Vol. 794
No. 222

Tuesday
11 December 2018

PARLIAMENTARY DEBATES
(HANSARD)

HOUSE OF LORDS

OFFICIAL REPORT

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The first time a Member speaks to a new piece of parliamentary business, the following abbreviations are used to show their party affiliation:

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
Lab Co-op	Labour and Co-operative Party
LD	Liberal Democrat
LD Ind	Liberal Democrat Independent
Non-afl	Non-affiliated
PC	Plaid Cymru
UKIP	UK Independence Party
UUP	Ulster Unionist Party

No party affiliation is given for Members serving the House in a formal capacity, the Lords spiritual, Members on leave of absence or Members who are otherwise disqualified from sitting in the House.

House of Lords

Tuesday 11 December 2018

2.30 pm

Prayers—read by the Lord Bishop of St Albans.

NHS: Specialist Services in Remote Areas

Question

2.36 pm

Asked by ***Lord Beith***

To ask Her Majesty's Government what work is being carried out within the National Health Service to improve access to specialist services in areas which are remote from main hospitals.

Lord Beith (LD): My Lords, despite the temperature, I beg leave to ask the Question standing in my name on the Order Paper.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, NHS England, which is responsible for overseeing the commissioning of specialised services, is committed to considering the centralisation of such services, such as stroke provision, where it will raise clinical standards and improve outcomes. However, in doing so, NHS England is bound by its statutory duty to reduce health inequalities, including for people living in remote areas. A series of adjustments to funding allocations for clinical commissioning groups are designed to deliver that obligation.

Lord Beith: My Lords, I am grateful for that Answer. As the Minister indicated, many specialist treatments and emergency admissions now take place in major hospitals for patient safety and better outcomes, but what about the communities that are 50 miles or more from those hospitals? Some patients must travel for three or four hours at a time for follow-up consultations and treatment. Does the Minister recognise that, in remote areas, community hospitals need to provide a wider-than-usual range of services and treatments—such as the chemotherapy we have in Berwick—including follow-up consultations, examinations and radiography, using modern technology to link the patient to the clinician at the distant hospital?

Lord O'Shaughnessy: I absolutely agree with the noble Lord that while it is important to specialise those services because they have been demonstrated to deliver better outcomes, we need to make sure that ancillary services can be delivered as close to the community as possible. In preparing for this Question, I was delighted to see that Northumbria Healthcare NHS Foundation Trust and the county council are building a new hospital in Berwick to provide that sort of care. That is welcome, but we also need to make sure that we protect community hospitals elsewhere in the country and that they can continue to deliver out-of-hospital care.

Lord Turnberg (Lab): My Lords, there is one important way in which patients in remote parts of the country can access specialist care: telemedicine. It is quite easy to send X-ray pictures, scans and blood test results online, and even to interview patients. I send things via WhatsApp to my children almost every other day. It is entirely possible for me to do that on my iPhone; surely the NHS can do it too. I understand that Wales has managed to do it quite well. Is it possible for us to do the same in England?

Lord O'Shaughnessy: The noble Lord is right. Of course it is possible for us to do it in England; it is happening all over the country. Telemedicine offers fantastic opportunities, such as Skype-based GP consultations. Indeed, there is the example of Morecambe Bay's remote clinician pilots in a variety of specialisms, such as gastroenterology and mental health care. Clearly, that is important. I point the noble Lord to the tech vision published by my relatively new Secretary of State this autumn, which points out the massive potential for digital health in reducing these kinds of inequalities.

Baroness Redfern (Con): Within limits, a shifted out-patient model allows specialists to provide the same kind of consultations, investigations and procedures as in regular settings. Does the Minister not think a possible way forward would be to develop larger PCTs, as they would be more financially able and therefore have the capacity to provide that service in areas remote from the hospitals?

Lord O'Shaughnessy: My noble friend makes an excellent point. The number of CCGs is reducing over time, as they tend to merge. Of course, they are increasingly coming together into integrated care systems, which cover a larger geographic community. Every one of those makes sure that people have not only community care but specialist care available.

Baroness Meacher (CB): My Lords, how many of the 3 million people who face the closure of their general practice in the coming year are in remote areas where they have a long way to travel to a hospital? What do the Government plan to do to ensure that some form of health service is available to those people? Telehealth can help, but people often need an examination.

Lord O'Shaughnessy: The noble Baroness is quite right. There is an urgent need to recruit more GPs. We continue to be committed to that. I am sure she will be pleased to hear there are more GPs in training than there ever have been. We are also providing a £20,000 salary supplement to GPs who go and practise in rural areas.

Baroness Jolly (LD): As the noble Baroness said, there are occasions when a patient needs to see a specialist, but travelling to access specialist services is especially difficult for those on low incomes. What is NHS England doing to advertise the healthcare travel

[Baroness Jolly]
costs scheme to patients in rural areas? Do the Government hold information on how many eligible patients are claiming?

Lord O'Shaughnessy: There are a number of schemes, as the noble Baroness points out. As well as the travel costs scheme, there is the low-income scheme. They are designed to help people with those kinds of costs. I do not have the specific numbers about take-up, but I shall certainly write to her with those.

Lord Clark of Windermere (Lab): The Minister is correct to highlight the building of new hospitals, but these are no good if you cannot attract staff to them. Can he comment on the pilot scheme in west Cumbria which is training senior nurses to undertake the work of some junior doctors? How successful has that been, and how many students will take part in the second year of the course, which starts in January? What plans do the Government have to increase the number of staff right across the health service?

Lord O'Shaughnessy: I shall look at the scheme the noble Lord mentions and would be delighted to follow up with him directly on that. We need more staff; we have more NHS staff than we did in 2010, but nevertheless we need more GPs and nurses. Of course, we also need to diversify the workforce in new ways. One of the most exciting innovations in the workforce sphere recently is the creation of several thousand nursing associate posts to support nurses and doctors in a range of settings.

