provide information on offenders' whereabouts in order to challenge them about their movements and help them avoid dangerous situations, or to provide robust evidence of violations of exclusion zones, then this can be achieved through 'passive' tracking"—

that is to say, not this complicated system—

"and may not even require the daily flow of information from the monitoring company to offender managers that was made available in some areas during the pilots".

That 2006 report also found that active tracking, whereby an offender's general movements are followed in real time, could not be used because of the high level of resources which would be needed for such an operation.

Also in that report in 2006, probation officers, police officers and youth workers were generally less enthusiastic about the way that the satellite tracking equipment had worked. They were particularly worried about GPS drift—where GPS plots are, for a short period of time, wildly aberrant—and signal loss. Both created uncertainty in their minds. Had the offender tampered with the equipment, had the equipment broken down in some way, or had the signal been blocked by a tall building or some other obstruction? Their other concerns were that maps of offenders' movements were sometimes unclear, insufficiently detailed or difficult to interpret; that battery life was limited; that ankle tags frequently needed changing; that communications between offender managers and the monitoring companies were not as good as they ought to be; and that tracking units were intrusive and infringed civil liberties. That was the position in 2006. One would have thought that the current pilot schemes should have been completed and brought before this House before introducing the system more widely.

The scheme in 2004 to 2006 was therefore not followed up in the light of the comments received. GPS tags have been used in a number of situations since, specifically for integrated offender management schemes—IOMs—but on a voluntary basis only. The case for their use is not open and shut, and the expense for hybrid or active tracking where offender managers feel it necessary to carry out immediate action is considerable. One would have thought that the Government would have awaited the findings of the recent pilots before introducing as part of the criminal law of England and Wales a scheme that is similar but which differs in one very important respect: the proposal for compulsory, not voluntary, tagging on a large scale.

On Monday, the Minister helpfully provided me with an embargoed copy of the report; I am grateful to her for that and for the courteous letter

that accompanied it. I read and digested its contents. Unfortunately, because of the timing of this Motion to approve the statutory instrument, I cannot comment on its findings or conclusions. When will it be published? When could I comment on it? When the DPRRC considers the appropriate course for parliamentary scrutiny of the exercise of powers granted to Ministers in a Bill and advises the House, it does so in the belief that the use of the affirmative procedure will give the House an opportunity to raise any matters of concern on the evidence. There is evidence—there is an embargoed report—yet we proceed tonight without that report having been published. It is not available to Members of this House for comment.

8.15 pm

However, I think that I am entitled to raise a number of questions without reference to the report's contents. First, has electronic monitoring been shown to have any significant impact on the rate of reoffending? The 2004-06 study followed offenders for up to five months after the end of their tagged period. Its report stated that, during that limited period,

"26 per cent … of satellite-tracked offenders were either reconvicted for an offence committed during their period of tracking … or while unlawfully at large following their recall/revocation … or were considered by their offender managers … to have committed an offence during their period of tracking".

The report also stated:

"If a longer period had been available, more convictions would almost certainly have been detected".

Secondly, some people are vulnerable and lead chaotic lives. There are strict conditions attached to the use of tags: offenders have to be able to charge the tags for two hours a day in a docking device, and failure to do so is a breach that can result in punishment. Anybody who has to charge their phone every night knows that it is not always possible to make sure that you have done it. Exclusion zones and other conditions have to be agreed and communicated to the offender. Does an offender leading a chaotic life fuelled by drugs or alcohol have the capacity to understand and comply with orders of this sort?

Has a suitable design of the tags been developed? Back in 2006, there was considerable criticism of their comfort, the ease with which they could be removed and so on. Most importantly, will the resources be made available? What a familiar comment that is. The 2006 evaluation identified a mismatch between what the pilot areas sought from satellite tracking and what the monitoring companies had been resourced to provide. With such exclusion zones and conditions, there obviously has to be 24-hour monitoring of the central system alongside a field team that can be sent out to deal with any breach that occurs during that 24-hour period.

Finally, what steps are being taken to inform and advise magistrates, judges and prison staff so that they may have confidence in the system? I very much regret that the Motion has been brought forward at this time without the report being publicly available for your Lordships and everybody else to read and comment on. I beg to move.

Lord Beecham (Lab): My Lords, the story of the Government's policy on electronic tagging over the past seven years has been one of a prolonged disaster. Of course, the Minister is not to blame for that. She has tried to be helpful, although today's letter—referred to by the noble Lord, Lord Thomas—warning recipients not to quote the contents of a document she sent us labelled "Embargoed" was, to put it mildly, unfortunate. I remain grateful for her attempt to be helpful, even if the Ministry of Justice appears to be vying with the Home Office in the competition to be seen as the most incompetent government department.

It is seven years since this policy began its gestation and 16 months since the announcement that the oligopolist G4S—an organisation presumed by the Government to be able to conduct all kinds of services across the system of government in this country—had been awarded a £25 million contract, notwithstanding the fact that it was then under investigation for fraud and that a National Audit Office report criticising the prolonged delay in implementing a policy of satellite tracking for offenders was soon to be published. A ban on G4S was imposed in 2013 after allegations of overcharging on contracts for the electrical monitoring of offenders, although the ban was lifted in 2014 on the basis that G4S had paid £109 million and Serco, another familiar scion of private enterprise, paid £70 million.

Labour's shadow Lord Chancellor, Richard Burgon, has referred to G4S as having billed the Government,

"for tagging thousands of 'phantom offenders' – including those who were dead or in jail",

and to,

"serious delays in informing the authorities that over 100 prisoners had been fitted with faulty electronic tags".

In addition, Capita and two smaller firms became involved, although one withdrew after six months and another after 16 months, following incremental delays in the programme. Can the Minister explain how these failures in contracting occurred, and what steps have been taken to improve the department's commissioning practice?

G4S purports to be able to provide public services across a broad range, including health, prisons and probation, but in January the Public Accounts Committee published a damning report, pointing out that a scheme due to be completed in 2013 was running five years late at a cost of £60 million to the taxpayer, with an additional irrecoverable loss of £9 million. What is more, the new tags are apparently expected to be available early next year. Can the Minister update us on progress, including both the starting and the completion dates for this project?

In its damning report in January 2018, the Public Accounts Committee described the programme as having been "fundamentally flawed", and,

"so far … a catastrophic waste of public money which has failed to deliver the intended benefits",

adding that the MoJ had,

"wasted a huge amount of time and … money to end up with … the same types of tags and supplier it had when the programme started".

Significantly, the committee's critique declares that the Ministry of Justice,

"lacked the capacity and capability to manage the difficulties and delays that it created".

This appears to be confirmed by the fact that it is seven months since the report of the Secondary Legislation

Scrutiny Committee asked why the draft order had been laid while piloting of the scheme was in progress—the very issue raised in the noble Lord's Motion.

Just how long is that process of piloting going to take? Who will evaluate the response? What role will Members of both Houses have in considering the response and triggering the implementation of the order? And what plans are there to review the performance of the contractors? Who will conduct such reviews, and what provision will be made to terminate contracts in the event of failure on the part of the contractors, or if it transpires that, in any event, little or no improvement in reoffending by those fitted with tags has resulted?

Baroness Vere of Norbiton: I thank both noble Lords for their comments, and I hope to be able to address as many of the points raised as possible. First, clearly I shall have to take on the chin that criticism of what went on previously with this project. I do not have the information about what steps were taken, and why the failures occurred, in front of me, but I will write to the noble Lord and set out properly what happened previously and how we will address these issues in future.

I now turn to the comments of the noble Lord, Lord Thomas of Gresford. When I opened the debate, I tried to explain that this order provides an extension of provisions that already exist. There are other classes of subjects that can already be location monitored on a stand-alone basis. One of the reasons for not hanging around and waiting until the evidence, as he called it, is published, is that the report is not for stand-alone location monitoring on its own. It covers all sorts of different location monitoring, so it is more of an ongoing step, for all sorts of electronic monitoring, much of which is already covered by legislation.

The noble Lord took us back 12 years, to 2004 to 2006, and to what people said then. During the passage of the Crime and Courts Act, there was a significant debate about the civil liberties elements of the tagging, but technology has moved on significantly since then, and we are dealing with a very different beast from what was then being reported on.

Lord Mawson (CB): I am in favour of innovation and the use of technology. Indeed, I have spent a lot of my life in the field of innovation, and was involved for a period in technological innovation. So I am in favour of all of this. The technology is used for young people in cars, with little black boxes that monitor where our children who have just learnt to drive are going. Our family's experience of it is that these things are open to abuse from insurance companies—and from technology companies. I worry that things are going on that are far from fair for our young people. My question is: how sure is the Minister that this technology can be trusted and will work in practice? She says that things have moved on, but my experience is that technology always has downsides and weaknesses, and we need to be very secure about it. I am just checking, in this case, what tests have been done.

Baroness Vere of Norbiton: I thank the noble Lord for his intervention. As I explained in my opening remarks, the technology we are talking about is GPS tracking. Yes, it is used in black boxes. My son has one in his car, so he does not do naughty things on the road—which is superb—and we all have it in our telephones. If the noble Lord is asking whether the technology has been tested, I think we can say that it certainly has. Indeed, it is probably used by most of us on a daily basis as we make our way around in the world using Google Maps. More specifically, the partners in place that will be building up the service providers all have great experience in this area. For example, mapping the data from the tags will be done by Airbus—which I think probably knows a fair amount about where things are, particularly aeroplanes in the sky. Of course we are confident that the technology works, and I believe that the pilot has made us confident that the application of it for this particular group of people is a good thing.

The noble Lord, Lord Thomas, commented on the timing of the publication of the report. I am now in two minds about why I shared that anyway. I did it to put noble Lords' minds at rest, because the responses from the pilot were, as we have heard, fairly positive. I cannot give the noble Lord a date for publication, but it will be very soon. That is how all this has fitted together.

As for the timing of the SI, noble Lords discussed this in the Moses Room many months ago, and one of the reasons for the timing relates to an issue that was raised slightly later, about engaging with stakeholders. How can we ensure that this system is actually used by the people who need to be able to step up and say, "You can have a tag, because we can trust you to go into the community, provided that you do certain things"? We have found that, the more we can engage with the people within the criminal justice system who will make those orders, the more likely they are to use the tag. We wanted to get the timing of the SI right so that we could engage with stakeholders.

The noble Lord also mentioned charging. I think that I too mentioned that in my opening remarks. It takes one hour a day, and—to be a bit brutal—it is slightly better than being in custody to have to sit down somewhere and charge a tag. There is also the portable battery charger; I talked about that too. So I do not believe this is a huge issue. The design, too, is much better. We have all seen that the size of these things has now come right down to an insignificant size that will go under a sock, which is very good.

As for resourcing, the cost of monitoring has been brought down significantly by technology—and on the flip side, there are benefits. The cost of investigations could be lower for the police as they look for people they want to rule in or out of possible criminality.

I take the point made by the noble Lord, Lord Beecham, about G4S. I will write to him and set out what happened with G4S in the past, but I reassure him that we have run a fully compliant, open and competitive bidding process for all service providers. There is no scope to exclude bidders within this system, even if they are subject to an ongoing investigation. I recognise the noble Lord's concerns. We are obviously keeping things under a careful, watchful eye, but we are pleased with the service providers we have.

Finally, on reporting, there are no specific plans to publish an individual report on the effectiveness of the new service, but the ministry will monitor take-up and

effectiveness as part of the benefits realisation and will also report on the service providers' performance. I am sure the noble Lord will find that very interesting. It will report on their performance against service level agreements and the number of orders being managed as part of wider regular offender management publications. I think noble Lords will see the numbers, there will be commentary about how well the service is working and there will be the results of the longer-term pilot by MOPAC in due course.

Lord Beecham: Before the Minister sits down, will she give an indication of when we will get the reports she has just referred to?

Baroness Vere of Norbiton: I am afraid I cannot. We know that the first tranche of GPS tags will be coming out at the end of 2018. Full rollout is expected by summer 2019. I think that a period will have to elapse from full rollout until we can get some proper numbers, so I think it will be after that, but obviously I cannot set anything in stone.

Lord Thomas of Gresford: My Lords, there is one group of people who have not been discussed this evening, and that is the judges, magistrates and prison governors who will be concerned with making these orders. I am not sure that they will be tremendously helped by, or have much confidence in, the replies that we have received. I beg leave to withdraw the amendment.

Amendment to the Motion withdrawn.

Motion agreed.

House adjourned at 8.31 pm.

Grand Committee

Wednesday 21 November 2018

3.45 pm

The Deputy Chairman of Committees (Lord Rogan) (UUP): My Lords, if there is a Division in the House, the Committee will adjourn for 10 minutes.

Misuse of Drugs Act 1971 (Amendment) Order 2018

Considered in Grand Committee

3.45 pm

Moved by ***Baroness Williams of Trafford***

That the Grand Committee do consider the Misuse of Drugs Act 1971 (Amendment) Order 2018.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, I am grateful to the Advisory Council on the Misuse of Drugs for its advice, which has helped to inform the draft order before us. The order was first laid before Parliament on 17 October and will control pregabalin and gabapentin as class C drugs under the Misuse of Drugs Act 1971. Should the order be made, pregabalin and gabapentin will be subject to permanent control under Schedule 2 to the Misuse of Drugs Act 1971 through an amendment to Part 3, which specifies the drugs that are subject to control under the 1971 Act as class C drugs.

The order follows the recommendation from the ACMD to control the two drugs under class C of the 1971 Act, as their harms are comparable with those of other substances controlled as class C drugs. To help those with a legitimate medical need access these drugs, and subject to Parliament's approval of the order before the Committee now, we will schedule both drugs under Schedule 3 to the Misuse of Drugs Regulations 2001 through regulations.

Pregabalin and gabapentin are prescription medicines which are used to manage a number of disabling long-term conditions, including epilepsy. They are also licensed for the treatment of general anxiety disorders. In its advice, the ACMD identified a number of harms—in particular, it drew attention to the dangers that can arise when the drugs are used in combination with other central nervous system depressants. In these circumstances, they can cause drowsiness, sedation, respiratory failure and death.

The ACMD also highlighted the risk of addiction that pregabalin and gabapentin presented, as well as the potential for illegal diversion and medicinal misuse. Its advice also drew attention to the concerns of health staff in prisons who reported a high number of prisoners being prescribed the drugs without a thorough assessment of their needs.

Across the United Kingdom, there have been significant increases in the prescription of both drugs: pregabalin prescriptions have increased from 2.7 million in 2012 to 6.25 million in 2017, while gabapentin prescriptions have risen from 3.5 million in 2012 to over 7 million in 2017. In tandem, there has been an increase in the number of deaths related to pregabalin and gabapentin since 2009. In the last five years there have been 408 deaths where pregabalin was mentioned on the death certificate, and 203 in the case of gabapentin. This compares with four and one for pregabalin and gabapentin respectively in 2009.

By controlling the two drugs, we will restrict the potential for misuse by making diversion and their illicit supply more difficult but without compromising access for those who have a legitimate need to access the drugs for healthcare purposes. Parliament's approval of this order will enable UK law enforcement to take action against those who illegally supply these drugs and against those who illegally possess them. Possession of a class C drug is an offence resulting in up to two years in prison or an unlimited fine, and the supply or production of a class C drug is an offence resulting in up to 14 years in prison or an unlimited fine.

If approved, the order will send a clear message to the public that the drugs should only be in the possession of those who have been legitimately prescribed them. We hope that the significant supply offences for class C drugs will make people think twice before they consider diverting pregabalin and gabapentin into the illegal market.

The measure to control these drugs is scheduled to come into force in April 2019. Given the widespread use of the two medicines, this will help to provide the healthcare sector with sufficient time to implement the new requirements. I can assure Members that all relevant information will be communicated to other stakeholders and the wider public. The Home Office will issue a circular with legislative guidance for the police and the courts. Guidance will also be published following engagement with interested parties about the effect of the legislation in preparation for it coming into force in April. In addition, the Government will continue to update its messaging on the harms of these substances.

I hope I have made the case to control these harmful drugs and I commend the order to the Committee.

Lord Paddick (LD): My Lords, I am very grateful to the Minister for explaining the order to us. As she has said, this puts two substances into class C of the Misuse of Drugs Act 1971, on the recommendation of the Advisory Council on the Misuse of Drugs.

We support any evidence-based scientific approach to reducing the harm caused by drugs, legal or illegal. My question is very simple. The noble Baroness talked about a very clear message being sent to the public, but why do the Government not always act on the scientific, evidence-based assessment of the ACMD?

The problem with drugs classification under the Misuse of Drugs Act is threefold. First, based on independent scientific assessment, drugs are not classified according to the potential harm that they cause. For example, GHB—gamma-hydroxybutyrate—is believed to cause a significant number of deaths—perhaps as many as several a week in the UK alone. Yet it is classified as a class C drug. Cannabis which, to my knowledge has not been the direct cause of any drug-related death, is a class B drug. Because of this, and several other misclassifications of which I could give

[Lord Paddick]
examples, the classification of drugs under the Misuse of Drugs Act has fallen into disrepute among those who might arguably be helped most if they knew that the classification of drugs was based on how dangerous they were.

At this stage, I should point out an interest to the Committee. A former partner, who then became my best friend and who was very experienced in the use of recreational drugs, died from an accidental overdose of GHB.

Secondly, because the classification system does not reflect potential harm, only potential sentence, it has become irrelevant to most drug users. They quite simply work on the basis that the penalty is irrelevant to them as they have no intention of getting caught.

Thirdly, any drug classified under the Misuse of Drugs Act carries a heavier penalty than a new psychoactive substance covered by the Psychoactive Substances Act 2016 in that possession of a new psychoactive substance is not an offence, whereas possession of any drug classified under the Misuse of Drugs Act is an offence. This is even though some of the new psychoactive substances are more harmful than drugs classified under the Misuse of Drugs Act.

Our drugs laws are a mess, the Government's drugs strategy is ineffective and, if we are to stop our young people dying, we need a fundamental rethink. We called for a scientific, evidence-based review of our drugs laws when we debated the Psychoactive Substances Bill—a proposition both the Conservative and Labour Benches refused to support. Therefore, I note with interest the comments of the Parliamentary Under-Secretary of State at the Home Office, Victoria Atkins, in the other place, when this order was discussed by the Tenth Delegated Legislation Committee on 12 November this year, at 6.05 pm, where she said that the Government have announced,

"an independent review of the misuse of drugs in the 21st century". —[*Official Report*, Commons, Tenth Delegated Legislation Committee, 12/11/18; col. 4.]