Lord Kakkar (CB): My Lords, I declare my interest as chairman of UCLPartners. The provision of centralised specialist services is predicated on the basis that there is an appropriate mechanism for integrated care across the tertiary, secondary and primary care institutions. Are Her Majesty's Government satisfied that the regulatory framework to assess the quality of that care exists? If not, what mechanisms are being put in place to ensure regulation across integrated care pathways?

Lord O'Shaughnessy: The noble Lord makes an excellent point with great insight, as ever. We all want to move to an integrated care system which allows us to worry less about levels of care and think instead about patients and the care around them. We believe a lot can be done within the current regulatory framework but, when the Prime Minister asked the NHS to produce its long-term plan in return for the significant funding increase we are giving, she asked what legislation might be needed to complete that framework.

Baroness Masham of Ilton (CB): My Lords, as president of the Spinal Injuries Association, I ask the Minister if he is aware of the terrible state of spinal injury specialised hospitals, which do not have enough beds. Is he aware that the association and our fundraisers have privately employed two specialised nurses to help the hospitals which do not have expert help available?

Lord O'Shaughnessy: I am of course concerned by the point the noble Baroness makes. She has raised it with me privately. I absolutely applaud the work that the association has done but I will come back to her about our specific plans on how to make improvements.

International Development: Co-operation with the EU

Question

2.44 pm

Asked by ***Lord Bruce of Bennachie***

To ask Her Majesty's Government what measures they propose to secure continued co-operation on international development programmes and funding in partnership with the European Union.

Lord Bruce of Bennachie (LD): My Lords, I beg leave to ask the Question standing in my name on the Order Paper and draw attention to my entry in the register of interests.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, the political declaration sets out a vision for our future relationship with the EU. It provides for future UK-EU dialogue on development co-operation and for further discussions on how we might contribute to EU instruments in areas of mutual interest. Any further participation will be subject to the structure of EU instruments in the next multiannual financial framework post-2020, and to adequate UK oversight and participation for UK organisations.

Lord Bruce of Bennachie: My Lords, the UK delivers around £1.5 billion of its aid through EU institutions, which amounts to about 12% of the EU budget, and it is rated good or very good under DfID criteria. Given the challenging objective under the UN of ending absolute poverty by 2030 and leaving no one behind, and that the Government state that we share the same concerns, values and commitments to the sustainable developing goals as the EU, will he ensure that we continue to work closely with the EU in partnership? Will he give an absolute commitment that, whatever form Brexit takes, there will be no disruption to programmes, which could cause the poor to suffer or even die?

Lord Bates: I am very happy to reiterate the commitment on the important matter of humanitarian programmes in the unlikely event of a no deal. The more general point is covered in paragraph 108 of the political declaration, which talks about and articulates that very clear ambition. Of course, the EU itself is in a process of change in the instruments available. The EDF is coming to the end of its lifetime, and there is now discussion about a new neighbourhood instrument. We want to see what shape that takes before making any longer-term decisions, but the noble Lord is absolutely right to say that our interests and those of our European friends are very much aligned in this area.

Lord Forsyth of Drumlean (Con): My Lords, would my noble friend agree that one of the biggest barriers to prosperity and development for developing countries is the European Union's customs union, which results in their products being made less competitive and unable to reach our markets?

Lord Bates: One of the things that we can be incredibly proud of relating to the poorest countries in the world is the work done to give tariff-free, quota-free access to UK markets and to the EU for about 100 of the poorest countries in the world. We are committed to replicating that. In fact, we have already done so through the cross-border trade Act, which has already passed through your Lordships' House.

Lord Lea of Crondall (Lab): My Lords, would the noble Lord agree that if the EU did not exist, this sort of Question would be a very good reason for inventing it? I give the examples of Burundi and Gabon, which each have only about one person competent to deal with a whole number of areas. Would it not be ridiculous if each European country came and told them that the criteria for auditing and testing were to be done 27 different ways? It is vital that this kind of co-ordination continues, preferably by the EU with British participation.

Lord Bates: Actually, for the vast majority of interventions of the type the noble Lord mentions we are talking about not EU but UN systems where we seek to have greater harmony. A lot of the things we seek to do with the sustainable development goals are a UN commitment. Our climate change ambitions are driven by a UN framework. There are lots of things that we work together on, but they tend to be more supranational, rather than in large bodies such as the European Union.

Lord Collins of Highbury (Lab): My Lords, the fact is that the political declaration says very good words about the EDF and the need for Britain's participation. Clearly, the Government have signed up to that. We are all a bit tired of the mantra that it is all subject to negotiation and these are all hypothetical questions. I ask the noble Lord to set out before the House now what the Government aspire to. How do they see participation and what do they see as the likely costs? Will we be able to control those costs? Because I think the public are being hoodwinked.

Lord Bates: We propose to leave the European Union on 29 March with a deal and that will then lead to the negotiation of a framework. During the implementation period that is proposed, we will continue to be party to the European Development Fund. When the new neighbourhood instrument is developed, we will evaluate it in light of our priorities and whether our European friends will allow a third country to be party to it. If so, we might continue to participate in it, but one thing is for sure: whatever happens in the course of Brexit, our overall commitment to the world's poorest, as a leader in this area, will not be shaken at all.

Baroness Sheehan (LD): My Lords, our EU membership has allowed the UK not only to magnify the impact of our aid but also to influence EU development policy to suit our own objectives. Therefore, potential impacts if the UK leaves the EU include a reduction in the global impact of the UK's ODA and a reduction in value for money. Has DfID made any attempt to evaluate this, both in monetary terms and in terms of the damage done to our part in delivering the global SDGs?

Lord Bates: What we have made clear—I made it clear myself at the Foreign Affairs Council on development which I attended in Brussels two weeks ago—is that we believe that the future partnership needs to focus much more on three areas: peace and security; migration, and delivery of the sustainable development goals as part of that; and climate change. We believe that to focus on those and on the least developed countries will be the best way forward. We are making those arguments now because we will continue to be a strong member of the European Union until 29 March.