Can the Minister provide the Committee with further details of who will be conducting this review, what their terms of reference are, and any other details that may be of interest?

Lord Rosser (Lab): My Lords, I thank the Minister for explaining the purpose of the order and its provisions. We support it but I have some points that I would like to raise. As has been said, the order controls pregabalin and gabapentin as class C drugs under the Misuse of Drugs Act 1971. Currently these two substances are subject to the Psychoactive Substances Act 2016.

The two substances are used, as the Minister has said, to manage a number of disabling long-term conditions including epilepsy and general anxiety disorders. Although they have legitimate medicinal uses for which they can continue to be used, the two substances in question, when taken with other central nervous system depressants, can be the cause of serious harm including respiratory failure and, at worst, death. The Advisory Council on the Misuse of Drugs has said the two substances in question can be addictive, with the potential for illegal diversion and supply and medicinal misuse. Prescription rates have soared—the Minister gave the figures—while the number of deaths related to the two substances have also increased: just over 400 from pregabalin over the last five years and just over 200 from gabapentin.

Concerns were raised in 2014 by the Health and Social Care Board about the potential misuse of pregabalin. Apparently, in February 2015 Her Majesty's Inspectorate of Prisons reported concerns of health staff in prisons that a high number of prisoners were being prescribed the drugs without a thorough assessment of their needs, and in a way that did not meet best-practice guidelines. Does that mean prisoners in prison being prescribed the drugs without a thorough assessment of their needs or prisoners prior to their coming into prisons being prescribed the drugs in the wrong way? Either way, the question must be how that has been allowed to happen. What will the planned guidance and communication say to address the issue of drugs of this kind being prescribed without a thorough assessment of the patient's needs?

For how many years have these two substances been available? What is it that starts the procedure for the control of such substances as class C drugs as per this order? With concerns being raised in 2014, it does not seem to be a particularly quick process. Who or what organisation makes the initial move, and what is then the procedure for getting the matter before the Advisory Council on the Misuse of Drugs? Or is it the advisory council that has to take the initiative in the first instance?

Paragraph 12.2 of the Explanatory Memorandum states:

"Enforcement of offences in relation to drugs controlled by the Order will be subsumed into the overall enforcement response to controlled drugs".

That statement is in marked contrast to the impact of the order on pharmacies, GPs and the NHS as a whole, for which precise figures have been given in the Explanatory Memorandum with regard to the additional cost. So what will the additional cost be of implementing this order to the police, the court system and the Prison and Probation Service of enforcing these new offences? What is the estimated number of new offences that will be committed each year as a result of controlling these two substances as class C drugs? Is the reality for our overstretched police that either they will not arrest many people for offences related to those two substances or, if they do, it will be at the expense of investigating, enforcing and arresting people for other offences? Is that what,

"subsumed into the overall enforcement response to controlled drugs",

really means? If not, what does that phrase mean?

4 pm

Paragraph 13.3 of the Explanatory Memorandum states:

"Exemption from the 1973 Regulation requirements will also ensure that small business should not incur additional cost, e.g., for providing new safes within their premises".

What are the implications of not providing safes within premises? How many businesses will be exempt from the 1973 regulations? What businesses are they? Against what criteria is a judgment made on whether to make

an exemption from the 1973 regulations? What would be the cost of providing new safes or cabinets? Paragraph 16 of the impact assessment refers to,

"the excessive cost to medical suppliers of the drugs that the 1973 Regulations require".

It is therefore clear that an estimate of the cost has been done, since, without it, nobody could refer to "excessive cost".

I am sure that the Minister will correct me if I am wrong, but, as I understand it, the exemption was not recommended by the Advisory Council on the Misuse of Drugs, which thought that the regulations should apply.

Baroness Williams of Trafford: I thank both noble Lords for their points. The noble Lord, Lord Paddick, asked about the review of drugs. As he said, the Home Secretary announced on 2 October a major, independently led review of drug misuse. While the review will obviously not cover prescription drugs, it will look at a wide range of issues, including the system of support and enforcement around drug misuse, to inform our thinking about what more can be done to tackle drug harms. It will make sure that we know as much as possible about who drug users are, what they are taking and how often, so that law enforcement agencies and the police are able effectively to target and prevent the drug-related causes of violent crime. We will shortly set out the terms of reference and the name of the reviewer, which I cannot give at this point. The review will inform our thinking and help shape what more we can do to tackle drugs and drug harms.

The noble Lord, Lord Rosser, asked whether the drugs are prescribed before people come into prisons or while they are there. I do not have that answer now, but whether the drugs are used before prison or while in prison, it is a problem in the prison estate. I will provide him with a breakdown of where we think the prescribing occurs.

The noble Lord asked whether the Government had asked the ACMD or vice versa. The Government can ask the ACMD for its advice, but the ACMD can also ask the Government to instigate an assessment of drug scheduling. On the additional cost, the financial implications are set out in the impact assessment. The cost in year 1 to pharmacies is estimated to be about £97,000 and the cost to the CPS £172,000. There is an additional dispensing cost to the NHS which is estimated at present value to be £53.7 million over 10 years. That has obvious implications for GPs. Officials will meet the necessary bodies to outline the effect on GPs' practices of the rescheduling of both drugs.

Lord Rosser: The issue was not that I was not aware of the costs on GPs, pharmacies and the NHS, because they are spelled out in great detail in the document, even telling us what is the average pay per hour, working out that it would require five minutes for people to find out how to operate the new system and working out the cost of five minutes at £20 or £30 per hour—whatever the figure is. My point is that there is no reference to the cost of the order on the police, the criminal justice service, the probation service or the Prison Service—people can be sent to prison for up to two years. It just says that the cost will be subsumed into the overall cost of dealing with controlled drugs. I find it odd that the Government can set out the calculations in enormous detail of what it will cost pharmacies, GPs and the NHS but remain utterly silent on what the cost will be to the criminal justice system.

Baroness Williams of Trafford: I outlined the projected costs to the CPS in year one, but the noble Lord asks a reasonable question and I will try to get him an answer. As he says, the number of organisations affected is stated in the impact assessment.

The noble Lord, Lord Paddick, asked me about the exemption from the 1971 regulations. If I may, I shall write to him. Oh, it was the noble Lord, Lord Rosser.

Lord Rosser: My point was that small businesses appear to have been exempt from the 1973 regulations in relation to the provision of a safe or appropriate cabinet. I shall stand corrected if I have got it wrong, but I understand that that was not what the advisory committee recommended. Why has the advisory committee's recommendation been ignored in this case and what are the implications of not applying the 1973 regulations in relation to storage in safes and cabinets?

Baroness Williams of Trafford: Again, that is a reasonable point—and I now have the answer. We accepted the ACMD advice in principle, subject to consultation.

Lord Rosser: But am I nevertheless correct in saying that the ACMD did not say that the 1973 regulations should not apply? I am well aware that there is consultation; the document says that small businesses were dead against the regulations being applied, which may not be a surprise. I am asking about the implications of not applying those 1973 regulations, bearing in mind that, as I understand it, the ACMD did not say that they should not apply?

Baroness Williams of Trafford: I go back to the consultation. Following the provisions of this option will mean that, although the drugs will be subject to auditing requirements, there will be no requirement to store them in controlled drugs safes—as the noble Lord said. Apparently, a significant number of respondents did not think that organisations could accommodate the drugs in existing safes, and expressed concern that this would result in substantial additional costs associated with buying and installing such safes.

Lord Rosser: I thank the noble Baroness for her promise to write to me, but these regulations about storage were drawn up with a purpose, to prevent something happening. It is now being said that they will not apply, although, as I understand it, that is not what the ACMD recommended. What is the downside of not applying the regulations, which were presumably made with a purpose? Clearly, the people most against them being applied were the small businesses that would be affected. Can I be told what the downside of not applying them is? Why was the recommendation of the ACMD not followed? I understand that there

[Lord Rosser]
was consultation, I understand that there were groups which were against that, but perhaps they had a vested interest.

Baroness Williams of Trafford: I think that the issue is slightly more complex than it appears at face value. If the noble Lord will oblige me, I will write to him on this point but on that note, I beg to move.

Motion agreed.

Operation of Air Services (Amendment etc.) (EU Exit) Regulations 2018

Considered in Grand Committee

4.11 pm

Moved by ***Baroness Sugg***

That the Grand Committee do consider the Operation of Air Services (Amendment etc.) (EU Exit) Regulations 2018.

Relevant document: 4th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee A)

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Sugg) (Con): My Lords, these draft regulations will be made under the powers conferred by the European Union (Withdrawal) Act 2018, and will be needed if the UK leaves the European Union next March without a deal. Following the UK's decision to leave the EU after the referendum in 2016, the Government have been working to develop a positive future relationship with the EU. This would include a comprehensive and ambitious air transport agreement.

The Department for Transport has undertaken a significant amount of work with respect to the withdrawal negotiations and to prepare for the range of their potential outcomes. The best outcome is for the UK to leave with a deal and, as noble Lords will be aware, a draft withdrawal agreement is being considered. We remain confident that this agreement will enter into force at the end of March next year but, as a responsible Government, we must make all reasonable plans to prepare for a no-deal scenario. To that extent, we have conducted particularly intensive work to ensure that there continues to be a well-functioning legislative and regulatory regime for aviation. We set out in the technical notices in September how this would work and this instrument provides the means to deliver some of those outcomes.

EU Regulation 1008/2008 provides the basis for the internal market in air services. It consolidated provisions within a number of prior regulations that had gradually liberalised the market for air services within the EU. The regulation sets out harmonised conditions for the licensing of air carriers in the EU and provides the right for any EU-licensed air carrier to operate on any route within the EU, without prior authorisation. The regulation prohibits market distortions which had historically existed in Europe, such as restrictions on pricing or the ability of air carriers to freely set air fares and lease each other's aircraft. It also sets out common rules for the provision of public service obligations through scheduled flights to peripheral regions that would not otherwise be commercially viable.

A further element of the internal market provided for by this regulation is for wet leasing. A wet lease is when one air carrier leases an aircraft together with its crew, maintenance and insurance from another operator. EU air carriers can freely wet lease aircraft registered in the EU, provided that it would not endanger safety, but restrictions are imposed on the lease of aircraft from beyond the EU. The EU has also pursued an external aviation policy by agreeing comprehensive air transport agreements with third countries, and by seeking consistency in the provisions of the bilateral air service agreements between member states and third countries. Regulation 847/2004 establishes a procedure for member states to notify each other and the Commission, and to work together on the negotiation and conclusion of air service agreements.

The draft regulations we are considering today fix deficiencies in the retained EU regulations, alongside the preserved domestic legislation made to implement aspects of those regulations, so that the statute book continues to function correctly after exit day in the event of no deal. The effect of these fixes was described in the technical notice published in September, which set out how the UK would regulate air carriers. Many of the fixes make it clear that the retained legislation applies only to the UK. For instance, references to "Community air carrier" are replaced with "UK air carrier". Another amendment requires air carriers to have their principal place of business in "the United Kingdom" rather than in "a member state". Since, in the event of no deal, the UK would no longer participate in the EU's external aviation policy and the Commission would have no authority in the UK, regulation 847/2004 would be revoked. The UK would be free to negotiate bilateral air services agreements with other countries without regard to the Commission or EU member states.

4.15 pm

Turning to operating licences, the withdrawal Act ensures that operating licences previously issued to UK air carriers remain valid. An operating licence is required by air carriers before they can offer commercial air transport and ensures that UK air carriers are financially robust, appropriately insured and managed by fit and proper persons. A separate air operator certificate is also required and ensures that the air carrier meets essential safety requirements. While all commercial aircraft operators require an air operator certificate to show that they are safe, some will not provide air transport services—for instance, a hot air balloon offering leisure flights—and therefore would not require an operating licence.

Separate instruments on aviation safety, security and the rights of air passengers will be brought to the House in the coming weeks. UK-licensed air carriers will need to continue to meet all the substantive requirements for a valid operating licence, with one exception. The requirement in regulation 1008/2008 for air carriers to be majority owned and controlled by

EU nationals would be revoked, since this is a definition that would no longer apply to UK nationals. It would also be redundant for two reasons. First, nationality requirements are routinely specified in the terms of our air services agreements. These determine the eligibility of air carriers to operate under the terms of those agreements, based on the nationality of their ownership. We expect any future aviation agreements with the EU to include that nationality requirement. Secondly, in the event of no deal, all UK air carriers would require a route licence to operate beyond the UK. There is a nationality requirement in that route licence too.

UK route licences pre-date the EU operating licence, and in many ways were superseded by it, since, through the UK's membership of the EU, our air carriers were exempted from the requirement for a route licence for operations to the EU. Route licences serve a useful purpose. Unlike an operating licence, conditions can be attached to the licence preventing air carriers operating certain routes. For example, route licences prevent UK air carriers flying directly to Northern Cyprus, and it is the mechanism through which decisions on the allocation of scarce capacity are enforced.

Route licences are being provided for free by the CAA to any UK carrier that requires one. One of the conditions for a route licence is that the applicant should be either a UK national or an organisation controlled by UK nationals. The Secretary of State also has long-established powers to instruct the CAA to waive this requirement, which he has done historically, most recently for easyJet UK and Wizz Air UK.

As a result of this instrument, the rules for wet leasing foreign aircraft will not change. UK air carriers seeking to wet lease a foreign-registered aircraft would be required to demonstrate to the satisfaction of the CAA, as they do today, that to do so would not endanger safety. If that aircraft was registered in a country other than in the EU they would also have to demonstrate to the Secretary of State that safety standards equivalent to the UK's would be met and that the lease is justified on the basis of exceptional needs, to satisfy seasonal capacity needs or to overcome operational difficulties. Permission might be refused if there is no reciprocity regarding wet leasing to the country in which the aircraft is registered. This instrument also makes a number of changes to reflect the fact that EU-licensed air carriers would no longer enjoy the automatic right to operate to, from or in the UK.

As I said, public service obligations, or PSOs, are subsidised air services that would not otherwise be commercially viable. Contracts for PSOs in the EU can be won by any EU-licensed carrier, but fixes made by this instrument would mean that only UK-licensed carriers, and carriers from countries with which the UK has exchanged the right to operate wholly within each other's territory, would qualify for PSO contracts in the UK. As all the PSOs in force in the UK are currently operated by UK-licensed air carriers, there will be no impact on existing services.

In a similar fix relating to scarce capacity, domestic regulations currently provide for a process rarely used in cases where the frequency of operations between the UK and another country is constrained by provisions in the relevant air service agreement. If all the permitted frequencies are being operated, the UK will always seek to lift or remove the limit. In cases where the other country is unwilling to do so and another air carrier wishes to enter the market, a scarce capacity allocation hearing will be held. This instrument amends the regulations for this allocation process to ensure that only air carriers that would qualify to operate under the terms of the relevant air services agreement—rather than all EU air carriers—are eligible for the scarce capacity allocation.

All the previous points relate to domestic oversight of UK carriers. I turn now to foreign carriers. While air services are not included within the scope of the World Trade Organization, there is an international legal framework for the operation of air services— the Chicago Convention of 1944. One of its provisions is that scheduled international air services are prohibited, except with the special permission of the state concerned. The UK provides permission through the air services agreements it concludes with other countries and the issuing of foreign carrier permits by the CAA.

In the event of no deal, amendments made by this instrument would require that EU air carriers apply for a permit from the CAA before operating to the UK. This would ensure that all air carriers operating to the UK had full and proper safety oversight and that their aircraft were properly maintained and operated.

We envisage granting permits to EU carriers to continue operating to the UK. In its recent communication of 13 November, the Commission confirmed that it intends to reciprocate for UK air carriers. In addition to the announcements about visa-free travel, the Commission said that UK air carriers would still be able to fly over the EU, including Ireland, and to land in and fly back from the EU.

As I said in my opening remarks, we are working to achieve a positive deal with the EU, but this SI is an essential element of our contingency planning for a no-deal exit. It would only enter into force on exit day in the absence of a withdrawal agreement. The legislation would ensure that the UK's licensing regime for air carriers continues to work effectively and that the aviation industry has clarity about the regulatory framework in which it would operate.

I commend these regulations to the Committee.

Lord Foulkes of Cumnock (Lab): My Lords, this is really the most extraordinary debate in which I have ever taken part. I say this with no disrespect to the low key introduction by the Minister in which she explained exactly what is happening—at least the detail, but not the context of it. Sitting in this Committee Room are a number of Members of the House and officials who would be much better occupied doing something useful. We are looking at a proposal—a statutory instrument—for a no-deal situation which the Government do not want and which the vast majority of people in the House of Commons do not want. We are going to spend hours dealing with many more.

This is one of nearly 700 statutory instruments that are coming before us because of this crazy Brexit in which we are currently involved. Even allowing for all those qualifications and even if we have to, this is not a satisfactory way of doing it. This has such major

[Lord Foulkes of Cumnock]

implications that it would normally be in a Bill discussed on the Floor of the House at Second Reading and then in detailed consideration in Committee. We would go through all the implications, discuss them, consider amendments and work out what was wrong and what was right. Now we are expecting it to go through on the nod in this Grand Committee. I hope not to spoil these expectations—it might do. It is not a satisfactory way of dealing with the situation.

Then we get the report of Sub-Committee A of the Secondary Legislation Scrutiny Committee. This Committee has had to divide into two sub-committees. My noble friend Lord Cunningham has taken over the duty of chairing the second sub-committee to look at this in detail. They are doing a good job under very difficult circumstances. On this statutory instrument they have come up with a devastating report—one of the most devastating I have seen:

"We draw these Regulations to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House".

It continues in paragraph 11:

"The House may wish nonetheless to press the Minister further on how, in the event of "no deal", bilateral arrangements between the UK and individual states will be put in place before exit day to ensure there is no gap in the continuation of flights between the UK and the EU after 29 March 2019".

The Minister dealt to some extent with that, but not fully, and I shall come to the detail of that later. Paragraphs 13 and 16 outline the additional responsibilities that the CAA will have and doubt whether it will be able to deal with them without substantial additional resources—which, again, would be better spent elsewhere instead of doing something completely unnecessary. Paragraph 22 states:

"The House may wish to press the Minister on the issues of reciprocity that arise in maintaining the current wet leasing arrangements".

I have not previously seen a report that raises so many questions.

Look at what is happening outside the Chamber. In an excellent report by Chris Morris, the BBC's Reality Check correspondent—thank goodness that we have people doing reality checks particularly on Brexit—he points out that if we leave with no withdrawal agreement,

"the UK would no longer be part of the EU's single aviation market, which is the basis for flights in and out of the country at the moment, not just to the EU itself, but to other countries with which the EU has a deal—such as the United States and Canada. In all, the EU governs direct UK aviation access to 44 other countries".

As the Minister said, and as the report states, of course, you can always negotiate new agreements,

"but access would start at a pretty low level and negotiations take time".

We know that they will take a substantial time. He continued:

"That's why a sudden no-deal scenario is so alarming to the industry".

That was even pointed out by the Chancellor of the Exchequer in October last year:

"The UK would no longer be governed by the regulations of the European Aviation Safety Agency, which deal with all sorts of things like maintenance and common standards".

As the report states, we would have to undertake the responsibility of dealing with those ourselves—again, extra expenditure:

"The UK Civil Aviation Authority could … take on all the same rules, and hire lots of new staff to implement and oversee them, but it would",

then have not only the extra expenditure, but,

"have to convince other international regulators to recognise it—another time-consuming process".

So we would have to go round to convince all the other regulators that they should recognise our approach. As the Reality Check correspondent said,

"if you're following EU aviation rules in full, you basically have to accept a role for EU courts like the European Court of Justice as well".

According to the Prime Minister, we will no longer be subject to the European Court of Justice, but it will be involved in this, according to the BBC report. All of this makes it difficult for airlines that are already selling tickets for flights after the planned Brexit, which many of us here hope will not go ahead. The report continues:

"'Right now we will continue to sell in the hope and belief that when a conclusion comes to the Brexit scenario, common sense will prevail and people will realise the need for intra-Europe travel', said Roy Kinnear, the chief commercial officer of FlyBe. 'The biggest fear has to be if at the eleventh hour and fifty-ninth minute there is a complete cessation and breakdown, and a shutdown of air travel between the UK and Europe".

It is being predicted that they could be a total shutdown of traffic between the United Kingdom and Europe.

The International Air Transport Authority is worried. IATA states:

"The UK government's papers on the air transport implications of a "no deal" departure from the EU clearly exposes the extreme seriousness of what is at stake and underscores the huge amount of work that would be required to maintain vital air links".

Its director-general said:

"While we still hope for a comprehensive EU-UK deal, an assumption that 'it will be all right on the night' is far too risky to accept".

That is what the Government are accepting: it will be all right on the night. We have heard them say something equivalent to that so many occasions.

I could go on at great length; I have lots more to say.

4.30 pm

Noble Lords: Oh!

Lord Foulkes of Cumnock: Well, the Minister is encouraging me to do that. Lots more could be said.

The development of low-cost airlines, which we and—I was going to say "our" constituents—the constituents of Members of the other place have all taken advantage of, has been based on arrangements agreed within the European Union, which we have been part of.

I have a specific question for the Minister. Access to the EU's internal market for air transport could be retained by the UK joining the European common aviation area. Membership is not restricted to EU member states. However, membership would require the UK to accept EU aviation laws and may be

incompatible with the stated desire of the UK Government to be extricated from the jurisdiction of the Court of Justice of the European Union. Given the awful prospect of no deal, which almost all of us pray will not happen, will we consider joining the ECAA and therefore accept the jurisdiction of the Court of Justice?

The question of leasing was also raised by the committee. At present, aircraft owned by or leased to nationals of, or companies with their principal base of business or registered office in, the EEA and the Commonwealth, may be registered in the United Kingdom. Will this ability to register aircraft on the UK aircraft register be open to EEA entities post Brexit?

The airlines have made various comments. Michael O'Leary, the outspoken chief executive—I do not think that he has been got rid of yet—of Ryanair, said that a no-deal Brexit was now more likely and that, in such a scenario, flights would be grounded. IAG, which owns British Airways, Iberia and Aer Lingus, was more positive in its assessment. Willie Walsh—wee Willie Walsh—said in March that he firmly believed that the issue of flying rights would be resolved. Well, what I understand it to have done to resolve it is move its headquarters out of London to Madrid—that is a strange way of resolving it—like many others are moving out of London because of Brexit.

This is a total disaster. I hope that the Minister will answer the questions. I hope that she will try hard to give some reassurance, although I do not think she can. However, if there is no such reassurance, I shall not be prepared to accept this statutory instrument today.

Lord Berkeley (Lab): My Lords, following on from my noble friend's excellent summary of where we are, I recall a couple of weeks ago in debate on an Oral Question in the Chamber suggesting to a Minister that the safest way would be for the Government to advise people not to buy package holidays that started on or after 30 March, because there is no compensation at the moment and the planes might not fly. The Minister thoroughly rejected that idea, as of course he would.

I hope that the Minister will respond to my noble friend's reference to the comments in the Secondary Legislation Scrutiny Committee's report. I do not want to repeat them, but they are highly complex. For the CAA to have to give out route licences as well as operating licences looks to be a recipe for not having enough people and, as my noble friend said, for grounding. The same applies in respect of paragraph 16, so I shall not go on to that.

I am very disappointed with what is listed under "transport" in the political declaration that came out last week. As somebody else has said, it is a series of statements without verbs. It states that the parties intend to have a comprehensive air transport agreement. Well, they might do, but they have a lot of work to do. It refers to:

"Comparable market access for freight and passenger road transport",

and acknowledges the intention of the UK and other member states,

"to make bilateral arrangements for cross-border rail".

That is all on rail; there was nothing else on it at all. It also says that the maritime transport sector would be underpinned by,

"the applicable international legal framework, with appropriate arrangements for cooperation on … safety and security".

When will we see the SIs covering these other sectors that we have not seen already? We will want to have a pretty detailed debate on them.

My noble friend mentioned safety and maintenance. They are extremely important. I will raise the question of standards across the various sectors. I wrote to the Minister a couple of weeks ago on railway standards. She kindly replied today so I have not been able to circulate her reply around, but I will do so. It exposes quite a significant difference of approach between different parts of the Department for Transport. The Minister's response on railway standards is basically that, although the Government would like to be able to have their own standards for domestic traffic, they would do this only after substantial consultation with the industry. That sounds fine. The industry, which I will not quote now, is very much in favour of staying in the European railway agency because of the international need to have one common set of standards across the world for ease of manufacturing and exporting as much as anything.

The same applies to the road sector with automotive manufacturing. The CEO of the SMMT, Mike Hawes, gave some very interesting evidence to the House of Lords EU Internal Market Sub-Committee recently, saying:

"The major regulatory powerhouses tend to be the EU, especially around the environment but also safety, and the US",

but they are very different and demonstrate very different approaches to policy, particularly on safety and the environment. He says that the EU is highly influential. The same comments could equally apply to air. I am interested to see what the sub-committee says when it reports.

However, last week the Secretary of State said when he gave evidence to the same sub-committee that breaking away from the EU will mean that the UK can rip up the rulebook and set its own standards for sectors such as rail. He sees no reason why the country should be made to abide by European regulations. He told the sub-committee that there was no need to remain part of the European rail regulatory body as the country's rail systems vary in a vast number of ways from that of continental Europe, but the only example that he could give was station platform heights, which is just crazy. Station platforms for HS2 might need to be a little bit different, but there are many more stations that HS2 trains will go into that will not be affected. Presumably the Secretary of State has the same views on other sectors, such as road and air. Why does he have that view? The Minister's statement now and her letter to me seem to have a much more balanced approach to standards, recognising that all the industry sectors in transport want to keep close alignment with the standards for very good safety, exporting and general manufacture reasons.

I also have one or two questions on the regulations themselves. The first is on the PSOs, which the Minister mentioned. It is good that they want to continue with the use of PSOs but will there be a similar need for regulations for other modes such as the bus, rail and maritime sectors in this country? If so, when will we see those and if not, why not?

[Lord Berkeley]

Paragraph 2.5 of the draft Explanatory Memorandum, as the Minister said, says:

"The Regulation will now reflect … that",

the legislation,

"applies only within the UK".

How will air carriers from outside the UK be able to apply for licences to operate either into or within the UK? Who do they apply to and how long is it going to take to operate?

My noble friend talked about British Airways and IAG. I have a big problem with IAG because I tried to fly to Madrid on Friday and I was denied boarding at Heathrow—the wonderful new terminal 5. It was particularly galling when I had got up at 4 am to get to the airport. The point was that I could not check in on the web because I had bought the ticket through Iberia, which along with British Airways is part of AIG, and it said online, "Go to the British Airways check-in" because it was a British Airways flight. So I went there and it said, "Go back to Iberia". I did that three or four times and swore, then I left it and went to the airport, where they said the flight was full. I said "Well, I've got a ticket", so they sent me to the gate and it was still full. It is so nice in terminal 5 because you cannot come back from its satellites by train; you have to walk through a long tunnel.

I got the standard European compensation very quickly and was promised a refund of the fare, because the next flight would have been too late. I said, "Could you cancel my flight back in the evening?". She said, "You're on an Iberia flight—I can't cancel it". Now this is one company. I do not know whether the company will be based in London, Madrid or Timbuktu, but if it cannot get its act together when it is one of the biggest operators out of the UK, heaven help us. I certainly shall not fly with it in the run-up to Brexit, if I can avoid it. I hope that other people will not have the same problem and that it will be all right on the night.

Paragraph 7.7 of the draft memorandum refers to:

"The discretion given to EU Member States to regulate the distribution of traffic rights and impose measures".

Who does that? It is yet more extra work, maybe for the CAA or the Government. Paragraph 7.9 refers to,

"a permit in order to perform aerial work".

I find the definition of aerial work slightly confusing. Is it about running a drone, aerial photography or what? Again, that seems to be a bit more work for the CAA. Finally, the Committee may be glad to hear, paragraph 7.11 refers to when operating air services to the EU is revoked and says that,

"all air carriers operating international air services from the UK will require a route licence".

That is what we said before; who is going to negotiate the route licences and operating licences?

As my noble friend said, this will end in chaos. We are pretty well there. There seems to be no agreement even between different parts of the Department for Transport and the Ministers, and I share my noble friend's view that the only solution is to stay within the EU.

4.45 pm

Baroness Randerson (LD): My Lords, when I put forward my Private Member's Bill—excitingly entitled the Open Skies Agreement (Membership) Bill—immediately after the last election it never occurred to me that, nearly 18 months on, my concerns would still not have been answered. My concerns related to the international air agreements that make international air travel possible. We are members of those agreements by virtue of our membership of the EU. The sad, chaotic situation that the Government have got themselves into in their Brexit negotiations is threatening many people's plans for the future and threatening companies' ability to trade in the future, because they cannot rely on air services.

This SI in preparation for a no-deal scenario is far from reassuring. Rather, as the noble Lord, Lord Foulkes, said, it reminds us all of what is at stake and how far we are from a solution. The report of the Secondary Legislation Scrutiny Committee points to a number of unanswered questions. I am grateful to the committee, as I am sure we all are, for its work and I am glad that the Explanatory Memorandum has been updated. Being rather a keen student, I read the original—even the updated one has a lot of complexity and leaves a lot of questions unanswered, but the original one was not as good as it should have been. If there is no deal, UK and EU airlines will lose, as the Minister said, the automatic right to operate services between the UK and the EU without the need for permission from individual states.

The DfT has stated that it expects to grant permission for EU carriers to fly to and from UK airports and expects that to be reciprocated. That is a lot of expecting. What discussions have the Government already had? The Minister said that a lot of work has been done on it, but are we in a position where the whole thing could be more or less rubber-stamped if Brexit arrangements were sorted out? Would everything else slot into place quickly, or are we at an earlier stage in the process? If there is no deal, the Government have said that they intend to make bilateral agreements with individual states. These would obviously need to be in place by the end of March if there is to be no gap in services. It might not be technically possible to sign them until that day, but they have to be fully agreed and worked up. Specifically, what progress has been made so far in these draft agreements on developing the understanding with the other 27 EU countries? Are we negotiating with all the rest of the EU as individual states or just taking the most important ones in terms of the level of traffic?

These regulations are yet another example of the steady increase in the amount of bureaucracy that is being heaped on individuals and companies as a result of Brexit. Last week—or was it the week before?—we were here discussing hauliers permits, trailer registration and international driving permits. This week it is the requirement for UK licensed air carriers to have both a route licence and an operating licence to provide services outside the UK. Although the DfT has been proactive in contacting carriers about this and we can therefore, I assume, count on the fact that air carriers across the EU are aware of it, and although awareness

is clearly higher than in the case of the hauliers, who are largely completely unaware of what is going to hit them very soon, nevertheless it puts an additional burden on the airlines, as well as putting further responsibility on the CAA. I have remarked here before on the burden on the CAA of a wide group of responsibilities. We expect it to deal with space travel and failing airlines and to modernise airspace, and now we are expecting it to provide additional licences for air carriers. Can the Minister give us details of the additional resources being allocated to the CAA to deal with the more complex air services market that we will now face?

If there is no deal, all foreign carriers, including those from the EEA, will have to apply for a foreign carrier permit. Already the CAA processes thousands a year, but clearly it will have to process very many more in the future. What happens if a carrier does not apply? The DfT says that it expects EU carriers to make applications in good time, so what is the timescale? Using a parallel with haulage permits again, we discussed this not much more than a week ago. The hauliers have to apply by the end of the month, or certainly the beginning of December, in order to have a hope of getting their permits by January. There is a huge rush in that case. Is the system similar for the CAA? Is it fully geared up and are the airlines all ready to apply?

Lord Berkeley: Does the noble Baroness agree that the system for selecting who gets the permits for haulage that we discussed, as she says, a couple of weeks ago involves either drawing names out of a hat or seeing which haulier provides the best value for money for the country? Does she see that as an appropriate way of dealing with these air licences?

Baroness Randerson: My disappointment with the SI that we had a week or so ago was definitely with the lack of certainty about which criteria the Government would use. The Government adroitly managed to give themselves the broadest possible set of criteria and we are no nearer knowing how exactly those permits will be applied. The industry is worried as a result.

There has already been a degree of reorganisation within the aviation industry as airlines previously registered in the UK have moved abroad for their registration, with the inevitable drift of at least some jobs abroad. It is important that we bear in mind that this additional bureaucracy—the additional requirements as a result of Brexit—will put our expertise in such an important aviation market at a disadvantage.

The Secondary Legislation Scrutiny Committee raised the issue of wet leasing, which, as the Minister explained, is when an airline releases an aircraft and its crew and so on. This is usually done at busy times or in exceptional circumstances. If the aircraft is not registered in the UK, the airline has to satisfy certain safety criteria. The airlines are concerned that this should be the subject of a reciprocal agreement with EU countries. Can the Minister explain what progress the Department for Transport has made in its discussions on this?

Public service obligations apply when a service would be uneconomical but is needed for economic and social reasons. They usually apply to far-flung places such as the Scottish islands. In future, such services could be operated by UK carriers and by others with cabotage rights—although, to be honest, that would be unlikely with no deal. These are sensitive and complex issues of state aid. As someone from Wales, I know that there has been a long debate on why rights are granted on some Scottish routes but similar rights were not granted in Wales. Could the Minister give us a little more detail on this?

State aid rules were previously adjudicated by the European Commission. This is a complex and controversial area, but the distance of the European Commission in power terms from the decisions that it made neutralised the issue to a large extent. Those powers will now be given to the CMA. What resources will it be given to deal with this? I also warn the Minister that those things are likely to become much more sharply controversial.

Paragraph 7.10 of the Explanatory Memorandum deals with the allocation of scarce capacity. The 2007 regulations dealt with air service agreements between EU members and third countries. Scarce capacity occurs when there are restrictions on the frequency of flights. The Explanatory Memorandum includes a political declaration that the UK Government will always seek to lift or remove such a cap but will hold a hearing to allocate frequencies if that is not possible. What is the legal force of that statement? It seems that it is simply a political declaration. It is a statement of intent by the current Government, but they cannot bind their successors. I would like some clarification on that.

Finally, it would be helpful, as we sit here week after week wading our way through dozens of these SIs, to be able to see the full context of where we are on air services. Maybe the Minister can tell us what other air services SIs we are waiting for.

Lord Rosser (Lab): I thank the Minister for explaining the purpose and content of these regulations, which set out the contingency measures for the licensing and oversight of flights to and from the UK in the event of no deal with the European Union. UK carriers will require a route licence, as well as the operating licence that is currently required under EU law, for operations beyond the UK. Air carriers from the European Economic Area will also have to obtain a foreign carrier permit to operate in the UK.

In the event of there being no deal with the European Union, UK and EU airlines will no longer have the automatic right to operate air services between the UK and the EU without the need for advance permission from individual states. In this scenario, the Government expect to grant permission to EU carriers to operate to UK airports and for this to be reciprocated by EU states granting permission to UK air carriers to operate to points in the EU. Failing such a multilateral agreement, the Government's intention would be to seek bilateral arrangements with individual states. I know that this point has been raised before but I raise it again: why do the Government believe that such bilateral arrangements between the UK and individual states could actually be put in place in the short time left even between now and 29 March 2019, let alone between early or mid-December and the end of March 2019?

5 pm

Since in a no-deal situation, UK airlines will need a route licence as well as an operating licence to operate air services to the EU, the regulations require UK-licensed air carriers to have both licences to operate air services outside the UK. Is there any restriction on the number of route licences that will be available? I know that this point has been asked before but I ask it again: what additional burden workload-wise will the issuing of route licences to airlines which need them prior to next day impose on the CAA? What increase in applications for route licences is expected and how long, on average, does it take to process and make a decision on such an application and then, if agreed, to issue that licence?

In the event of no deal, EEA airlines will need to apply for a foreign carrier permit to operate in the UK. What additional workload will this impose on the CAA between now and exit day? Once again, how long will it take to process and make a decision on whether to agree to a foreign carrier permit and, if agreed, to issue such a permit? How many such applications are expected between now and exit day, and against what criteria will decisions be made on whether to issue a foreign carrier permit?