Lord Grocott (Lab): Given that one crucial element of a successful overseas development policy is to get the aid as rapidly as possible to the front line where it is needed, can the Minister tell us whether any study has been made of whether that is best accomplished via the European Union, with whatever bureaucracy may be involved in that, or by the money and the support going directly to the field—to the mine clearance or whatever it might be—directly from the British Government to the people that need it in the front line?

Lord Bates: Indeed. Most of these funding mechanisms are commissioning organisations, either European or through DfID; therefore funds do not actually get delivered by the European institutions. Rather, they commission organisations such as UNICEF or the ICRC to deliver that work on the ground. Most of it is done, essentially, through co-operation through the United Nations: that is what we are all working together for and, of course, that will be subject to no change whatever.

Buildings: Energy Performance

Question

2.53 pm

Asked by ***Lord Stunell***

To ask Her Majesty's Government what steps, if any, they plan to take to improve the energy performance of buildings as a contribution towards reducing carbon emissions and achieving the United Kingdom's climate change obligations.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, the Government are committed to improving the energy performance of buildings—with some speed, I hope. In the clean growth strategy, we set out our aspiration for domestic properties to achieve energy performance certificate band C by 2035, to reduce business energy use by 20% by 2030, and for the public sector to achieve a 30% reduction in carbon emissions by 2020-21.

Lord Stunell (LD): I thank the Minister for his Answer. He will know, of course, that the UK's performance is falling well below the targets set in the clean development strategy and, indeed, in the figures he just gave. Buildings account for 30% of the UK's energy emissions. Is it not time to start a major programme of retrofitting existing buildings, particularly homes, thereby saving people's energy costs and meeting our carbon targets?

Lord Henley: My Lords, I accept the importance of buildings in achieving our carbon reduction targets. But I remind the noble Lord, as I have previously, that since 1990 we have reduced our emissions by some 43%; that is the fastest decarbonisation of any G20 country, which is something we can be proud of. As the noble Lord correctly states, it is important that we do this particularly for buildings. The clean growth strategy set out our aspirations for as many homes as possible to be upgraded to an energy performance certificate of band C by 2035, and we will continue to pursue that.

Lord Dubs (Lab): Is the Minister aware that at night many office blocks have the lights blazing all the time? I was in Canary Wharf recently and all the lights were on late at night. Could the Government not take some action on that immediately?

Lord Henley: My Lords, one would hope that the owners of those buildings would have the incentive of the cost of lighting those buildings. But the noble Lord ought to be aware that light does not necessarily always consume that much energy, particularly if the owners have switched to LED lights and other forms of lighting that can reduce their carbon footprint. What the noble Lord sees is not necessarily what is happening in terms of energy consumption.

Lord Krebs (CB): My Lords, I am sure the Minister will agree that one of the simplest forms of retrofit to improve the energy performance of existing homes is loft insulation, yet the Committee on Climate Change, in its 2018 report, notes that loft insulation installation rates are now at their lowest for 10 years. The committee also sets a target for the Government as part of the trajectory to 2050, and the legally binding commitment we have made, of installing loft insulation in the remaining 2.5 million homes where it can be installed simply and effectively, by 2022. Does he also note, and will he comment on the fact, that the current rate of installation will mean that this target is not met until at least 2080?

Lord Henley: My Lords, I agree with the noble Lord that loft insulation is one of the best ways for any householder to reduce the amount of energy they use and have a warmer house. One would hope that there are two motivators here. One, obviously, is price, which should encourage people to buy their insulation and install it. We also offer advice through the Simple Energy Advice service—a new digital approach offering tailored advice to home owners—which has been available online and by telephone since the spring to encourage people to look at ways of insulating their homes.

Lord Geddes (Con): My Lords, why is it not mandatory for all new buildings to be fitted with energy-saving devices such as solar or photovoltaics?

Lord Henley: My Lords, I think the owners of most new buildings go to a great deal of trouble to make sure that they are properly insulated. They have to be insulated up to a certain level. I will write to my noble friend in greater detail. Whether they want to go further and whether that should be mandatory is another question.

Lord McNicol of West Kilbride (Lab): I am sure the Minister will agree that improving the energy efficiency of buildings plays a crucial role in tackling fuel poverty and helping to bring down bills for the most vulnerable. According to the Committee on Climate Change, the Government are "off-track" to meet their fourth and fifth carbon budgets. Can the Minister set out to the House what steps, if any, his Government are taking to get back on track?

Lord Henley: My Lords, my understanding is that we have met our first carbon budget. We are on track to meet our second and third. I will take advice on where we are on the fourth, and write to the noble Lord.

Baroness Jones of Moulsecoomb (GP): My Lords, obviously I care about all the environmental aspects of these issues, but measures such as home insulation also create huge amounts of business for small and medium businesses, and thousands of skilled jobs. Why are they not at the heart of the Government's industrial strategy?

Lord Henley: My Lords, we are all fully aware that the noble Baroness cares very strongly about the environmental aspects and I assure her that they are at the heart of our industrial strategy. We want to see people take the business opportunities of selling insulation and individuals then taking the opportunity to insulate their home.

Mobile Networks: Resilience

Question

2.59 pm

Asked by ***Lord Lucas***

To ask Her Majesty's Government what steps they will take to improve the resilience of United Kingdom mobile networks following the outage of O2's services.

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde) (Con): My Lords, I ought to declare a very small interest as a customer of O2 and, therefore, someone who is in line for a reimbursement of two days-worth of my monthly subscription.

There is a regular dialogue on interests of concern to both industry and Government. DCMS works closely with the telecoms sector on resilience issues via the Electronic Communications Resilience and Response

Group, which leads on resilience activity and emergency response. The industry has a good track record of enhancing resilience, and we will be working closely with O2 and the wider sector to understand the causes of this incident and what lessons can be learned.