EU law currently provides for an internal market, as the Minister and others have said, in the wet leasing of aircraft, and harmonises restrictions on the leasing of aircraft from third countries. The current regime of approvals for UK carriers wishing to lease aircraft is maintained under these regulations but, as has been said, the market access arrangements for the wet leasing of aircraft, as set out in paragraph 7.6 of the Explanatory Memorandum, will not be reciprocal with the EU. I know this has been asked already but I simply ask again: what are the implications for carriers of potentially not being able to benefit from the same arrangements in EU states after exit, in the light of our maintaining the current wet-leasing arrangements?

I am conscious of what the Minister said. I think she was referring to the part in paragraph 6 of the revised draft Explanatory Memorandum which states:

"The Secretary of State can withhold approval if there is not a reciprocal level of market access with the country from which the carrier proposes to lease an aircraft".

However, in what circumstances would the Secretary of State withhold that approval, in the light of the fact that there does not automatically seem to be reciprocity in the regulations?

On page 11, the Explanatory Memorandum refers to the widening of the scope of certain criminal offences, which are in the Air Navigation Order 2016, through the regulations. The effect would be that all foreign carriers operating to the UK, whether from the EEA or beyond, would be subject to the same legal requirements. How many non-EEA foreign air carriers per year currently fall foul of the criminal offences in question, which are being widened in scope in these regulations to cover EEA air carriers in the event of no deal?

Finally, although I appreciate that I have been briefer than other noble Lords, which is not an adverse comment as they made most of the points that need to be made, I would be grateful for an answer to this. I think the Minister referred to the communication of 13 November that we have had from the Commission about preparing for the withdrawal of the United Kingdom from the European Union on 30 March. It has a section on transport, which says that if there is no agreement it,

"would lead to abrupt interruptions of air traffic between the United Kingdom and the European Union, due to the absence of traffic rights and/or the invalidity of the operating licence or of aviation safety certificates".

As the Minister knows, the document then goes on to set out what the Commission would do in that situation on traffic rights, aviation safety and certain other issues.

Can she confirm that the document to which I have referred is the one that the EU would seek to apply in the event of no deal—that is, that what it says about traffic rights and other issues is what it seeks to negotiate with us on aviation in the event of no deal? If I am right in thinking that—I should be grateful for confirmation that I have understood it correctly—would what the Commission proposes in this document be acceptable to the UK in the event of no deal?

Baroness Sugg: My Lords, I thank noble Lords for their consideration of these draft regulations. A wide array of issues has been raised but I will limit my responses to those directly related to the SI that we are discussing, given the time and the number of questions. I agree with the noble Lord, Lord Foulkes, that issues around aviation and Brexit are incredibly important and it is important that we get them right. However, this SI is not about our negotiating position, which is being discussed extensively elsewhere; it is purely correcting the regulations to ensure that we have a functioning statute book should we leave with no deal in March.

I am not quite sure that I agree that this is one of the most devastating reports from the SLSC that I have seen. The committee often quite rightly draws SIs to the special attention of the House, and I and the rest of the Government are very grateful for its work on that. I am also grateful to the noble Lord for reading out the BBC report, which is quite right in its facts. I hope I can provide some further assurances as we go through the questions.

I turn to the points raised by the SLSC, to which many noble Lords referred in their questions. I shall take each point in turn. First, on how, in the event of no deal, we will ensure that bilateral arrangements are in place to ensure that there is no gap—the noble Baroness, Lady Randerson, is quite right to point out that it is important that there is no gap—we remain confident that we will get an agreement on a broader deal. However, if that is not possible, our first option will be to consider a multilateral agreement between the UK and the EU. The Commission has also proposed this, with suggestions for a bare-bones agreement in the event of no deal. The noble Lord, Lord Rosser, is right to point out that the statement from the Commission on 13 November is its latest position on that in the negotiation, and it will form part of the conversation as we go through the detail. In the meantime, in the event of no broader deal and no multilateral deal, both of which we fully expect to reach, we have also reached out to counterparts in individual member

states to reach a shared understanding on a bilateral basis of what arrangements would apply between our two countries.

The second issue specifically raised by the SLSC is the resources that the Government are providing to the CAA. The CAA is already the licensing authority for UK airlines. It provides regulatory oversight and has the resources in place to ensure that it can continue to do so. All the holders of type A operating licences—that is, operators of aircraft with more than 20 seats—already have a route licence. All the holders of type B operating licences have been individually contacted and invited to apply for a route licence free of charge, as I mentioned before, from the CAA. Some of those companies operate exclusively domestic services and do not need a route licence, but we are confident that those that need a route licence will be issued one.

Lord Foulkes of Cumnock: I have just realised the implications of something the Minister said a couple of minutes ago. As well as a multilateral agreement with the EU, we are negotiating bilateral agreements with all 27 countries—is that right? Could the Minister explain if this is what we are doing?

Baroness Sugg: As I said, our firm preference is for a wider deal, providing for a comprehensive air services agreement with the EU. Failing that, we have the option of a multilateral agreement and, failing that, bilateral agreements with member states. As the noble Lord would expect, we are speaking to member states about a wide range of issues.

Lord Foulkes of Cumnock: Is a Minister—either the noble Baroness or one of her colleagues—or some of the officials flying out to these countries to discuss it, or are they coming here? An astonishing range of what I hope is unnecessary activity is taking place. Could the Minister confirm that that is exactly what is happening?

Baroness Sugg: As I said, to make responsible preparations it is important to consider all the different options available to us. Of course we are having conversations with the Commission and the member states about a wide range of issues. I am not able to give further detailed information at this moment but our preference is very strongly for a broader deal which will provide a liberalised agreement with the EU, though there are other options available to us. I hope this provides reassurance that we will continue to see flights between the UK and the EU. We will continue to work towards this as we move towards exit day.

Lord Rosser: On bilateral discussions, the European Commission document that we have had—which I appreciate extends across the whole gamut and does not apply just to aviation—says:

"In the same spirit, Member States should refrain from bilateral discussions and agreements with the United Kingdom, which would undermine EU unity".

It may be that this particular sentence does not apply to air transport. Is it then the case that we are having bilateral discussions in the apparent teeth of opposition from the European Union?

Baroness Sugg: Our first point of contact is with the EU Commission to agree a wider deal. It has been widely reported that the Secretary of State has written to other member states to discuss the potential bilateral agreements. We are working very hard to get that wider deal. That is our focus but, should that not happen, then of course we are making sure that we are as prepared as possible to ensure that we do not have any disruption in services come 29 March.

Baroness Randerson: I made the point that our worldwide agreements on air travel are made as a member of the EU. So we have to be convinced that we will have an agreement with the rest of the world beyond the EU by the end of March. How are these negotiations going, for example with the USA?

Baroness Sugg: I will come on to that. As the UK, we have 111 bilateral agreements with the rest of the world in our own right. The noble Baroness is quite right to point out that we have bilateral agreements through our membership of the EU.

The next issue raised was on the basis of our expectations, how we are working with EU carriers to make sure that we have no gap in services and the assurances we can give that the CAA has the capacity and resources in place. Our expectation is that EEA carriers would require advance permission before operating to the UK. This is founded on international law. I already spoke about the 1944 Chicago Convention and that that treaty expressly prohibits scheduled international air services.

In anticipation of the increased volume of permit applications from EEA carriers, the CAA has already upgraded its systems for permit processing and recruited additional staff. All scheduled permits are issued on a seasonal basis. The next summer season starts on 31 March 2019, so there is a predictable increase in workload for this. We are expecting 100 to 150 seasonal permit applications. The CAA currently issues around 3,000 ad hoc permits a year. It is preparing to be able to process at least double that if necessary.

Lord Foulkes of Cumnock: How many additional staff have already been recruited to the CAA and how many more does the Minister expect to be recruited?

Baroness Sugg: I do not have those specific numbers, but we are reassured that the CAA is fully prepared. We have already allocated it some funding from the Treasury to ensure that it has the proper resources in place.

5.15 pm

A number of noble Lords brought up wet leasing. Just to clarify, reciprocity will count for EEA members, by virtue of the EEA agreement, as well as EU members. Maintaining the current wet leasing arrangement is the right thing to do for the industry as a whole and for passengers. We are making every effort on this, as well as on other areas, to minimise disruption. Maintaining the current system for wet leasing foreign aircraft is part of that effort. As I said, we expect reciprocity on that.

[Baroness Sugg]

The future partnership agreement that has been published contains a provision for a comprehensive and ambitious air transport agreement. The noble Lord, Lord Berkeley, rightly highlighted that there is more detail to come on that. It is the overarching aim and there is lots of detail to come below that. The noble Lord, Lord Foulkes, asked about the direct jurisdiction of the CJEU. We have been clear that we will no longer be subject to direct CJEU jurisdiction after the UK has left the EU, but there are models that already allow non-EU countries to participate in the EU aviation acquis. Any disputes could be resolved through a joint committee, for example. That is the model we will be looking at.

As I have said, the majority of our bilaterals are already done in our own right. Where market access beyond Europe is currently determined by EU-negotiated agreements, we are already working with the countries involved to make sure that we can continue those services. We are confident that these arrangements will be in place before the UK leaves. The Department for Transport has a very experienced and able team in aviation negotiation that has been doing this on separate bilaterals for many years.

Specifically on the US, it is again absolutely our aim to maintain liberal market access arrangements between the UK and the US. Discussions are ongoing about post-Brexit air services and really positive progress has been made. We continue to discuss this with the US Government and I hope to be able to update noble Lords in the future.

Turning to some of the questions raised by the noble Lord, Lord Berkeley, there are certainly more SIs to come. We have already discussed some aspects of roads, aviation and maritime and will do so again, as well as on rail, in the coming weeks and months. These will be discussed in time for exit day. On the specific question of how many SIs remain on aviation, of the 14 in total, six have been laid. Those still to come cover safety, air service competition, security, air traffic management, aviation statistics, passenger rights, noise and slots. Those are coming and we can all look forward to them.

On standards, we will absolutely discuss standards throughout the SI programme. The noble Lord pointed out that I wrote to him on that and he is quite right that our approach differs across modes. That will be discussed as the specific SIs come up. Where relevant, any EU regulations on PSOs and other modes of transport will be retained through the withdrawal Act. The changes that will be needed will be made through SIs so that, irrespective of the outcome of negotiations, the essential bus, rail and maritime services can continue to operate.

I am sorry to hear about the experience that the noble Lord, Lord Berkeley, had at Heathrow. I know that code sharing can cause some issues, but the changes that this SI makes will ensure that all holders of a valid UK operating licence will continue to be UK licensed carriers, and that includes BA. Airlines have been closely engaged throughout the development of this SI and all the other SIs.

As for route licences, these are issued by the CAA to air carriers wishing to operate internationally. Currently a route licence is required only for those air carriers that operate beyond the EU/EEA, but in a no-deal scenario all UK carriers operating internationally, including to EU member states, will need one. Most airlines already have a route licence—the CAA issues them for free, as I said—and the CAA already has people processing those licences. Everybody who needs one will have one by March.

On the powers to distribute traffic rights and impose measures that would be revoked by this instrument regarding aerial workers' services such as aerial photography, flying, advertising banners and parachute drop shots, the CAA already issues those permits to non-EU aircraft.

On the question from the noble Baroness, Lady Randerson, on the PSO/state aid point, the CMA will take the function previously carried out by the Commission with an appropriate allocation of resources. On scarce capacity, hearings are provided for in the Civil Aviation (Allocation of Scarce Capacity) Regulations 2007, but the noble Baroness is quite right: it is a statement of government policy that we will try to lift any cap on bilateral frequencies in our air service agreements.

Aviation is crucial to the UK economy. We are of course committed to getting the best deal. We are positive that we will not see any disruption in flights. I think that is evidenced by our technical notices publication, these SIs and the comments from the President of the European Council back in March saying that he is determined to avoid any disruption of flights. The latest publication from the Commission last week says that it is absolutely in both our interests that flights between the UK and the EU continue; there were over 160 million of them in 2017. The noble Baroness, Lady Randerson, is right to point out that we need all this to be in place by 29 March. We are genuinely confident that it will be.

I will be brief on the question of the CAA and give a few more details about permits. Happily, there are no limits to these permits. We issue several types of permits—the seasonal ones that I mentioned and the ad hoc charters. I talked earlier about when they will be up for issuing, but we will continue to process them as quickly as possible and do not expect any delays. The CAA expects to process between 100 and 150 seasonal permits and, as I said, it currently issues 3,000 ad hoc permits a year. We do not know exactly how many more will come but it will be able to process at least double that number if necessary. The CAA has been working intensively to ensure that it has the right capacity in place.

On this specific SI, there are two provisions in the instrument that impact the CAA: air carrier licensing and foreign carrier permits. As I said before, only a small number of air carriers do not hold route licences. The system for consideration is being upgraded and it is not a new capability. The provisions in this instrument are estimated to cost the CAA around £100,000. As I alluded to before, last year the Secretary of State provided £2.7 million on an exceptional basis to fund the CAA's costs to avoid imposing an additional burden on the aviation sector.

The Government remain confident that we will reach an agreement with the EU. Of course it is important that we prepare for the unlikely outcome

that we leave the EU without a deal. I appreciate noble Lords' interest that we get Brexit right for aviation and, believe me, I share that interest, as does the department, as I hope is evidenced through the detailed SIs and technical notices that we are putting forward. This SI is part of that. It is essential to ensure that a crucial part of the regulatory framework for civil aviation continues to work effectively in the UK from day one after exit. It is part of our preparations for the unlikely scenario of no deal and we hope it provides industry with clarity and stability in regulatory oversight.

Lord Rosser: Before the Minister sits down, if the document that we have had from the European Commission, specifically the section on air transport, represents the Commission's stance in the event of no deal—as I understand it, the Minister said we were in discussions with it—what is the latest date by which something has to be agreed so that it is effective from 29 March? Presumably what has been listed here by the European Commission as its position cannot be agreed the day before, and presumably it has to be agreed before then to come into operation on 29 March. So what is the latest date, realistically, by which something has to be agreed?

Baroness Sugg: The noble Lord will know that there are many positions on the negotiations. As I said, that is the Commission's latest position. We are continuing to negotiate with it on the broader future partnership arrangements. Alongside that, we are of course talking to it about no deal too. There is no specific latest date. That is why we need to do this no-deal preparation, so that if it goes close to the date of exit the industry understands what the alternatives are. We are very keen to provide industry with certainty as early as possible.

We have the European Council on Sunday and I expect that there will be an outcome from that. We will then look at what next steps need to be taken. We are very hopeful that the deal is done and will be agreed by Parliament so that we reach our implementation period on 29 March and the industry has that certainty. Should that not be the case, we will of course continue the discussions with the Commission to provide certainty as early as we possibly can. I am very aware, in my many meetings with the aviation sector, of the importance of providing that certainty. That is what this no-deal planning and our continued negotiations with the Commission are about. I beg to move.

The Deputy Chairman of Committees (Lord Geddes) (Con): The Question is that this Motion be agreed to.

Lord Foulkes of Cumnock: Not content.

The Deputy Chairman of Committees: My Lords, I must remind the Grand Committee that the Motion before it is to consider—I emphasise the word "consider"—the regulations, not to approve them. Whatever happens here in the Grand Committee, the Government will need to table an approval Motion in the Chamber, where any Member concerned can properly register disagreement. I also remind the Grand Committee, as contained in paragraph 3.13 on page 29 of the *Companion*, that we cannot have a vote in Grand Committee. With that in mind, I put the Question again. The Question is that this Motion—I emphasise, the Motion being to consider the regulations—be agreed to.

Lord Foulkes of Cumnock: Not content.

The Deputy Chairman of Committees: I am sorry, my Lords, we cannot have a vote within the Grand Committee. The Motion is therefore negatived.

Motion negatived.

Textile Products (Amendment) (EU Exit) Regulations 2018

Considered in Grand Committee

5.27 pm

Moved by ***Lord Henley***

That the Grand Committee do consider the Textile Products (Amendment) (EU Exit) Regulations 2018.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, as the talks progress, we have now agreed in principle the terms of the UK's orderly exit from the EU, as set out in the withdrawal agreement. We have also agreed the broad terms of our future relationship, as set out in the outline political declaration. This puts us close to a Brexit deal that takes back control of our borders, our laws and our money while protecting jobs, security and the integrity of the UK. However, it is our duty as a responsible Government to prepare for all eventualities, including no deal. This instrument is part of that contingency planning.

It is essential to ensure that our consumer legislation continues to function effectively after exit day. Maintaining a comprehensive framework of consumer rights is crucial for prosperity. Household expenditure accounts for around 60% of the UK's economy. In 2016, retail sales stood at £800 million for textiles stores and £40 billion for clothing stores. Confident consumers help to raise productivity and deliver an economy that works for everyone.

These regulations will be made under the powers conferred by the European Union (Withdrawal) Act 2018 and were laid in draft before the House on 10 October. They amend EU regulation 1007/2011 on textile fibre names and related labelling and marking. The EU regulation prescribes the labelling or marking that must be applied to textile products to inform consumers of the products' textile fibre composition and the presence of non-textile parts of animal origin, such as fur. It also empowers the EU Commission to approve new textile fibre names and modify technical provisions, such as testing methods. The EU regulation also modifies the textile product regulations 2012, which set out enforcement provisions for the EU regulation in the UK.

5.30 pm

The EU withdrawal Act will retain in UK law EU regulation 1007/2011 in its entirety on exit day. However, once the UK leaves the EU, the EU regulation will no longer apply to textile products placed or made available on the UK market. To maintain high consumer protections, these regulations make essential changes to ensure that the requirements to indicate the fibre content of textile products and,

"non-textile parts of animal origin",

continue to apply in the UK after EU exit.

The regulations remove provisions that will no longer be relevant, such as requiring the label to be in an official language of the EU. After exit, the label must be in English. The regulations also transfer the powers currently exercised by the European Commission to take account of innovation and technical progress by approving new fibre names, tolerances—the difference between the fibre composition on the product label and the actual composition demonstrated through testing—and testing procedures to a UK Secretary of State. This is necessary because, after the UK leaves the EU, it will no longer be appropriate for the European Commission to approve new textile fibres for the UK market.

To maintain high consumer protections, the powers and penalties applicable to breaches of the EU regulation will be retained after EU exit. Only minor amendments are made to the UK textile products regulations, such as removing the need for the Secretary of State to have regard to the penalties for breaching the EU regulation in EU member states when carrying out a review of the regulation.