Lord Lucas (Con): My Lords, I thank my noble friend for that encouraging Answer. He will be aware that O2 is not the only recent example of lack of systems resilience. Work undertaken by the Government in preparation for a possible hard Brexit has revealed that a very large proportion of British business is driving extremely close to the edge of chaos in terms of how little it would take to seriously disrupt their businesses and our lives. Will he encourage his colleagues to encourage businesses, once Brexit is past us, to maintain the provisions they are now making against possible difficulties, in the cause of our running a more resilient society than we apparently have been doing?

Lord Ashton of Hyde: I assure my noble friend that my department, which is responsible for telecoms, will continue to work with the Electronic Communications Resilience and Response Group. By coincidence, there is a meeting of that group next week, from which we will find out exactly what happened with the O2 outage and the emergency response, which worked well. I can assure my noble friend that we will continue with that, whatever happens with Brexit.

Lord Foster of Bath (LD): My Lords, any measures that improve the resilience of mobile connectivity for those that already have it will be welcome but sadly, many people, particularly in rural areas, have no or poor mobile connectivity. What steps are the Government taking to help those people? In particular, do they intend to place on the winner of the auction of the 700 megahertz spectrum a rural coverage obligation or, better still, a RuralFirst obligation?

Lord Ashton of Hyde: As the noble Lord knows, the Government have made huge progress in extending the availability of both broadband and mobile connectivity. The Future Telecoms Infrastructure Review showed the way to increasing the amount of fibre optic cable across the country, which is currently behind the European average, and we now plan to do that. One of its features is the "outside in" policy, which will enable rural areas to have priority in the rolling out of fibre-optic cable.

Lord Brabazon of Tara (Con): My Lords, if I had come from abroad and was using a foreign mobile phone, the O2 outage would not have affected me because my phone would have switched to a different network. Could we not arrange that, if such a thing happened again, our domestic phones would also switch to a different network?

Lord Ashton of Hyde: I am not sure my noble friend is entirely correct. The problem involved Ericsson, a third-party software supplier to O2, and had worldwide effects, so there is no guarantee that his foreign phone would have worked. I hasten to add that that was only for data, not voice.

Lord Stevenson of Balmacara (Lab): Does this whole episode not highlight the need to completely reconfigure the universal service obligation, which is failing so badly, to include mobile telephony—it does not at present—and to ensure the whole system focuses more on infrastructure capacity, reliability and service?

Lord Ashton of Hyde: As the noble Lord knows perfectly well, the universal service directive, which is the basis for the universal service obligation, only includes fixed-line service. Therefore, it would be impossible under European law to include mobile.

Baroness Neville-Rolfe (Con): My Lords, digital connectivity, whether through broadband or mobile, is a new utility and those who do not have it are socially and financially excluded. Can my noble friend tell me when 100% of homes in this country will have such connectivity?

Lord Ashton of Hyde: As the noble Lord, Lord Stevenson, alluded to, by 2020 the universal service obligation will give every household in this country a legal right to be connected at a speed of not less than 10 megabits a second.

Lord Harris of Haringey (Lab): My Lords, when the Minister and his colleagues consider the resilience of the mobile phone network—I refer to my interests in the register on this matter—could he ensure that resilience for all providers is covered in respect of electricity power outages and their impact on mobile phone aerials? Most of those have a battery life of only two hours if the electric power is off.

Lord Ashton of Hyde: Yes, power outages, pandemics and flood are some of the issues that the ECRRG, the group which I mentioned, has considered. It has improved the organisation for that in recent months.

Baroness Finlay of Llandaff (CB): Is the Minister able to provide assurance that first responders and emergency services have a back-up system across all parts of the United Kingdom in the event of any of the systems going through an outage period?

Lord Ashton of Hyde: I am not able to give that assurance as I do not know what bases the emergency services use. If, for example, they were entirely dependent on O2 they would not have back-up. I am not aware whether that is the case but I will certainly write to the noble Baroness on that subject.

Lord West of Spithead (Lab): My Lords, the Civil Contingencies Secretariat used to produce a pamphlet which covered all the resilience issues, including communications, power and pandemics. Now that is included as part of the national risk register, so that when you look it up on the web you can draw down

[LORD WEST OF SPITHEAD]
things. Is there any plan to produce that very useful booklet again, which went to every single household and gave advice on how to confront these various resilience issues?

Lord Ashton of Hyde: I am not sure of the answer to that. Critical national infrastructure is the responsibility of the Cabinet Office and I will certainly ask those there and write to the noble Lord.

European Union (Withdrawal) Act 2018
Statement

3.07 pm

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, with the leave of the House I will repeat the Answer to an Urgent Question which was given by my honourable friend Robin Walker, the Parliamentary Under-Secretary of State for the Department for Exiting the European Union. The Statement is as follows:

"Mr Speaker, I recognise this was a question which was the subject of much discussion and some speculation yesterday. I hope to be able to put honourable Members' concerns at ease.

Put simply, in keeping with the clear intention of the European Union (Withdrawal) Act 2018, the Government will ensure that the question of whether to accept an agreement is brought back to this House before 21 January. If Parliament accepts that deal, we will introduce the EU withdrawal agreement Bill to implement the withdrawal agreement in domestic legislation. If Parliament chooses to reject the deal, the Government will be required to make a Statement on their proposed next steps and table a Motion in neutral terms on that Statement. Following the passage of the amendment to the Business of the House Motion last week, that Motion will be amendable. So it is our clear intention that this House will consider this matter before 21 January and have the opportunity to decide on the deal.

But let me also say this clearly: in the unlikely and highly undesirable circumstances that as of 21 January there is no deal before the House, the Government would bring a Statement to the House and arrange for a debate, as specified by the law. I am confident that we will have a deal the House can support, but I hope the Statement puts to rest the concerns of honourable Members about the Government's commitment to meet the spirit, as well as the letter, of the withdrawal Act and to respect the will of the House".

3.09 pm

Baroness Chakrabarti (Lab): My Lords, I am genuinely grateful to the Minister for that Answer which clears up the apparent lack of clarity from the Prime Minister yesterday on the legal force of the 21 January deadline and the lack of certainty from the leader of the House of Commons yesterday on the ongoing force of Dominic Grieve's amendment. However, six weeks is still a very long time for the errand of collecting mere assurances, not least when the Prime Minister openly contemplates, "the risk of an accidental no deal".—[*Official Report*, Commons, 10/12/18; col. 25.] The clearest thing of all is that yesterday's House of Commons vote was pulled in pure, blind panic with little regard for the economic and constitutional consequences for our country.

Lord Keen of Elie: My Lords, I do not accept the allusion to uncertainty that the noble Baroness referred to. We are following a discernible course of action in order to implement a demanding issue in accordance with the will of the people of the United Kingdom. As regards the idea that it will be six weeks, no time limit has been fixed for the period in which this matter will be the subject of further assurance and in which it will be brought back to Parliament. What we have said is that 21 January is a date beyond which we will not go.

Lord Marks of Henley-on-Thames (LD): My Lords, however well intentioned, the Answer just repeated simply ignores the legal problems. Pulling yesterday's vote has left us mired in a legislative no man's land from which the withdrawal Act offers us no escape. Section 13(4) does not apply because the House of Commons did not decide not to pass the Government's resolution—it decided nothing—so there is no requirement under that subsection for the Government to set out their proposals within 21 days. Subsections (8) and (11) do not apply because they depend on an absence of an agreement in principle, but there is such an agreement, even though not one approved by the Commons. So there is no obligation on the Government under the Act to set out their proposals.

It follows that as matters stand, the country is in a state of limbo. There is no legislative significance to 21 January and the Government are legally unconstrained by time limits, even though the time until March is running out. If the Government will not give us a firm timetable, so long as the text of the withdrawal agreement remains in place but unapproved, the only solution may be for the House of Commons to find a way to force a vote on the Government's resolution put to it last Tuesday and reject it, so activating the obligation for the Government to make a Statement within 21 days under subsection (4). Does the noble and learned Lord agree with this analysis?

Lord Keen of Elie: My Lords, I commend the noble Lord upon his exercise in statutory interpretation, which would undoubtedly attract an A-. The position at present is that in keeping with the spirit of the Act the Government will ensure that the matter is brought back to the Commons before 21 January.

Lord Foulkes of Cumnock (Lab): My Lords, we are all obliged to the Minister for his explanation. Will he now confirm that what the noble Lord, Lord Kerr, has been saying again and again has now been confirmed by the European Court of Justice, that we can unilaterally agree to withdraw our Article 50 withdrawal and remain part of the European Union now that we know the consequences of leaving? Is that not something that the noble and learned Lord, Lord Mackay of Clashfern, has said on a number of occasions would be the sensible thing for Parliament to do and get on with running this country?

Lord Keen of Elie: My Lords, the noble Lord, Lord Kerr, has said many things with regard to Article 50, but the Court of Justice of the European Union has given its ruling on its interpretation of Article 50, and it speaks for itself.

Lord Harris of Haringey (Lab): My Lords, the noble and learned Lord told the House that the Government will act within the spirit of the legislation and propose a vote in the House of Commons by 21 January, although that is rather late. How much credence can be placed in the Government acting in the spirit of something when yesterday morning, Ministers were fanning out around the country promising that the House of Commons would be voting today? Is this not a Government who break their promises and break the undertakings they have given?

Lord Keen of Elie: No, my Lords, this is a Government who act, and will continue to act, in the public interest.

Lord Wallace of Saltaire (LD): My Lords, the House was told some months ago that there was a substantial body of legislation following the withdrawal Act to be carried through before 29 March, including a very substantial number of statutory instruments. The time between 21 January and 29 March is extremely short. Will the Government Front Bench provide a Statement as soon as possible on what legislation will be required to implement any agreement by 29 March, what can be left until later and how the House might manage that between the last week in January and the final week of March?

Lord Keen of Elie: It will of course be for the Government to determine what legislation is brought forward and when. The Government remain confident that there is sufficient time to bring forward the necessary legislation for our exit from the European Union as at 29 March of next year.

Lord Hain (Lab): My Lords, is the Minister aware that governance in this country has become an absolute laughing stock, both domestically and internationally? Is it not right that we call a people's vote to get us out of this mess and give people the opportunity to decide to remain within the European Union?

Lord Keen of Elie: I gently remind the noble Lord that what he refers to as the people's vote is actually a second referendum; that the first referendum had on the paper the question of whether or not we remain in the European Union; and that that question has been answered.

Lord Pearson of Rannoch (UKIP): Now that the Luxembourg court has agreed with what I have been saying for many months—that we can in fact resile from clauses 2 to 5 of Article 50—does that not present us with an opportunity? Can we not now go through the Council of Ministers to offer European citizens continuing mutual residence and free trade under the WTO, all of which is much more to the advantage of the people of Europe than it is to ours? When that is agreed, we can discuss with Brussels how much money we give them, if any.

Lord Keen of Elie: My Lords, this Government have no intention to withdraw the Article 50 notice, which has been tendered in accordance with the relevant treaties.

Lord Watts (Lab): My Lords, given that the Prime Minister has now realised that her deal will not stand up, are the Government looking at a Plan B? Are they looking at the Norway option or other options to get us out of the mess that they have got us into?

Lord Keen of Elie: My Lords, the matter of the present agreement is still the subject of ongoing discussion with members of the EU 27 and with the institutions of the European Union. Once those discussions are completed, of course the agreement will be brought back to this Parliament.

Lord Hamilton of Epsom (Con): My Lords, as the meaningful vote is not being held today and may well be held on, say, 20 January, will there be another 21 days after that for the Government to respond?

Lord Keen of Elie: In the event that the House of Commons resolves not to approve the withdrawal agreement, in accordance with the provisions of Section 13, it will be a requirement that a Minister of the Crown will, within a period of 21 days, make a Statement to the House with regard to our intentions.