These regulations are needed to deliver certainty and stability for consumers and business. Consumers will experience no practical change as a result of them since textile products will continue to be labelled after EU exit as they are now. Businesses sourcing textile products from UK manufacturers or importing these products from outside the EU will experience very little change in the labelling regulations that they must comply with. This will also be the case for UK manufacturers. Businesses importing textile products from within the EU will become responsible for ensuring the accuracy of the labelling or marking of textile products. However, as the UK and EU textile labelling regimes will be very similar at the point of exit, EU suppliers will already understand the shared requirements of the regulations.

To support innovation, businesses wishing to have a new fibre name approved for the UK market will be able to apply to the UK Secretary of State. To enable consumers and business to plan and prepare for these changes, a consumer technical note has already been published. Further guidance to help business understand how to comply with the requirements of the regulations will be published in due course.

The regulations are a sensible and necessary use of the powers of the EU withdrawal Act that will ensure that our consumer law continues to function effectively on exit day. I commend the regulations to the Committee.

Lord Foulkes of Cumnock (Lab): My Lords, I am grateful to the Minister for his introduction and for explaining the regulations so well. In light of the fact that the Secondary Legislation Scrutiny Committee has not drawn attention to any matter relating to these regulations for the House to give them special attention, I agree that it is appropriate to consider them in Grand Committee.

Baroness Byford (Con): My Lords, I support my noble friend in his introduction of this important legislation. As someone whose family was in the textile business for many years, I know that the definition of what makes up the product is hugely important. Labelling is key for people when they want to buy, particularly those with allergies. With modern technology, such a cross-section of mixtures is used in clothing, and so I welcome the statutory instrument. In the old days, there was botany wool, lamb's wool, Angora and cashmere and that was it. Today, a multiplicity of ingredients is used in textile production.

I thank the Minister for introducing the instrument. I understand that it does not create extra responsibilities or burdens for the industry, but will allow us to move forward. In future, labelling will be in English, which is an additional bonus to those of us who used to export 50% of what we produced. I have great pleasure in supporting this statutory instrument.

Lord Fox (LD): My Lords, the noble Lord, Lord Foulkes, is right to point out what he did. When giving us his blessing to consider this, he said that it seems relatively uncontroversial, and I have only one comment and one detailed question.

The comment is about labelling. The Minister rightly pointed out that there will be great similarities at the point of exit between regulation on this side and regulation in the EU 27. However, that will not remain the case for long. Divergence of regulation will start to change the labelling needs on this side versus that side. I point out that, whether we crash out or leave with a deal, that divergence will happen, suddenly or over time. It will mean that the label of a garment here and a similar garment in, say, France, will inevitably diverge. That is a cost, and one that over time will be borne by consumers in this country. It should be remembered clearly that, like many other measures we will see in SIs, in this Room and others, we are putting the cost on consumers.

My question relates to paragraph 7.10 and the approval of fibres. I should perhaps know the answer to this question, but clearly the Secretary of State is a busy person and will not personally deal with a new generic fibre name. Therefore, which agency in BEIS will deal with this? Is that agency being prepared for the arrival of this new process? What will happen to existing fibres that have been accepted within the European context? Will they be transferred to this agency overnight in the event of a crash, or will they be somehow left over the water and administered still by the European Union? What is the process by which these fibres are recognised and administered, and how are the tests validated? Who will do that and where will it happen? What is the scale of this operation? Is it three people in an office somewhere, 300 people or 3,000 people? I have no sense of the scale.

With those reservations, I should like to hear what the Minister says.

Lord Stevenson of Balmacara (Lab): My Lords, it has been an informative little debate, blessed as we are by the noble Lord, Lord Foulkes, to proceed in a relatively calm and considered way. I hope we can move smoothly to a conclusion.

The other two speakers have been supportive of the statutory instrument and I am not going to object to it either. The trouble with these things is that, however simple they appear on the surface, they raise questions in your mind. We have already heard examples of a couple of things that need to be responded to. I do not think that was done in any way to negate what is proposed, but it raises wider questions that we perhaps might return to at some future date.

I want to ask three or four questions of the Minister, and I am happy to receive the answers in writing if they are not available today. Most relate to the Explanatory Memorandum, which I thought was clear and good, and I congratulate the department on the way it has been produced.

I should just say that this is the first time I have dealt with an EU exit regulation. I think it might be sensible to lay down a few ground rules so that we can do it better as we go forward. There are several hundred still to come, or more, and, as others have said, if the department is at any point ready to define the total, that would be helpful for overall planning. For instance, I do not think it is necessary to circulate the annexe statements under the European Union (Withdrawal) Act 2018 Part 1 table of statements—a reference to that could perfectly easily be put somewhere and we could look it up for ourselves. That would save paper, complications and reading time.

Secondly, the department started—I do not know whether it is continuing—to write to Front-Bench spokespersons with details of certain SIs that were due to come forward, perhaps if there was something a bit more tricky or interesting about them. The trouble is, the letters became scattergun. I have had four. My noble friend Lord Grantchester has had six. Others may have had other numbers—I have not had time to ask round. If they are going to come at all, it would be helpful if they came to me as the leader of the group and I could disperse them. If they are not going to come, fine; that was a nice little flurry and it was very nice to get them, but the moment has passed.

My detailed points mainly concern the memorandum. Paragraph 7.6 says:

"The Textile Products Regulations provide sanctions and enforcement powers for UK market surveillance authorities (local authorities' Trading Standards departments) to ensure compliance with the EU regulation".

Of course, the burden here falls on trading standards departments, which, as we all know, have been suffering because of reductions in funding from local authorities. While the department, which has allocated additional responsibilities to trading standards departments, has also notionally allocated money to them, I worry that trading standards as a group is being asked to carry the burden of a lot of things which nobody has really costed or understood whether it is able to carry out the work. Have any discussions taken place with local authorities on this? For example, has a lead local authority taken responsibility for this, as is the case in some areas? Has it been discussed with the Trading Standards Institute? What is the rough estimate of the additional cost that might be involved?

The noble Lord, Lord Foulkes, mentioned paragraph 7.10 and issues around that. I have a similar point in relation to the functions of the Secretary of State. There are agencies currently in play which do work on the testing of products and related issues. Will the Office for Product Safety and Standards, which has responsibility for some of these issues, be involved in this process? The idea that the department is just going to absorb all this work seems slightly odd. Could a bit more clarity be provided on that?

The question of cost flows into the question of whether an impact statement is to be prepared. There is a general statement that if the costs are less than £5 million annually it will not be done. Changing over the whole system for all clothing manufacture in this country from one which was taking a template organised by the EU to a new one that takes its template from the UK will involve transitional costs. I would be very surprised if those were not close to £5 million. There is no particular point that I want to make here. I just wondered, as the department would have had to make a rough calculation of what the costs would be to invoke the de minimis threshold, whether the Minister might share it with us just so that we can have confidence that it is being done properly.

My other points are more generic. First, this is being done as a UK instrument and applies from its implementation date to the United Kingdom, yet there are within the United Kingdom a number of very specialist manufacturers of various textiles—I think of Harris tweed and things that relate to the particular wool that comes from Welsh sheep; Northern Ireland has its own distinctive history in linen. Why is this a reserved issue? If it is to be a reserved issue, what arrangements have been put in place to ensure that the devolved Administrations are involved in the process? The question is probably easily answered but raises a bigger point about how we might think about this in future, particularly as the Government have conceded on geographical indicators—GIs—and that therefore there will be quite a number of these, not necessarily related to textiles.

Secondly, the Explanatory Memorandum says that although no formal consultation was undertaken prior to the instrument being laid,

"discussions were held with industry experts and business representative groups".

A little note about who was consulted and roughly on what areas would be helpful. I look forward to that confirmation from the Minister in due course.

5.45 pm

Lord Henley: My Lords, like other speakers, I offer thanks to the noble Lord, Lord Foulkes, for his blessing of this statutory instrument. We are grateful for that. I will deal with most of the points, but it might be that on one or two I need to write to noble Lords with further detail.

Like my noble friend Lady Byford, I understand the extreme importance of labelling, particularly for those with allergies but also those who have other concerns.

[Lord Henley]
My noble friend will be aware that, only recently, my noble friend Lord Gardiner and I gave evidence to the EFRA Committee in another place on fake fur and real fur. Some older Members of the Committee may remember a time when people would try to sell fake fur as real fur, whereas it is now the other way round. Given how animals are farmed in other parts of the world, real fur can often be a lot cheaper than fake fur, and in trying to buy fake fur a lot of people do not want to buy real fur. The point I was coming to is that we are currently bound by EU rules on labelling. Both my noble friend Lord Gardiner and I felt that the existing labelling of fur and fake fur was not necessarily quite as clear for the consumer as it should be, which sometimes led to individuals buying real fur or objects with a tiny portion of real fur in the trimming when they did not wish so to do. I agree with my noble friend that labelling is important but I also emphasise that these regulations are there only for a no-deal scenario, so that should there be no deal—I am confident that there will be—we can be in a position to make sure that we have the right arrangements in place.

The noble Lord, Lord Fox, asked who would exercise the Secretary of State's powers when it came to enforcement. It is an important matter for local authorities and trading standards, but I can give an assurance that we provide funding to National Trading Standards of around £13 million a year, with £1.2 million a year for Trading Standards Scotland, for the co-ordination of regional and national trading standards in England, Wales and Scotland. I will have to write to him on why this is not a devolved matter. I still find it, as no doubt will the noble Lord, Lord Foulkes, extraordinarily confusing as to which matters are devolved and which are not, as was the case when we recently debated the changing of clocks, which seems to be devolved in Northern Ireland but not in Scotland or Wales.

Lord Fox: I am slightly confused. For example, if I have invented a fabulous new fibre and wish to start using it in one of the Minister's sweaters, do I pop into Hereford Town Hall and look for the trading standards person there? How do I know where to go? Who is the agent or person that I go to?

Lord Henley: I was trying to make it clear that local authorities deal with the enforcement. The noble Lord is asking about the labelling of his product. Perhaps I may write to him in great detail to make sure that I get exactly right who is exercising the powers of the Secretary of State and that he has the answer he seeks.

Lord Fox: While the Minister is writing, will he also explain what happens to existing fibres that are currently on a European ticket, so to speak? If they come in on your labels and have been improved in the European context, is jurisdiction over those fibres passed en bloc to that agency? What is the process, since the transfer of existing fibres to a new UK agency for their management does not appear to be allowed for in this SI?

Lord Henley: I will write in greater detail to the noble Lord, just to make sure that he is absolutely clear. In passing, on the question of correspondence, I give an assurance that from now on I will send all letters from my department on matters relating to SIs to the noble Lords, Lord Stevenson and Lord Fox: I will copy letters to one and the other. I am sorry if he has been confused: on some occasions I have written to the noble Lord and on others to the noble Lord, Lord Grantchester. I shall inform my office that in future it will be entirely himself. If the noble Lord, Lord Lennie, would like to receive those letters, I will send them to him too.

Lord Stevenson of Balmacara: In no sense was any blame to attach to the Minister personally: in fact, several of the ones that went to my noble friend Lord Grantchester were from his colleague Kelly Tolhurst. I got a couple from the Minister himself and my poor noble friend Lord McNicol got none.

Lord Henley: The poor noble Lord, Lord McNicol, got none, but I think I wrote to the noble Lord, Lord Lennie, on something. Anyway, between myself and my honourable friend Kelly Tolhurst we will look at our entire system and make sure that there is one recipient of all letters on the Official Opposition Front Bench and that similarly, the noble Lord, Lord Fox, will be a recipient of all other letters.

I move on to the question of the impact—the cost, as the noble Lord, Lord Stevenson, put it. After exit, the responsibilities for UK manufacturers or a business sourcing textile products from UK manufacturers, or importing them from outside, will remain the same; it will be the same for manufacturers. Anyone importing products from manufacturers in the UK would be putting a textile product on the market and so would become responsible for ensuring that it contains the appropriate label or marking and that it is accurate according to the retained EU regulation. The practical impact of this will be limited. I think any impact on business will fall far below £5 million annually and, as a result, we do not believe that a full impact assessment is necessary.

On exit day, UK and EU labelling laws will remain highly aligned. Textile products imported from the EU will therefore be compliant with the shared requirements and the saved EU regulation does not mandate any costly technical testing or the production of documentation as proof of compliance. Similarly, there would be no administrative costs at the border to demonstrate compliance. Many businesses already undertake compliance activities as part of their due diligence programmes. That includes asking for proof of fibre composition or procuring their own fibre composition test. As a result, it is unlikely that businesses would need to put in place additional checks to demonstrate compliance with the saved EU regulation. The Government will, in due course, provide further guidance to businesses to ensure that they have understood the requirements of the saved EU regulation.

The noble Lord, Lord Fox, asked about applications for new fibres. Businesses wishing to introduce a new textile fibre name or manufacturing tolerance will be able to make this application to the Secretary of State. The Government will, in due course, publish further guidance, including the process by which the Secretary of State will assess the various applications. Lastly, I

was asked: will businesses have to apply to both the United Kingdom and the European Commission to have a new fibre name approved for both UK and EU markets? Yes, in a no-deal scenario, it will no longer be appropriate for the European Commission to approve new textile fibres which can be made available on the EU market and therefore they will have to apply to both. I hope that will not be an onerous burden.

As I said, I remain optimistic, as always, that we will reach an agreement with the European Union, but it is important and prudent to have a regulatory and legislative framework in place should we leave without a deal. That is entirely what this instrument ensures.

Motion agreed.

Timeshare, Holiday Products, Resale and Exchange Contracts (Amendment etc.) (EU Exit) Regulations 2018

Considered in Grand Committee

5.56 pm

Moved by ***Lord Henley***

That the Grand Committee do consider the Timeshare, Holiday Products, Resale and Exchange Contracts (Amendment etc.) (EU Exit) Regulations 2018.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, I beg to move that the draft regulations, which were laid before the House on 22 October 2018, be considered.

These draft regulations will be made under the powers conferred by the European Union (Withdrawal) Act 2018. They form part of the work being done to adjust our existing legislative framework in readiness for leaving the European Union next year. Obviously, the best outcome for the UK is to leave the EU with a good deal. If a deal—and therefore a withdrawal agreement—is reached, the implementation date of this instrument could be changed by any subsequent Bill that the Government introduce to implement the withdrawal agreement into UK law. However, it is sensible to prepare for all scenarios, which is what we are doing in bringing this instrument before this Committee today

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 transposed the 2008 EU directive on timeshare and long-term holiday products into UK law. The 2010 regulations improved consumer protection for those investing in timeshares across EEA states, aiming to improve consumer confidence in the industry. That was done through a number of new consumer rights and obligations on traders. Under the new rules, a consumer considering the purchase of a timeshare had always to be made aware of the key information in a standardised form in the language of the EEA state of which they were a national or resident. That new regime also extended consumer protections to a much broader range of holiday-related services, including resale, exchange and long-term holiday contracts, as well as timeshare contracts. These services are all characterised by long-term commitments of significant financial risks for consumers.

If approved, the regulations will make minor and technical amendments to the existing timeshare regulations to correct deficiencies that would arise from the United Kingdom's withdrawal from the European Union. The draft regulations now put before the Committee make amendments to references to EEA states and language requirements. These include amendments which ensure that contracts governed by UK law are still protected when the UK is no longer a member state of the EEA. They widen the scope of the regulations so that certain contracts governed by the law of an EEA state will now be subject to the same regime as contracts governed by the law of third countries. In addition, language requirements are amended so that key information must be provided in English.

In practice, most of the protections of the timeshare regulations 2010 will continue as currently, except that some contracts applying the law of an EEA state will now be subject to the same requirements as contracts applying the law of a third country.

Principally, this instrument saves the current regulations, so that they remain the same for UK consumers buying timeshares and other long-term holiday products in the UK and from UK companies where contracts are governed by the law of the United Kingdom.

Where UK consumers buy certain timeshares and other long-term holiday products governed by the law of EEA states, these contracts will now be treated in the same way as contracts applying the law of a third country, as EEA states will now be third countries.

The new regime will generally not cover contracts where UK consumers purchase timeshares and other long-term holiday products from EEA traders when they are in that EEA state. These contracts will be generally be subject to the laws of that EEA state. As UK consumers will no longer be citizens of an EEA state, then that EEA state's law may not apply in the same way to UK consumers as it did previously.

Additional amendments have been made to correct legal deficiencies and substitute references to the EEA, including EEA states. This will ensure legal operability of the legislation on day one of exit.

Finally, the regulations will include provisions for the contract and mandatory pre-contractual information to be provided in English, as well as allowing for them to be in another language, whether or not it is an official language of an EEA state.

A comprehensive assessment of the impact of the instrument has been undertaken. The conclusions were that as this instrument does not represent a substantial policy change, it is expected to result in little or no wider impacts or transfers. The instrument is also expected to have minimal effect on UK businesses, UK consumers, the wider UK society, the environment and the rest of the UK economy. This is because, as I said, the effect of these regulations for timeshare and other long-term holiday products will generally remain constant.

In conclusion, the regulations are a sensible and necessary use of the powers of the withdrawal Act that will ensure that our consumer law continues to function effectively on exit day, and I commend them to the Committee.

6 pm

Lord Fox (LD): My Lords, this appears to be so uncontroversial that the noble Lord, Lord Foulkes, has left the room. However, I have a couple of questions. The Minister has done a great job in describing the limitations as well as the extent of this move. It is of course the limitations that concern me. One of the main ways in which timeshares, particularly non-British timeshares, are sold is in situ. In other words, people are sold to by people who literally come up to them in the street. It will not be clear to those individuals, who have been used to the process of being sold to and, in some cases, buying such products that the legal basis on which they are buying property will change. No longer will the contract be unified across the state. They will have bought a property in a foreign legal environment.

I make the same point as I made on the previous SI. That foreign legal environment will gradually diverge. It will diverge slowly or quickly, but it will change. It is clear that if that is how it goes, the Government and the industry have to work very hard to explain the legal complications that can arise from buying a property from a EU 27-based seller in an EU 27 country. It is not clear to me what is the legal redress if you buy a property from a UK-based seller in an EU 27 country. My suspicion is that it probably depends. That is another point on which serious information will be required to avoid people being mis-sold on that basis.

The Minister did not to any great extent address resale. Where does this leave the UK owner of an EU timeshare bought from an EU seller who comes to resell? It does not appear to me that this SI addresses this issue at all, but it is of great concern. Say the Minister had, in a fit of excitement, bought a timeshare on a golf course in the Algarve several years ago. He is shaking his head, but perhaps he should have done that—he would be relaxed. If he had bought that timeshare from a Portuguese seller, where does this leave him when it comes to the contract and process of resale? Where is the court of redress? Where is the process?

The SI is good as far as it goes, but it does not address the key consumer issues. Once again, it is consumers who will suffer. Whether we crash out or have a deal, the divergence will potentially create a significant downside for consumers. I would like to hear the Minister's view on that.

Lord McNicol of West Kilbride (Lab): My Lords, this is one of the more straightforward regulations. We can see that by the fact that we have lost my noble friend Lord Foulkes from our discussion. As was touched on, the main aim is to change references to "the EEA" to "the UK", and similar changes in language from "official language of an EEA state" to "English". At this stage, I cannot find much of substance to disagree with. However, I am sure my shadow BEIS colleagues may have some points to raise when this is discussed in the other place. Like my noble friend Lord Foulkes before me, I have just a couple of questions for the Minister.

First, much of the instrument deals only with replacing European references with domestic alternatives. However, the regulations will also ensure that contracts governed by the law of an EEA state will be treated in the same way as contracts governed by the law of non-EEA third countries. Did the Government consider any other option for EEA contracts?

Secondly, prior to the publication of this instrument, the Government chose not to carry out a consultation. This seems fair, considering the volume of secondary legislation and the relatively minor impact that this will have. However, it could be expected that the Government will have held informal conversations with those affected by the regulations. Will the Minister explain whether any such discussions, with industry or others, have taken place?

Thirdly, the Explanatory Memorandum claims that there is no impact on UK businesses. However, as a result of this instrument, businesses dealing with timeshares will surely have to acquaint themselves with the new regulations. Does the Minister not agree that, however minor, there will be some necessary adjustments for business to make?

Finally, on a similar note, does the Minister agree, like me, with the comments of his colleague the Secretary of State for Work and Pensions? This morning, she said that the UK will not be leaving on a no-deal Brexit as there is no majority in the other place for that to pass.

Lord Henley: My Lords, I remind the noble Lord that we had a referendum a couple of years ago and we agreed that we were leaving the EU. That was the manifesto that both the party I represent and the noble Lord's party went to the country on in 2017. We are leaving the EU. It depends on what terms. These regulations are about dealing with the question: what will happen if there is no deal? We hope there will be a deal but if there is no deal, we want to make sure that the proper protections are there.

The noble Lord, Lord Fox, asked a number of questions which went slightly wider than the regulations in front of us. The important thing to say to anyone who is thinking of buying a timeshare, whether in this country or another, is that whatever they do, they must take all the proper legal advice. I have no plans, when I walk round a golf course on the Algarve—which I have never done and have no intention of doing—to buy a timeshare, but there are people who want to buy timeshares and they serve a purpose. Whatever they do, the important thing is to make sure that they are getting the right advice, either in this country, if they are buying it here, or in another country. I think we would all agree on that point. Where people have had problems, it is very often because they have bought in the manner that the noble Lord, Lord Fox, seemed to be suggesting—someone comes up to them while they are on holiday and makes this suggestion.

Now that we are leaving, what protection will UK consumers have when buying timeshares in Portugal? Obviously, it will depend on where the consumer bought the timeshare. UK consumers who buy timeshares under UK law will be covered by the protections in the existing timeshare regime. If they are buying timeshares in Portugal from Portuguese traders, they will generally be subject to Portuguese law and the protections that that member state extends to non-EEA nationals. Consumers will be encouraged to understand the specific conditions of the contract and to take all appropriate advice.

The noble Lord also asked: how do we prevent people being misled? Obviously, I share his concern for vulnerable consumers who are unfairly targeted by manipulative and misleading sales tactics in many industries, but particularly here. I believe that the current timeshare regime, reviewed and updated by the 2010 regulations, provides adequate protections for timeshare consumers. The regulations require that clear and comprehensive information is provided to the consumer before any contract is agreed; that information on termination must also form part of the contract; that timeshare buyers also have the option to change their mind within two weeks of signing a contract, during which no money can be taken; and so on.

The noble Lord, Lord McNicol, asked whether it was possible that there would be further changes. He will be aware that the European Union (Withdrawal) Act does not give us the powers to create any legislation or substantially change any retained EU legislation. The changes that this instrument would bring into effect are made in exercise of those powers, to remedy deficiencies in retained law and not to change the effect of retained law. But we know that many people have concerns about some of the protections. I can give an assurance to the noble Lord that my right honourable friend and others will always keep these matters under review if we feel that there are not the appropriate protections. This will always be a concern. The Government would act if necessary.

Lord Fox: I agree with the Minister's "buyer beware" point, which was very clear, but he did not have the opportunity to address the point on resale.

Lord Henley: I agree that resale is a vital point, because when one buys a timeshare one usually feels that one has an asset which, if it is to have value, should be able to be sold.

I was asked where the court of redress would be. If it was a Portuguese contract, the court of redress would be in the Portuguese courts. Perhaps I may double-check what the precise position would be in respect of something sold here that is in another place. If the noble Lord comes to a deal while sauntering around a golf course in the Algarve—so that is just a deal that he has made in Portugal—it is quite clear that the Portuguese courts will deal with it, but I had better write to the noble Lord on what the position would if he bought it here and it was in that EEA state to make sure that I get it absolutely correct.

I hope that that explanation is sufficient. As the noble Lord, Lord Fox, pointed out, the noble Lord, Lord Foulkes, has now felt that he can depart, so I hope that we can move on.

Motion agreed.

Infrastructure Planning (Water Resources) (England) Order 2018

Considered in Grand Committee

6.16 pm

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

That the Grand Committee do consider the Infrastructure Planning (Water Resources) (England) Order 2018.

The Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs (Lord Gardiner of Kimble) (Con): My Lords, the purpose of the order is to amend the Planning Act 2008. The Act sets out a streamlined national planning process for infrastructure projects which are "nationally significant". If a project meets certain thresholds set out in the Act, it will be considered under it, with the Secretary of State as the decision-maker.

This order will change the thresholds under which reservoirs, dams and water transfers will qualify as "nationally significant".

Lord Campbell-Savours (Lab): Can the Minister explain what the driver is behind this order? Who is pushing for it?

Lord Gardiner of Kimble: My Lords, the Government are pushing for it on behalf of the nation in so far as we undertook consultation. With climate change and population growth, we need to prepare. We wish to place a greater emphasis on the environment and therefore to deal with overabstractions. We need to find ways of having sufficient water, given the projections of an increase in population. This is about planning. We do not expect the projects to which this measure will apply to take place in the next five years; this is about forward planning. We think that these changes will probably embrace about six projects in England. The noble Lord asked who is driving this. We need to take a public responsibility to ensure that there is sufficient water for the nation. Yes, we should cut consumption where we can, but, because of population growth and climate change, we are bringing forward this measure now as part of our forward planning. It will involve public engagement, but that is the background to it.

On conclusions and criteria, we needed to make sure that we consulted, so we consulted on our initial proposals last November and then held a more detailed consultation in April. There was broad support for our approach from a range of stakeholders who responded, including water companies, environmental groups and other interested groups.

In reaching a conclusion on the new thresholds, we considered a number of factors, including the physical size of the infrastructure in question, the size of population that could be served by its output and the major infrastructure the Government anticipate will be needed in future. This is likely to require developers to engage with a number of planning authorities and other regulatory regimes. We also wished to move to a level playing field so that different water resource schemes are all required to meet thresholds that are as consistent as possible to qualify for consideration under the Act. This should help avoid developers favouring one scheme over another just because they prefer one planning route over another.

In making these amendments, we are introducing a consistent metric to measure the output of each infrastructure type. This metric is known as deployable output and is commonly used by the water industry for water resource planning. Deployable output is an annual average measure of the number of litres of water a particular piece of infrastructure can be expected

[Lord Gardiner of Kimble]
to produce in a day under drought conditions. We concluded that a project expected to have a deployable output of 80 million litres per day—a level that could serve a population of around half a million people—is a nationally significant infrastructure project.

As explained, the order will amend qualifying thresholds for two existing infrastructure types mentioned in the Act and introduce a third—desalination plants. In the case of water transfers, this order would reduce the size of the threshold that projects would need to meet to qualify as nationally significant in line with the number of people served—that is, 80 million litres per day.

There will now be two ways for reservoirs to qualify for the streamlined planning process under the Act. The order would introduce a deployable output measure, consistent with transfers. However, we have chosen to retain a measure based on physical volume, recognising that the size of reservoirs matters. This is not just because of the impact they can have on neighbouring communities, but because a large reservoir takes a long time to drain down. Thus, with a relatively low deployable output, it can be an important part of overall water resource resilience. We have increased the volume for reservoirs to qualify under the Act from 10 million cubic metres to 30 million cubic metres.

We have also introduced desalination plants as a new infrastructure type. Consistent with the other infrastructure types, if the deployable output of a given desalination plant is expected to exceed 80 million litres per day, the project can be considered under the Act.

While the national level is the right one for decisions on nationally significant infrastructure, it is vital that those communities directly affected have their say and are heard in the decision-making process. The Act and regulations made under it set out the consultation requirements for development consent order applications. I can assure your Lordships that extensive pre-application consultation and engagement with those affected by the proposals will need to be undertaken by applicants. Furthermore, members of the public can participate in the examination process by registering their interest, thus ensuring that local views can be heard.

The main benefit to the developer of projects meeting the criteria in the Act is that they will face a less complex, consenting process with quicker decision-making. A number of consent requirements, such as planning permission, listed buildings consent and scheduled ancient monument consent, are replaced by a single consent, issued by the Secretary of State, following advice provided by the Planning Inspectorate.

It is the Government's intention to designate a national policy statement for water resources infrastructure under the Planning Act. This policy statement will summarise government policy—

The Deputy Chairman of Committees (Lord Geddes) (Con): My Lords, it has just been drawn to my attention that a Division has been called in the Chamber. Since we have a few seconds to go until 6.25 pm, the Grand Committee therefore stands adjourned until 6.35 pm.

6.25 pm

Sitting suspended for a Division in the House.

6.35 pm

Lord Gardiner of Kimble: My Lords, it is the Government's intention to designate a national policy statement for water resources infrastructure under the Planning Act. This policy statement will summarise government policy on water resource infrastructure, including setting out the need for nationally significant infrastructure. It will make clear what the Government expect a planning inspector to take into account when examining an application. We plan to lay a draft of this in Parliament by the end of the year. I look forward to engaging with your Lordships on this in more detail next year.

The amendments in this order are part of how we make sure we have enough water now, and in the future. Population growth, climate change and making sure we leave enough water in the environment will become more challenging in the future. We expect proposals for nationally significant infrastructure to originate from statutory water resource management plans, as these are where options to reduce demand and increase supply have been assessed. We know that some new infrastructure will be needed to meet water demand in the future. Our assessment of the current draft water resource management plans is that around half a dozen proposed projects, needing to start in the next decade or so, are likely to qualify as nationally significant under the Act as amended by the proposed order. For all the reasons that I have outlined and because of the Government's strong view that we need to plan for the future, I beg to move.

Lord Campbell-Savours: My Lords, we all want water but we also want safeguards. Much of my contribution is going to be about safeguards. When I saw this order—which was only this afternoon—I had to do some pretty speedy homework and make a few phone calls. I also looked up on the internet the definition of NSIPs, and they are described as,

"major infrastructure project developments in England and Wales that bypass normal local planning requirements".

Whenever I see those sorts of words, I think immediately: what are the safeguards? There are no safeguards that I can see defined in the order before us.

I want to draw attention to a particular example of where things could go wrong when there are no safeguards. I will tell the story of what happened over the Thirlmere reservoir in the Lake District. I am presuming that United Utilities and other water companies are among those to which the Minister referred when he spoke about the consultation that took place. I am sure that they would have a primary interest in ensuring that this order goes through, because I would imagine that in certain circumstances they will certainly be the beneficiary of it and use it.

Thirlmere is in my former constituency in Cumbria, which I represented for some 21 years. For many of those years, it was a major problem because of the way the legislation had originally been framed in terms of protecting the interests of consumers and residents in the area. The primary use of Thirlmere, as it was described in a letter from one of the senior managers in the Environment Agency, is,

"as a water resource reservoir for United Utilities. In addition, United Utilities has voluntarily drawn down the reservoir to

enable some flood storage during winter months. However, as the low reservoir levels during the 2018 dry weather period show, there needs to be a careful balance between Thirlmere's primary use as a water supply and its use for flood storage".

That is what I am on about—the balance. There is nothing in these regulations that even refers to the need for safeguards as part of the discussion around the balance between the availability of water and flood risk in local communities.

I want to now refer to some incidents that took place and the response of the local communities. In January 2005, November 2009 and December 2015, Keswick, a town where I have lived for most of my life, was flooded. On the last occasion, 515 properties were flooded during Storm Desmond. As the formidable Lynne Jones, secretary of the Keswick Flood Action Group, said in correspondence to United Utilities:

"I make no apology for continuing to contact you. I know that UU will never really manage the reservoir with a view to our safety without legislation to enforce them to do so".

That is precisely why I am speaking on this order, because it is not in here. In the end, the solution is in your hands; you who are far away and who cannot understand the fear that so many in our community live with.

There are 2,630 residential properties in Keswick, and 515 properties flooded during Storm Desmond in 2015. Let me explain to the Committee what that means. Keswick is a town in two parts: there is the lower part and the higher part. In the main, the higher part does not flood, although certain parts of it do. But the lower part floods extensively. In the lower part of the town, there has been a dramatic drop in property prices. I do not live there, but the people who do worry constantly about the fact that they cannot sell their properties and have difficulty insuring them. Throughout the winter months, they are haunted by the prospect of being flooded. The river Greta, which runs through the town, has built-in flood defences, which broke down on one occasion. The truth is that the town is living in fear because of inadequate safeguards.

Today, legislation is going through that will make it easier for water companies to pursue the development of reservoirs without the safeguards that the people in Keswick demand for Thirlmere. It is a very clear idea. I imagine that they are the people driving this on because they know that they will be able to bypass much of the planning arrangements that currently exist.

I want to refer to what people think should happen in the future to resolve these problems. Within these regulations, there should be reference to measures to ensure that communities are safeguarded. Lynne Jones has been in contact with me today, and I will refer in this debate to what she said. She said it is obvious that the reservoir should be managed for flood alleviation alongside water supply. However, legislation is needed to make this a reality, and the present Floods Minister refuses to consider this possibility. So we are going to have more reservoirs, without safeguards, and the potential of future flooding. She went on to say—

Lord Gardiner of Kimble: I wonder whether I might help the noble Lord. I can see the line of approach he is developing and would be the first to say that all Governments need to address flooding concerns.

Important to the context of this work is that it is all predicated on the Reservoirs Act 1975, which sets out extensively the safety requirements of large reservoirs and contains a number of provisions, which I am happy to outline.

This piece of work is from the Planning Act 2008. There is already legislation on the matters that the noble Lord is raising. I apologise for intervening but I just wanted to say that this is not in isolation; there is other legislation which deals with safety. The noble Lord may well question the 1975 Act but there is legislation, passed by Parliament, which deals with the safety of reservoirs. I hope that is helpful to not only the noble Lord—I am sure he knows about this legislation anyway—but other noble Lords.

6.45 pm

Lord Campbell-Savours: My case is very simple: the legislation does not work. That is why half of Keswick lives in fear every winter. If you go to Keswick today and take a poll on the street and ask people what their major concern is, it is that their houses are going to be flooded. In the last flood in that small town, 515 properties were flooded. Many of them had to be evacuated. So when we talk about legislation being there to protect these communities, I am sorry, it is just not working. We need legislation that works. This order offered us an opportunity to deal with these matters. It could have referred to other regulations which could be introduced to deal with those safeguards but there is no reference at all to them. So I will carry on.

The second point Lynne Jones makes is on scheme funding. She says:

"The way that the EA look at the financial viability of a scheme does not lend itself to a full catchment approach. Funding is limited to the cost of damage to the individual towns and each is considered in isolation. If funding looked at the damage to farms/infrastructure/footpaths etc. from the high fells to the coast then perhaps Cumbria/our catchment/Keswick would have a better chance of getting viable schemes. The EA has trumpeted a full catchment approach loud and long since the 2015 floods but the only actions are, frankly, an excuse to have various NGOs have their snouts in the trough and get money to plant trees/reconnect the river to the flood plain/re-wilding and other tinkering schemes which keep them in jobs and have no real impact on the kinds of flows which threaten homes".

This is what people in Keswick believe, yet we are putting through an order which makes it easier for these water companies to build without safeguards.

Lynne Jones goes on to say:

"We need to tackle the series of intense and prolonged winter storms that we experience. Doing easy/cheap/relatively ineffective things and expecting us to cheer is not really helpful. I firmly believe that 6.4 of the Habitats Directive is not applied in the spirit for which it was created … Flood risk needs priority over environment. Brexit is an opportunity to improve legislation for community protection from flooding".

She then says:

"The government's funding formula is unfair. The Derwent catchment has no money for any major works which could reduce flood risk. The funding formula does not take into account much of the costs which a community like ours faces: damage to bridges, pathways, parks, sports facilities, tourism and business in the area; nor does it take into account depth of flooding, repeat flooding and the detrimental effects it can have on the health and well-being of the community".

[Lord Campbell-Savours]

I return to my case: there is nothing about safeguards in this order. We drive such orders through, give these big companies the right to build more of these reservoirs and the regulations are not in place to safeguard communities.

Finally, the letter talks about resilience:

"Government has to stop praising our resilience. We have no choice. Resilience is used as an option instead of addressing the real risks. I doubt the Dutch would accept resilience as an option"—

I am sure they would not. She continues:

"Resilience leaves people open to cowboy builders, inflated prices, product companies that don't last long enough to honour their guarantees. People are encouraged to buy flood gates when the water seeps in through the brickwork/up from the floor and the only dry section is the flood gate itself. Resilience is useless if flood water is over a metre deep as water then has to enter homes to prevent structural damage. Unscrupulous firms will sell products anyway".

My point is very simple and I will repeat for a fourth time: this order gives big companies the right to build new water facilities—which the Minister has talked about and we all welcome—but the safeguards are not there. People are going to suffer. There will be more flooding in the future, probably as a result of these developments, because the legislative background that the Minister referred to does not work. People in the north of England, particularly in Keswick, desperately want legislation to deal with a problem that in many cases is ruining their lives, in some cases is ruining their livelihood and in many cases is ruining their health. I appeal to the Government to listen to these people and stop fobbing them off with silly little schemes.