Lord Judd (Lab): My Lords, does the Minister accept that meanwhile there is real urgency about what happens next and that the 21 January strategy should in a sense fade into the background because immediate information and certainty is necessary? I am constantly approached by people in business, the professions, the health service and universities about the uncertainty prevailing in their planning for the future. We are going into the new year with no further indication of certainty on which they can plan.

Lord Keen of Elie: My Lords, certainty can be embraced in due course by proving the withdrawal agreement that has been laid before Parliament.

Mental Capacity (Amendment) Bill [HL]

Third Reading

3.20 pm

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

Amendment

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

In Schedule 1, page 16, line 12, at end insert—

"(2A) In determining whether either of paragraph (a) or (b) of sub-paragraph (2) applies, the responsible body must consider the views of any relevant person about the wishes of the cared-for person that are brought to the responsible body's attention.

(2B) In sub-paragraph (2A) "relevant person" means a person engaged in caring for the cared-for person or a person interested in the cared-for person's welfare."

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, throughout the progress of this Bill both the Government and noble Lords have been keen to improve the protections and safeguards contained within the reformed deprivation of liberty safeguards system so that the welfare of the cared-for person is always of paramount importance. It is that principle which lies behind the amendment I have laid for debate today.

The amendment makes it clear that any relevant person who identifies that a cared-for person is objecting to arrangements is empowered to raise the matter with the responsible body and can trigger a review by an independent AMCP. Furthermore, the amendment specifies that the responsible body must consider the views of anyone engaged in caring for the person or a person who is interested in their welfare. Importantly, this amendment is explicit that staff of all kinds can raise concerns, as well as others with an interest in the person's welfare, and it will support staff and others, such as families or carers, in their ability to do so. I take this opportunity to thank the noble Baronesses, Lady Finlay, Lady Thornton and Lady Barker, and the right reverend Prelate the Bishop of Oxford for highlighting this very important issue on Report, and for working with and meeting me to agree a way forward.

The amendment that the Government are proposing makes it easier for inadequacies in care provision to be addressed more swiftly. Recent issues with Gosport, Winterbourne View, Mendip House and, sadly, many other cases have highlighted how important it is that family, friends and staff feel empowered to raise concerns, and for action to be taken as a result. The amendment means that if a member of staff or a family member thinks that the person is objecting and that that is not being properly considered, they can raise it with the responsible body. That body, which of course is legally responsible for authorising a deprivation of liberty, will be able to use that to judge whether an AMCP should therefore complete a pre-authorisation review. Being able to raise such concerns directly with the responsible body is particularly important as it means that staff and others can raise concerns without having to go through those who may be directly involved in the care or treatment of the person. That will enable people to feel supported and more confident to take such action.

The Bill already requires that an AMCP completes the pre-authorisation review if it is reasonable to believe that the cared-for person does not want to reside or receive care or treatment at a place. However, I agreed with noble Lords on Report that we should have something in the Bill which is explicit about the sorts of things the responsible body must consider when making this determination so that staff and families feel supported in speaking up. That is what this amendment achieves. I should add that the Government are committed to ensuring that the measure created by the amendment forms part of the necessary training and support ahead of the implementation of the new system.

Noble Lords will note that this amendment relates to the pre-authorisation review process. We understand that it will also be necessary to make sure that the ability to trigger an AMCP review is in place as part of the ongoing review process. Due to time constraints, we have not been able to table an amendment on this subject now, but I commit that the Government will return to this issue at the Commons stages of the Bill.

I again thank noble Lords for raising this issue and for working with the Government to produce this amendment. I hope the amendment satisfies the demands that noble Lords rightly made to give family and staff a higher profile in raising issues and to include that in the Bill. I beg to move.

Baroness Meacher (CB): My Lords, I hope the House will indulge me for one or two minutes. I welcome the amendment and have no objections to it at all. However, I note that the Government have not come forward with amendments in relation to three other issues. The first is the risk to others and the interface with the mental health review. It would be helpful if the Minister could give us an assurance that the Government will not seek in the Commons to clarify the interface between this legislation and the mental health review. There is talk of using "objection" as the key criterion, but in my view we also need to consider the risk to others as a possible principle to be considered. Can we have an assurance that the Government will not seek to resolve this issue during the progress of this Bill in the Commons?

The second issue concerns independent hospitals, which we have debated. Although I certainly do not wish to reopen that debate, can the Minister give us an assurance that work will be done in preparation for the Commons stages on the very serious situation in which many people find themselves in independent hospitals? These hospitals are often remote and—if I may say so—not well run. People are incredibly vulnerable in them, often far more so than in homes. An assurance that that will be addressed in the Commons stages would be helpful.

The third issue regards domestic situations. Whatever the Government decide to do in the Commons, can they bear in mind the importance of trying to limit the levels of bureaucracy and, ideally, of not continuing to use the Court of Protection? Again, many very vulnerable carers caring for very vulnerable people do not have the resources to deal with a lot more bureaucracy—they already have a hell of a lot to deal with. Can the Minister respond on that point?

Baroness Hollins (CB): My Lords, I share my noble friend's concerns about the impact and relevance of Sir Simon Wessely's review of the Mental Health Act. It is particularly concerning that the Bill will now proceed to the other place without careful consideration in your Lordships' House of how it will interface with Sir Simon's recommendations, which were published in his review only last week. His proposed new dividing line, which identifies whether the Mental Health Act or the Mental Capacity Act should be used in a given situation, will be based on whether P objects or, in the case of people with learning disabilities, whether P's behaviour puts others at risk. The Mental Capacity Act, as it will be in its currently amended form, has a direct bearing on any changes to the Mental Health Act, and vice versa.

Given this new dividing line, does the Minister expect more or fewer people with a learning disability to move across from the Mental Health Act to the new LPS system? What research is the department doing to explore this, and what impact will the change have on the number of people with learning disabilities and autism detained in assessment and treatment units? Is there a risk that the gains made by the transforming care programme will be reversed? Related to this, and given the uncertainties, will the Government commit to extending the transforming care programme, which is otherwise due to close later this year?

My final point is that the Wessely review specifically recommends that the periods between reviews of renewal decisions should be reduced in the Mental Health Act. This Bill as it stands would allow a responsible body to detain a person for up to three years without renewal review. Surely the Government will want to take this issue equally seriously with respect to the Mental Capacity Act.

3.30 pm

Baroness Murphy (CB): My Lords, I support this amendment. It is well thought through and I am glad that the Government have brought it forward. However, like my noble friends Lady Hollins and Lady Meacher, I have some very serious doubts about the continuance of this Bill as it goes to the Commons. We have already raised our anxieties about how it fits in with the Wessely review, and we have come to the end of our deliberations—when the noble Baroness, Lady Thornton, and the noble Lord, Lord O'Shaughnessy, normally congratulate each other on the process that we have gone through—but in fact we are leaving this Bill with the very same problems with which it came to this House.

The Bill came before Parliament because of the totally unviable nature of the current legislation. However, we do not have a statutory definition of deprivation of liberty for the purposes of this legislation and we now intend, as the Bill goes to the Commons, still to intrude on people living in their own homes. We are talking about a Bill that affects about 1 million people. It is currently projected to cost £2 billion a year but, with our amendments that introduce some improvements, it will cost considerably more.

Will the Commons really tackle the key issues? We have not seen the wood for the trees—that is the problem. We have tackled some really important minor issues but not the major issues that will make the legislation implementable in the care system. Can the Minister tell us what will happen next?

Baroness Jolly (LD): My Lords, I welcome the amendment and declare my interests as set out in the register.

I too would like to talk about the application to adults with learning disabilities, autism or dementia who also have a mental health diagnosis, and I would also like to talk about what other noble Lords have mentioned—the interface between the Mental Health Act and the Mental Capacity Act. As the Minister will have seen, Sir Simon's review redraws the dividing line between when a person should be detained under the Mental Health Act and when they might fall under the Mental Capacity Act.

Given that the proposed new dividing line is "objection" —in other words, those not objecting fall under the Mental Capacity Act—the role of the advocate in articulating the wishes of the individual becomes paramount in ensuring that the individual is treated under the appropriate legislation. With that in mind, I have a couple of questions for the Minister. Does he agree that advocates will need to receive sufficient support and training to understand this new dividing line, as and when it comes into being? Can he also clarify who will be responsible for ensuring that the training takes place and from whose budget the funding for it will come?

Baroness Finlay of Llandaff (CB): My Lords, I am most grateful to the Government for adopting the principle of the amendment that we put forward on Report and for recognising its importance. I am glad to see that this will be in pre-authorisation reviews and to hear the assurances that it will act as a trigger for all types of reviews and will be put into the Bill when it goes to the other place.

I also recognise that the Minister has touched on staff induction, which will need to include training on liberty protection safeguards and cover when the review should trigger further action. However, I seek a categoric assurance from the Minister that the code of practice will state that staff will have the full protection of whistleblower legislation whenever they raise a concern, even if, for whatever reason, it does not proceed to initiating a review. I was grateful that during our meetings the Minister openly discussed the possibility of vexatious triggers, although I estimate that these would be very few and that triggers for reviews would involve legitimate concerns about a person's welfare.

I also seek assurance that in its inspections the Care Quality Commission will be asked specifically to check that all staff know that they can request a review to be triggered and that they know that they will be protected. In addition, the responsible body, whenever asked to undertake a review, will need to keep a register of all such requests so that an emerging pattern of several requests coming from an institution will trigger a more major review into the type of care provided for everyone there.

One of the difficulties I anticipate arising at the interface between the Mental Health Act and the Mental Capacity Act is over the principle of objection. Among this cohort of people, objection may not be active; it may be passive. Sitting quietly, being withdrawn and being unhappy should be enough objection for people to consider whether the person should have been placed somewhere different or whether the conditions of their liberty protection safeguards should be altered. I have the impression that the type of objection envisaged in the Mental Health Act review was much more active than this type of passive objection, which could be interpreted as consent.

The other worrying aspect relating to this Bill and to the entire mental health review is the acute shortage of accommodation for people, both in the short and long terms. There is a shortage of suitable accommodation for people in crisis and of long-term accommodation

[Baroness Finlay of Llandaff]
that can meet people's needs. Some are therefore accommodated in places not really adequate for their needs, but there seems to be no other option.

I repeat my gratitude to the Minister for having listened and brought forward this government amendment, and for all the other amendments that have gone into the Bill and brought about substantive changes. I look forward to hearing those reassurances in his response.

Baroness Watkins of Tavistock (CB): My Lords, I concur with what other noble Lords have said and ask the Government to take one more look at the remaining conflict of interest relating to independent hospitals. It appears they will be able to employ their own AMCPs and, as the responsible body, authorise the deprivation of liberty of people in the hospital. This could pose a huge conflict of interest. The team has taken a great deal of trouble to remove this in the care home setting, and it seems it would be relatively straightforward to do so for independent hospitals. I fully support the amendments outlined today.

Baroness Barker (LD): My Lords, I too thank the Minister for bringing forward this amendment and for having taken the time and effort to discuss the thinking of the department with many of us. I pay tribute to him and to the noble Baroness, Lady Stedman-Scott. They were rookies—this was their first ever Bill—and they have done a tremendous job, not least because it is a fairly open secret that many of us think this is one of the worst pieces of legislation ever brought before this House. I seriously mean that; we have said it several times. Together, they have enabled all of us in this House to play a very responsible role in turning some very bad legislation into legislation that is still in many regards highly deficient, but not as bad as it was.