Baroness Byford (Con): I follow the noble Lord, Lord Campbell-Savours, and sympathise with the situation in which people find themselves in Keswick. The Minister has already referred the noble Lord to the previous Act and said that there are restrictions in it. If they are not being observed or things are not being done, that is a slightly different issue from what is before us today. However, I well understand the vehemence with which he has—"used" is the wrong expression—taken the opportunity to raise the whole issue of having a development in not the right area and not protected in the same way. I suspect that other Members of the Committee will come back on the issue of flooding.

I support and welcome the measure before us. The question asked earlier by the noble Lord, Lord Campbell-Savours, was: "Who is driving it and why are we having it?". From my very amateur point of view, it is looking to the future. There are going to be more people and we are going to need more water, so the ability to have four or six newer, larger innovations that will enable us to use water in a better and more sustainable way has to be the right approach. Still, I say to the noble Lord that it is not that I do not sympathise; it has been a terrible experience for people who have been troubled by flooding.

I welcome this statutory instrument. We need to plan for the long term. We cannot suddenly find ourselves short of water with nothing to fall back on. As someone who comes from the farming community, I am only too aware of the many demands there are for growing more food. The one crucial thing that we need is water. For those who live on the west side of the country, water is not an issue—it is there all the while—but for those of us who farm on the eastern side it is a huge problem. So being able to enlarge a reservoir or have desalination as a backstop has to be a welcome new initiative.

The Minister mentioned climate change. I agree with him, whatever the way in which it is changing. I think this last year will have reinforced the fact of climate change for all of us: it was a very cold winter, then we had a lot of rain and then in East Anglia we had three months of no rain at all. So we need the ability to be able to drain off water in order to supply crops. Those in rural areas who were not able to do so lost crops and could not get them off the fields because there was no water to enable it to happen. So we face big challenges.

I gather we have more consultation coming in a draft towards the end of the year. Perhaps when that draft comes through, it could include some of the concerns that the noble Lord, Lord Campbell-Savours, has indicated today. We need to ensure that where new reservoirs or desalination plants are being built, they are in a suitable place and not likely to reproduce the experience that they have had up in Keswick. There have been various consultations, and as far as I understand it they have on the whole been supportive.

I have one query for the Minister about the Explanatory Memorandum. There was one part of that I picked up on and did not quite understand because it struck me as slightly odd. I refer the Committee to paragraph 6.4:

"The development also cannot relate to the transfer of drinking water".

I thought: why not? I am sure the Minister will be able to tell me why, but it seemed odd that we are dealing with different things. However, I suspect from listening to the earlier debate with the noble Lord, Lord Campbell-Savours, that it will go back to a previous Act, where something will be written in to define what it is. Again, I think it should be slightly clearer in the memorandum because I do not understand why.

I am happy to support the statutory instrument, but I should like the Minister to bear in mind some of the comments that have already been made on the question of where such developments are positioned. This is a key issue. In some areas, I am sure that people will accept that they need to be there. They may be rural areas—I do not know quite how they would be defined, but in future years we will need to balance flood protection with water conservation and using water to the best of our ability.

The Duke of Montrose (Con): My Lords, my experience of water retention on this scale is that I was involved in the transformation of Loch Lomond into a reservoir capable of supplying 450 million litres of water a day.

On the volume of water held back by a dam being increased from 10 million to 30 million cubic litres, perhaps the Minister can say whether the noble Lord, Lord Campbell-Savours, can take some comfort from the fact that the smaller reservoirs would still be subject to all the regulations in the 1975 Act. I have

just come from a meeting where we were addressed by an executive from Anglian Water. He said that it was under severe pressure this summer and that, if it has to extract any more water from ground sources, it feels that it will be moving into an area where damage might be caused. This must be quite a worry.

Baroness Redfern (Con): My Lords, I too welcome the SI and agree with many of the comments of my noble friend Lady Byford. We have droughts in the eastern part of the UK, so I welcome looking at our reservoirs and desalination plants.

I have a query about the impact on costs to local authorities. In paragraph 12.3 of the Explanatory Memorandum, it says that,

"there will be a slight increase in costs to Local Authorities … as more resource will be required in order to advise on applications".

Is that for central government or for local authorities? Budgets are tight and I should like some clarification, particularly on that explanatory note.

Baroness Bakewell of Hardington Mandeville (LD): My Lords, I declare my interest as a district councillor. I thank the Minister for his opening remarks and for setting the scene so clearly.

Water is a natural resource which is not finite. Our lives and livelihoods depend on it, and the well-being of all living creatures, trees and plants relies on there being a ready and plentiful supply of fresh water.

As the Minister has said, the change to the Planning Act 2008 for nationally significant infrastructure projects was out to consultation for six weeks during November 2017 and then for a shorter, three-week period in April this year. The first consultation resulted in a significant number of responses but no definitive consensus. The second consultation received 20 responses from those bodies directly affected by the change to the law. There was broad agreement with the proposed amendments. I find this encouraging, as it is quite a significant alteration to the capacity currently covered by the 2008 Act.

The change from 10 million to 30 million cubic metres represents a trebling of dam or reservoir capacity. This is likely to have some impact on the surrounding area and, no doubt, the people affected will have views that they wish to express.

To avoid drought conditions in parts of the country—such as we have heard about—it is imperative for major projects which both conserve and move water to be streamlined to ensure they proceed on time.

7 pm

In my role as a district councillor, I am aware that planning is an issue which can significantly divide people, not always to the greater good of an area. It is important that residents are not sidelined by developers in their wish to complete their schemes. I note that, although the legislation is focused on reducing delays and delivering schemes efficiently, I am reassured that there will be public consultation at the pre-application stage. This consultation with charities and voluntary bodies is important, not only to improve transparency but to ensure that all angles have been covered when the final scheme begins construction. Those designing major infrastructure projects have not always covered every aspect of delivery. Sometimes a very minor amendment can make all the difference and save both time and money. We are not talking about dozens of nationally significant infrastructure projects. As the Minister has said, there will be fewer than 10 planned over the next decade. However, it is important for those projects to have the backing of the public who will benefit from the increased water capacity.

Although I wholeheartedly welcome this change to allow for increasing the capacity of reservoirs and desalination plants, I note that—as has already been mentioned—there is only a reference to a slight increase in costs to local authorities. This will come through advising on those important infrastructure schemes. As we are all aware, local authorities have falling budgets—some of them are failing—and increasing demands on their services, not least in the care of the elderly, dignified services for the disabled and the protection of vulnerable children. I am concerned that yet another burden will be placed on local authorities at a time when they have absolutely no room for manoeuvre in their financial affairs. I ask the Minister to encourage his colleagues in the Treasury to fully fund any increased spending that is likely to be caused to local authorities.

I thank the Minister and his officers for their time and extremely useful briefing on this important statutory instrument.

Baroness Jones of Whitchurch (Lab): My Lords, I welcome the Minister's explanation and echo the thanks of the noble Baroness to him for the courtesy of arranging a briefing on this SI in advance of today's consideration. We, too, broadly welcome the proposals, which we believe will lead to greater water resilience in the UK. As we know, despite its reputation for rain, England is at increasing risk of water shortages. Extreme weather from climate change, coupled with an increasing population, especially in the drier southern and eastern areas, has put the water system under increasing pressure. We know that that will only rise over the coming decades.

I agree with my noble friend Lord Campbell-Savours that extreme weather is not just about drought; it is also about flooding. We have debated time and again in the Chamber the terrible consequences for local communities—not just in Keswick, but in other areas—which are faced with the same infrastructure breakdown which allows flooding to take place over and over again. The Government need to address that key challenge. I agree that this may not be the right vehicle to do that, but we should not lose sight of the important challenge of addressing the sort of communities which he spoke so passionately about.

Thames Water warned, just last month, that in a little over 25 years a projected population growth of more than 2 million people will leave a shortfall of 250 million litres per day between the amount of water available and that used. We have to address the issue of water shortage nationally. This has not been helped by an ageing infrastructure and a lack of investment from water companies in the past. This means that change is necessary to create a modern infrastructure which can adapt to new demands, which we can already predict will add pressure to the system.

[Baroness Jones of Whitchurch]

The Minister will be aware that several stakeholders argued during the consultation that demand management techniques should be exhausted before any new infrastructure is developed and that water transfers should be a last resort. We agree that that while reservoirs and dams can play a key role in stabilising water availability, it is imperative that we reduce demand and waste. One area where progress is urgently needed relates to the industry's inability to get on top of leaks. The noble Lord will know that in June Thames Water was ordered to pay £120 million back to customers, having been found to have breached its licence conditions by allowing millions of litres of water to spew out of pipes through leaks. So we need urgent action to reduce water leaks, with meaningful targets for action by water companies year on year. Will the Minister update us on the agreements that have been reached with water companies to make this a reality? Will he also explain what action is being taken to change consumer behaviour around domestic water consumption? Breaking through this barrier is a real challenge, not least because consumers have a simplistic view of the water cycle and the ease by which turning on a tap can deliver water without any concern to the source of that water supply.

Any government proposals must make sure that the ways we build infrastructure and supply water in the future are sustainable for the environment and for local communities. According to a report published by WWF, nearly one-quarter of all rivers in England are at risk because of the vast amounts of water being removed for use by farms, businesses and homes. Some 14% of rivers were classed as overabstracted, meaning that water removed is causing river levels to drop below those required to sustain wildlife, while a further 9% were described as overlicensed, meaning that the river would fall to a similarly low level if permits to take water were utilised fully. This means that if permits to abstract water from rivers were fully utilised, levels of water would be unable to sustain wildlife and the necessary biodiversity that goes with it. What safeguards are in place to ensure that the increase in nationally significant projects does not lead to more overlicensed and overabstracted rivers? Will the Minister ensure that the national policy statement on water resources prioritises sustainability, not profits?

One of the key challenges of these proposals is the issue of local engagement. The noble Baroness, Lady Bakewell, touched on this and my noble friend Lord Campbell-Savours dwelt on it in some detail. In the proposals for large infrastructure projects there are indeed legitimate local concerns that need to be heard and addressed. I know that the Minister raised this in his introduction and set out the Government's aspirations, but it would be helpful if he would clarify how he intends to use the powers the Government are taking to guarantee proper community consultation in the future, so that he can give more assurance to noble Lords in this regard.

The Minister will also know that the Chartered Institution of Water and Environmental Management has expressed concerns that the criterion for defining a nationally significant infrastructure project,

"does not consider any regional or supra-regional water resources issues".

Will he ensure that the Environmental Agency and Ofwat recognise the importance of regional, multisector resource planning in delivering these changes, so that it is not just about local consultation involvement but also proper consultation at regional level?

Finally, while we welcome the introduction of desalination plants as a new category of NSIP, we share the view of many stakeholders that effluent reuse systems should also have been included. While these facilities are used only in times of projected or actual drought, it is likely that we will come to rely more on this type of water supply in the future, owing to the existential challenge of climate change and population increase. Can the Minister explain what more is being done to expand investment in this sector and encourage water recycling? Does he accept that not including effluent reuse as a new category of NSIP may deter investment in such plants?

In conclusion, we welcome the proposed amendments and support the Government's stated twin-track approach to improving resilience by stabilising supply and reducing consumption. This will be achieved only as part of an ambitious, long-term plan for the environment, including new policies to manage our water resources, a plan to meet our climate change targets and a strategy to reduce domestic consumption—as well, of course, as dealing with the extreme water consequences we have been debating this evening. I look forward to the Minister's response.

Lord Gardiner of Kimble: My Lords, I point out at the outset that although I am not as aware as the noble Lord, Lord Campbell-Savours, is about the flooding in his part of the world, as a Defra Minister, and beforehand, I absolutely understand and have seen the devastation and horror of flooding—indeed, the fatalities there have been—across the country. I am thinking particularly of the flooding experienced in one sense on the west side of the country, while on the eastern side there has so often been coastal flooding where the most terrible events have also happened.

I want to take away all that the noble Lord has said, and would be very happy to hear from any of the people who may have contacted him. I am not the Minister who has direct responsibility for flooding but in this House I take responsibility for all Defra matters, and I want to hear much more about the situation of residents there. I have friends in Cumbria who have suffered from the flooding, and I know that communities have been in a very difficult situation for many years. Perhaps I may spend some time outside of this discussion understanding more about the particular points that the noble Lord raised about Thirlmere and the issue of safeguards.

I know it was probably incorrect of me to intervene as I did, but I wanted to ensure that what we are trying to do here, through the Planning Act 2008, was on the record early on. I would of course want to hear in more detail whether there are issues with safety in reservoirs and the 1975 legislation, or issues arising therefrom, that we need to consider. This provision comes from the Planning Act 2008, and I suggest that it enables us to deal with the small number of what we believe to be nationally significant infrastructure projects

for water. This is the route that that Act envisaged. We are seeking to add some detail to it and, as I say, include desalination plants.

Lord Campbell-Savours: I am sorry to intervene. I want to ask one question. A part of the town now lives in fear of flooding, as I said, and in a large part of the town there has been a major drop in the property values of people's homes. I presume that there must be people now who are in difficulty over their mortgages. Because of the lack of legislation at the moment, with no way of controlling the operations of United Utilities, is it not possible for some national fund to be set up to help people who are in difficulty over the sale of their properties? I heard about a house last week that was on the market at nearly £600,000 and is being sold for £350,000. These are huge losses, which do not derive from the actions of the people that own them but directly from the absence of legislation that governs flooding. As I say, the danger in this order is that there will be more in the future.

Lord Gardiner of Kimble: I am grateful to the noble Lord. Clearly, I am not in a position to talk about resources, as he will understand very well. But obviously, in a different sense, this is why the Government brought forward Flood Re—there was a lot of consideration in the insurance world vis-à-vis it—to seek to address some of the difficulties that householders had. In fact, the noble Lord and I have had conversations about this and some of the distinct elements of where it has been successful. However, I understand generally that Flood Re has been a considerable success for householders with this problem.

7.15 pm

I want to spend a few moments in saying to the noble Lord, Lord Campbell-Savours, that I am very happy to take away and discuss the concerns in Keswick and any parts of Cumbria with whoever he wants to bring to see me. Our objective—the reason we have the Environment Agency; the reason we have bodies paid for by the public purse—is not to have it that people are fearful but that we do the best we can, through the use of Flood Re, through hard engineering or through other means that are increasingly utilised. We need to use a mix of approaches. I extend that offer to the noble Lord. In saying that this is about the Planning Act 2008 and other legislation that deals with safety, I take the point that he makes. It is a serious one and I know he reflects what many communities must feel. We must try to do all we can.

To return to the essence of the order, I am most grateful to noble Lords for raising a range of points and setting the scene about why we need to plan forward, whether on the production of food, the wise use of water in that production and the agricultural sector, or on reducing demand. The noble Baroness, Lady Jones of Whitchurch, was on the dot when she referred to reducing demand. Clearly, we need resilient water supplies, now and in the future. That involves not only creating new infrastructure but dealing with leaks. Nothing is more annoying than seeing water wasted in this way.

The Government made it clear over the summer—the drought obviously made this a matter of total public concern—that we, including through Ofwat, are expecting the water companies to improve their record. The regulator's challenge is already to reduce leaks by at least 15% by 2025. Over the long term, the industry is committed to work to an ambitious target set by the National Infrastructure Commission to reduce leaks by 50% by 2050. We need to hold it to account: the Government do and we all need to do so. I am expecting Ofwat to set appropriate milestones for each five-year planning cycle. I honestly think that the leakages we have are unacceptable. Yes, we have a fairly elderly infrastructure, but this is a hugely important point.

The other point, as raised by the noble Baroness and others, is about the way in which the public and we ourselves use water. It is very important that water companies help customers to use less water. The Government have a role to play and this is why in the 25-year environment plan we committed to working with industry to determine appropriate targets—I use the word targets for personal water consumption—and, indeed, the measures that we need to achieve them. I looked for some information on this and it is interesting that, on metering alone, evidence shows that metered companies use significantly less water. In 2016, metered companies in England and Wales used 33 litres per day per person less than customers who are not metered. The water companies must deal with the leaks and we, in turn, need to be more responsible.

A number of your Lordships raised another point. My noble friend the Duke of Montrose and the noble Baroness, Lady Jones of Whitchurch, talked about abstraction and, indeed, overabstraction of our rivers and bodies of water. The Environment Agency has already acted on that and made changes to over 270 abstraction licences, reducing the amount of water that might be taken from rivers and aquifers by over 27 billion litres per year. We published our abstraction plan this time last year, setting out how we will continue to make progress to reduce levels of abstraction where necessary. It is really important from the environment's point of view that overabstraction is dealt with. That is why the water industry has a responsibility to reduce abstraction where it cannot be sustained. From their draft water resource management plans, we expect water companies to deliver a total reduction of 260 million litres per day by 2025, and 480 million litres per day by 2040. We need to look at ways of reducing unsustainable abstraction. It is very important—I want to place this on record—that both the existing water resources management planning guidance and the future national policy statement emphasise the importance of sustainability.

The Planning Act 2008 is quite clear. The noble Baroness, Lady Bakewell of Hardington Mandeville, raised this, and I think we all feel that it should not for one minute be interpreted as a way of making it difficult for the voices of local communities to be heard. I can assure your Lordships that this is not the intention of what is a small number of nationally significant infrastructure projects to do with water. It is enshrined in the 2008 Act how people and communities affected by these major projects should absolutely be heard and have their concerns discussed. It is absolutely clear to me that anyone with the possibility of a major

[Lord Gardiner of Kimble]
infrastructure project near to them, having that impact on their community, will want to feel that that infrastructure is in the national interest and that it does not make them unsafe. To pick up the point made by the noble Lord, Lord Campbell-Savours, it is absolutely clear that we will need these projects, but there are mechanisms absolutely enshrined in the Act which we are not in any way touching.

On regional planning, the water industry has improved how it looks across the regions, seeking to better understand the problems faced and the best solutions to address them. This is why the national framework being developed by the Environment Agency is supporting that regional-level concept, as raised by the noble Baroness, Lady Jones of Whitchurch. Clearly, water does not just come down one river. There is a whole catchment area, and we will need to be responsible for our waters in a much wider way.

My noble friend Lady Redfern asked about local authorities—understandably, given her background in and leadership of local authorities. There may be some possible costs for local authorities in what is intended by this small number of projects, but we believe that the cost will be negligible. If I have any further detail or consideration on the work, I will make sure that she is kept in the picture on that.

My noble friend Lady Byford quite rightly asked about the Explanatory Memorandum. I am so glad that she is diligent in looking at it; I had to look at it myself. This is what was excluded in the 2008 Act. We did not propose to change the 2008 Act other than to use it for these three points for water infrastructure. Drinking water is also nearly always transferred in smaller amounts than the envisaged large transfer of untreated water, for instance. The transfer or movement of drinking water tends to be in smaller conduits; that is how I understand it. If there are any further particulars, they are not included because that was what was stated in the 2008 Act. We want it to be consistent with that.

I should also say—and I have just had a note, so this perhaps plays into the important point about flooding—that the Government are investing £2.6 billion in flood and coastal erosion risk management projects between 2015 and 2021. I would again be happy if the noble Lord, Lord Campbell-Savours, could consider this and work with Defra to see whether any of the points or localities he raised are engaged in that, but that £2.6 billion is obviously an indication of the concern that we all have.

A number of other points were made. On the matter of effluent reuse, we considered this and there was some support for it, but in the end our final view was that such schemes would likely include a water transfer, and so still could qualify as nationally significant if of sufficient size. There might also be an overlap with nationally significant wastewater infrastructure. We would also have set the threshold at an output of 80 million litres per day, in line with transfers and desalination plants. We do not think that industry has been deterred; in fact, draft water resource management plans contain a number of proposals relating to reuse. However, we are not aware of any such schemes that would meet a threshold of 80 million litres per day.

I will look at *Hansard*, but I have tried to respond to all the points that were covered. This is an important piece of long-term planning for our ability and for the Government's responsibility to ensure that the nation has sufficient water supply for consumers, business and residential; and that industry, agriculture and, importantly, the environment have sufficient water supply. Yes, it rains quite a bit, but we are not very good at using or retaining that water. This is part of what we are going to need to do: to have a range of projects—not many, because few will embrace this size—and the ability to forward plan. We are not expecting any of these projects to come forward in the next five or even 10 years, but this is about enabling the ability to start that journey of getting our country to be water-resilient. I take the point raised by the noble Lord, Lord Campbell-Savours, and I am genuinely grateful for the opportunity he gave me to come back to him with some of the points I have raised about the investment that is taking place. I promise to find out more about what is happening in his area. In the meantime, this is an important order for our future infrastructure and I commend it to the Committee.

Motion agreed.

Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018

Considered in Grand Committee

7.28 pm

Moved by ***Lord Bates***

That the Grand Committee do consider the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, claims management companies offer advice and other services to consumers making claims for compensation. They can provide vital support for consumers who may be unwilling or unable to bring a claim for compensation themselves. When the CMCs market functions well, these companies can act as a check and balance on business conduct.

CMCs are currently regulated by the Claims Management Regulator, under the Ministry of Justice. This regulatory regime was established in 2006 through the Compensation Act and was initially intended to be temporary. Reports of widespread misconduct suggested that the Government should act to strengthen regulation of CMCs. In 2015 the Brady review found evidence that the majority of stakeholders felt the Claims Management Regulator lacks the sufficient powers and resources to supervise the market properly. The Government took the first step to stronger regulation in 2016 through the Financial Guidance and Claims Act. This mandated the transfer of regulation to the FCA and the handling of complaints about CMCs to the Financial Ombudsman Service.

The aim of this legislation is to introduce a robust regulatory regime for CMCs that benefits consumers and is proportionate to the needs of the sector. We consulted on its provisions and we are confident that this legislation delivers on this aim. Through changes

to the regulated activities order and the financial promotions order, this legislation makes claims management a regulated activity in England and Wales and in Scotland for the first time. This will require firms to seek authorisation from the FCA in order to promote and carry out claims management services.

The order defines the types of claims management activities that will be regulated by the FCA by creating seven different permissions across different sectors for different types of activity. This will mean that regulation will be comprehensive as each CMC will need separate permissions depending on the specific activities and sectors that it wishes to operate in, which will enable the FCA to take into account the different types of work across each sector and different activities. Regulation will also be kept proportionate as CMCs will need authorisation only for the activities they actually carry out.

This is a change from the previous regime, which set out one permission enabling claims management activity across six different sectors. These six sectors have been preserved from the previous regime and mean that CMCs must be regulated for their activities in personal injury, financial products and services, employment issues, industrial and criminal injuries, housing disrepair, and for seeking out, referring, and identifying claims. As the Economic Secretary noted in the other place, the Government are aware of increasing claims management activity in areas other than those I have just named. The Government will monitor the new regulatory regime and consider how best to meet this challenge.

The order also sets out which organisations are exempt from the FCA's regulation. Concerns had been raised about the exemption of legal professionals, but I can assure the Committee that, first, solicitors are already strictly regulated by the Solicitors Regulation Authority for their work, which can closely resemble claims management work, and secondly, CMCs will not be exempt from regulation merely because they employ a solicitor. Rather the exemption is designed to ensure legal firms are not unduly burdened by dual regulation.

We have taken steps to make sure that this is a smooth transition. The FCA will be implementing a temporary permissions regime to ease the process for CMCs. The FCA is well placed to take on the regulation of CMCs, having already started to build the department which will oversee the transition of regulation. It is well resourced and has an expert pool of conduct supervisors and detailed knowledge of financial services. CMCs will be held to the same conduct standards as all FCA-authorised firms, and the FCA's rules will provide a robust and proportionate framework for how CMCs should carry out business and treat their customers. The FCA will be able to use its regulatory powers to deal with CMCs that do not abide by its rules.

In summary, the Government believe that the proposed legislation is necessary to ensure that the regulation of claims management companies is fit for purpose so that consumers can benefit from a professional service that offers value for money. I hope members of the Committee will join me in supporting the order. I commend the order to the Committee.

Baroness Drake (Lab): My Lords, I welcome the order. The FCA's greater range of powers allows for tougher regulation to address the conduct issues and other problems that we are familiar with in the CMC market. The reauthorising of existing claims management companies will ensure that they can comply with the new regime, and the senior managers regime can be used to hold managers accountable for the actions of their businesses. All this is to be welcomed.

Is there any estimate of how many existing claims management companies will not get authorisation under the new regulatory regime? What will happen to the cases that such companies are handling if they are not authorised? The previous regime required only one permission to enable claims management activity across all six sectors—personal injury, financial products and services, employment, industrial and criminal injuries, and housing disrepair. The order creates seven different permissions across those sectors, which again is a positive because it strengthens and focuses the regulation of the CMCs. However, it maintains the same exclusions and exemptions from FCA regulation that existed in the previous regime, even though there have been a number of responses to consultation suggesting that additional sectors should be brought into scope, particularly claims about cavity wall insulation, aviation and timeshares.

Ofgem's response to the Treasury consultation, by way of example, was prompted by an increase in correspondence with claims management companies dealing with cavity wall insulation, which are not regulated under the current regime. In eight months it received over 2,250 such requests compared with only 80 in the same period for the previous year. The energy company obligation scheme, which Ofgem administers, places an obligation on larger energy suppliers to deliver energy efficiency measures, including cavity wall insulation, particularly to individuals in fuel poverty and therefore vulnerable households. Ofgem considers that the significant increase in the number of subject access requests reflects claims management companies looking to pursue claims for clients against failed or wrongly installed insulation.

Somewhat wryly, Ofgem observes that over 6.2 million homes have cavity wall insulation under government schemes. It is clearly an emerging area for claims management companies, and it is in the interest of consumers for this area to be regulated. The Government's response was to the effect that further work was needed to understand whether this and other claims sectors should be regulated. Against that, though, we are hearing from an authoritative regulator telling the Government that there is an escalating problem that needs to be addressed. I ask the Minister to confirm the extent to which the order allows for additional claims sectors to be included in the new regime and to what extent a further statutory instrument is required to extend its scope. When can we expect a decision on the inclusion of cavity wall insulation claims? What other sectors are the Government currently considering whether to include?

It is proposed that the exemption afforded to claims management activity by independent unions, if they adhere to a code of practice, is maintained. Again, in my view that is a positive because thousands of trade

[Baroness Drake]
union members get service through their union. The existing code applicable to trade unions will be replaced by a new code to be published by the Treasury in time, I understand, for the regulatory transfer on 1 April 2019. What is the process for consulting the trade unions? Could the Minister give a steer on what areas in the code the Treasury is looking to change?

The Minister referred to solicitors carrying on claims management activity also being exempt if that activity is carried on as part of their ordinary legal practice because regulation comes via the Solicitors Regulation Authority. If a solicitor is not acting in the ordinary course of their legal practice but is carrying on claims management activity separately, the exclusion does not apply. Again, I noted that several responses to the Treasury consultation questioned that exemption or expressed concern about the robustness of the Solicitors Regulation Authority, suggesting, as one sees if one reads the submissions, that a risk of regulatory arbitrage could arise where the presence of a legal professional in a company allows it to seek SRA authorisation rather than meeting the more robust FCA process. Although the SRA and the FCA can develop memorandums, which I am sure they will, what assurances can the Minister give that this risk of regulatory arbitrage will be closely monitored, and does this order allow the FCA to revoke that exemption—that is, if it wants to consider that exemption, can it do so under this regulation?

Finally, under the General Data Protection Regulation 2018 and the Data Protection Act 2018, where personal data is obtained through an unlawful cold call, further use of it is prohibited. This is something that many of my colleagues were concerned about during the debate on this matter in the House. I know from reading the documents that the FCA is consulting on requiring claims management companies that buy leads from third parties to carry out due diligence to determine whether the lead generator is authorised and complies with the relevant legislation and regulations. However, again, I ask the Minister: when will the FCA conclude what is required of claims management companies—that is, to undertake due diligence and ensure that the leads they are buying are authorised—and will that be available before April 2019?

Baroness Kramer (LD): My Lords, given the hour, I shall try to be very brief. I support this statutory instrument but want to reiterate some of the points made by the noble Baroness, Lady Drake, and others.

Obviously, I support the transfer of supervisory responsibility to the FCA and the Financial Ombudsman Service, but it will be effective only if the FCA decides that it will use its powers. The notes accompanying the statutory instrument refer to the senior managers and certification regime, which has been in place for two and a half years. The industry was initially very afraid of that regime and the discipline that might follow, but it is not so any longer. Can the Minister tell us or ask his officials to write to us setting out how many actions have been taken under that regime? Obviously, you do not expect anything in the first months but, by now, given the fairly constant level of misbehaviour within the financial services industry, we should be seeing something coming through. I fear that the number will be quite low—possibly even zero.

I also reflect the concerns that the noble Baroness, Lady Drake, expressed about exemptions. The Minister referred in particular to the concerns expressed in consultation about the exemption for the legal profession, and he talked of the Solicitors Regulation Authority. I am afraid that its reputation is not good, and it is certainly not one of a body that is rigorous in its enforcement. I understand that there will be a memorandum of understanding and some sort of joint regime between that body and the FCA, but it would have been handy to have sight of that before we saw the SI. Can the Minister expand on that to give us some level of confidence both that these two bodies will work together and that they will be determined to be rigorous—something that, frankly, sits in neither's history?

I pick up the issue of cold calling, which the noble Baroness, Lady Drake, addressed. As the Minister knows, we have been very concerned that there is not a much more vigorous prohibition on using data obtained in an unauthorised way, and cold calling was a particular issue. The fact that no penalty will be paid by those who use the information is a really significant loophole. Can the Minister give us any update on whether there will be action in this arena? He will know that, although Parliament has provided many powers for regulators to tackle cold calling, anecdotally we are aware that its incidence has not slacked; it has just become much more targeted against vulnerable people. That is almost the worst outcome that any of us could have anticipated and something that needs to be dealt with very rapidly.

Lastly, I turn to the issue of new areas. This industry has a long history of producing one new wheeze after another. We could use some assurance that the FCA and others will be able to move rapidly as it begins to become evident that the industry has found yet another way to target individuals in some abusive form. I do not want to damn all claims companies. Some of them are very good; some are extremely responsible, but it is an industry that has managed to draw in quite a number of rogues. We all want them to be expelled as soon as possible.

7.45 pm

Lord Tunnicliffe (Lab): My Lords, I, too, welcome this statutory instrument and thank the Minister for introducing it. I also endorse what the noble Baroness, Lady Drake, has said, particularly her questions. I will not repeat what she said, but just observe that the regime will involve the Senior Managers and Certification Regime. I am sorry to hear that it is not as yet being used effectively. Perhaps the Minister will reduce our concerns. Perhaps it would be more top-of-mind if the reversed burden of proof originally in the scheme had been retained. Certainly, it is meant to be a regime which makes managers very clear of their duties, if not fearful. I endorse the idea of six bundled areas of responsibility being expressly divided into seven. I think that the noble Baroness, Lady Drake, asked whether there should be more than seven. It is a bit unfair of me, but I feel that the ombudsman becoming the financial ombudsman gives me a feel that he will be steelier and more effective.

The solicitor exemption depends on the exclusion that the activity is being carried on as part of their ordinary legal practice. The trouble is that we are

talking about solicitors. They are paid to get around regulations. Who will be policing that boundary? Who will have responsibility for understanding what a particular solicitor is doing and saying, "Sorry, that should now go into the financial control"? The solicitors doing this work in the ordinary course of their business nevertheless need proper regulation. Is the Solicitors Regulation Authority up to the job?

Lastly, I understand that the CMRU staff will be redundant at a point when the FCA will, we hope, looking for similar skills. I would like to know the Government's plans at a practical level for those staff.

Lord Bates: I thank noble Lords for their scrutiny of this SI and for their general welcome. I will try to address some of the key points and questions which have been raised.

First, the noble Baroness, Lady Drake, asked about estimates of numbers. According to the CMRU, there are current 1,238 authorised CMCs in operation. The overall number of authorised CMCs has been reducing on average by 10.9% per year for the past four years. The FCA's modelling shows that it expects to take on 906 firms in 2019.

The noble Baroness, Lady Drake, and the noble Lord, Lord Tunnicliffe, mentioned the solicitors' exemption and concern about potential regulatory arbitrage. The SRA and the FCA are in the process of updating their memoranda of understanding to ensure that the sector is closely monitored and properly regulated. The order contains a provision which disapplies the exemption from regulation by the FCA, should a CMC seek to avoid FCA regulation by employing a solicitor. That CMC will continue to be regulated by the FCA.

The noble Baroness, Lady Kramer, asked about solicitors, and not other regulated professionals, being exempt. Solicitors are already regulated by the Solicitors Regulation Authority. I understand the point that she made about that authority. The work of a solicitor advising on a claim is the same as, or very similar to, the work of a CMC seeking compensation for a consumer. As solicitors are regulated by the SRA for their usual activity, appropriate regulatory oversight is already present.

The Government have retained the other existing exemptions; we consider it correct that these bodies are not subject to regulation. That point was made by the noble Lord, Lord Tunnicliffe, and the noble Baroness, Lady Drake. The FCA will continue to monitor exemption from claims management regulation if it moves or migrates into other activities. Of course, it will also retain the right to come back with further suggestions.

The noble Baroness, Lady Drake, asked about the exemption for trade unions.

7.50 pm

Sitting suspended for a Division in the House.

8 pm

Lord Bates: My Lords, I was just touching upon the code of practice for trade unions, in response to a point made by the noble Baroness, Lady Drake. The Treasury proposes to maintain the code for trade unions and will replace the MoJ on the monitoring board. The Treasury is working with the Trades Union Congress and Scottish Trades Union Congress at an official level and will publish the code in due course. The code is being amended, mainly to update it to reflect the transfer of regulation.

The noble Baroness asked about CMCs moving into other sectors. We will carefully monitor the effectiveness of CMC regulation and work with the FCA, the SRA and others to ensure that the sector is benefiting its customers. On the estimate of how many CMCs will not get authorisation from the FCA and what will happen to their cases, the number of CMCs has been declining, and I gave some statistics on that at the beginning.

The noble Lord, Lord Tunnicliffe, asked what will happen to the highly qualified CMRU staff. The CMRU and the FCA are currently agreeing the transfer of staff as part of their transfer scheme under the Financial Guidance and Claims Act. The details are still subject to discussion.

The noble Lord and the noble Baroness, Lady Kramer, asked whether the Solicitors Regulation Authority was up to the task. The SRA is subject to oversight by the Ministry of Justice and provides strict professional regulation. A memorandum of understanding between the SRA and the FCA is being reviewed.

Lord Tunnicliffe: My question was: who can call a halt and say, "No, it must transfer"? If you have a solicitor who is growing like Topsy, who will know that by now they should stop doing that and reregister as a proper claims organisation?

Lord Bates: That is something that I think the FCA would be liaising on. If it felt that its activities were aligned with a CMC then, as I mentioned earlier, that would mean it would have to continue to be regulated by the FCA. On the specific point, unless there is any inspiration on its way, I will write with clarification to the noble Lord.

The noble Baroness, Lady Kramer, asked if any action had been taken on CMCs doing their due diligence on data under GDPR. The FCA is in the process of updating and publishing its rules for the CMC regime. It will be working closely with the Information Commissioner's Office, which is responsible for the oversight of data protection laws, to ensure that CMCs comply with the order, FCA rules and data protection legislation.

The noble Baroness asked whether the SRA was an effective regulator. The MoJ is responsible for the oversight of the SRA. The FCA and the SRA are currently reviewing their memorandum of understanding, and their conclusions will be published in due course. I think that covers most of the points.

Baroness Drake: Could the Minister clarify a point from one of my questions? Where an existing claims management company, authorised under the previous regime, transfers across to the FCA on the due date in April and is then subjected to the reauthorisation process but is not reauthorised, what happens in that instance to the caseload that it has been managing?

Lord Bates: They will be given 30 days to wind down their business in the event that that happens. I can write to the noble Baroness when I write to the noble Lord, Lord Tunnicliffe, and expand on that point if that would be helpful.

Baroness Drake: It is more about the consumer protection aspect that a group of people would be caught up in that, and I wondered who would carry on managing their cases. I am happy for the noble Lord to write to me about that.

Lord Bates: I will look at the record and check that I have answered the points as best I can and write regarding the points that I have agreed to. In the meantime, I beg to move.

Motion agreed.

Committee adjourned at 8.04 pm.

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