As the noble Baroness, Lady Murphy, said, inevitably we failed to see the wood for the trees. We were so busy dealing with big defects in what was presented to us that we did not really get the chance to stand back and look at what would be an efficient overall system. It is for people in the House of Commons to look at what remains to be done to improve the Bill as it comes to them.

Part of it is that we spent so much time looking at the role of care home managers, we did not get around to thinking about how AMCPs, IMCAs and appointed persons could work together more efficiently to ensure that the most vulnerable get the most attention. It is unfortunate that Sir Simon Wessely's review came to us only last week, with, at its very heart, the important issue of objection, the implications of which we should have been able to discuss in this Bill. I am sure we will need to return to that.

On this amendment, I thank the Minister for widening the triggers to include the involvement of an AMCP. But I want to flag up to those who will look at this in future the change in the role of care home managers and the role they will continue to play in renewing deprivations of liberty for up to three years, which is a big concern.

I also want to return to an issue that has been raised before: why, in this Bill, do we continue to deploy the best interest argument when it comes to ensuring that somebody has an IMCA? Several times we have asked to see the evidence base for creating that hurdle to access an IMCA, and the Government have yet again not given us any. A lot of people, particularly older women with dementia, will not get an IMCA because they will not be deemed to be objecting.

Perhaps the Bill's biggest deficiency, and one we have not discussed much, is that practically nothing is in regulation; large swathes of it will be left to a code of practice. If one goes back to the Mental Capacity Act, however, one finds regulations that relate primarily to those who will be enacting this legislation. Regulatory conditions are applied to those who can be an AMCP, and to what their training has to be, and to those who can act as an IMCA, and to their ongoing duties to maintain contact when people move and to step in when the appropriate person, for some reason or another, ceases to fulfil the obligations it was initially assumed they would.

I say to those who will look at this in the House of Commons: the Government must be required, apart from anything else, to come forward with a great deal more detail than we have been able to elicit from them. With that, I welcome what is before us today.

Baroness Thornton (Lab): My Lords, I join other noble Lords in welcoming this amendment, which we will of course support. It is a little disappointing that we have not made all the progress that we wished around the AMCP. We are half way there with the pre-assessment regime in this amendment and have a commitment that the other part will be undertaken in the Commons. As the Minister and other noble Lords will be aware, the Bill has to end its passage here anyway, so we will be able to see whether those commitments have been fulfilled to ensure that the safeguards are in place.

As we discussed on Report, and in the helpful meeting with the Bill team, the amendments we were seeking—to ensure that the care home manager is not responsible for decisions about independent consultation—have been responded to. However, I am not sure we are quite there yet.

As the noble Baroness, Lady Watkins, pointed out, a question remains about independent hospitals employing their own AMCPs and whether that is a conflict of interest that needs to be dealt with by the Bill. As other noble Lords have said, we need to ensure that if the person who expresses concern is a member of staff, they will be protected under the whistleblowing regime. I accept that, as the noble Baroness, Lady Finlay, said, that would not necessarily be included in the Bill, but it simply has to be there, otherwise this will not work.

The noble Baroness said that we are going to congratulate each other, but I shall do that next.

3.45 pm

Lord O'Shaughnessy: I am grateful to noble Lords for their acceptance of the amendment. It was tabled as a result of noble Lords' input and their best endeavours to resolve the situation. It goes part of the way there,

as we have discussed, and the Government are committed to solving it as the Bill moves to its Commons stages. There were specific questions on the amendment that I want to deal with. There were subsequent issues but I will deal with the Mental Health Act issues now. I shall leave the other issues until my closing speech because they anticipate what I will say when we come to the final part of the Bill's passage.

On the amendment, the noble Baroness, Lady Finlay, asked about the code of practice and ensuring that protection is set out in whistleblowing legislation. We will make sure that we do that. As she will know, and as I have discussed before in the House, the Government are committed to doing more on that in the follow-up to the Gosport scandal. That is important. She also made excellent suggestions about the role of the CQC, its inspection framework and making sure that those provisions are well understood, and about helping to train responsible bodies to look for patterns. That is excellent advice, which we shall make sure is reflected in both the code of conduct and the regulatory regime. I think those were the only questions on the amendment.

Perhaps I may mention the Mental Health Act review before I finish on the amendment and move on. Clearly, it is an important piece of work. There are 152 recommendations and it is right that we take time to consider the right way to respond to them. The Government have already taken on board two of those recommendations, but there are many more to consider. One of the questions in front of us, which we have talked about to some degree during the stages of the Bill—and which will clearly come to the fore in the Commons stages—is: what is the right vehicle to deal with the interface between the suggestions that Simon Wessely has made?

There is a difference of opinion in this House about how that should be done. The noble Baroness, Lady Meacher, and others have a contrary view, but we need to solve the problem in front of us—which is that the deprivation of liberty safeguards system is not working—and then, when we have decided what the right thing to do is, to improve the Mental Health Act and its interface with the Mental Capacity Act at that point. It would be precipitous to try to do that now, before we have had an opportunity to consider it properly. In saying that, I do not mean it is not important—quite the opposite. It is so important to get it right that rushing through it could store up problems of a kind that we do not want.

The noble Baroness, Lady Jolly, asked about advocates, their training for the new dividing lines and various other questions. We will have to work through these matters as we consider the right way forward in the Bill. I disagree with the suggestion of the noble Baroness, Lady Murphy, that we should reconsider whether the Bill goes ahead because it is not intended to, and does not, reflect these issues. The Bill needs to go ahead. We know that it will not solve all the problems before us and we will probably need to act again. However, noble Lords will know that it is not always straightforward to get legislative time—let alone at the moment—and we need to take advantage of the opportunity that we have to do something good now and seek to do further good when the opportunity presents itself.

I will reserve my other reflections until my closing speech, when I will attempt to deal with them. Otherwise, I thank noble Lords for their contributions to and support for this amendment. I beg to move.

Amendment agreed.

A privilege amendment was made.

3.49 pm

Motion

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

That the Bill do now pass.

Lord O'Shaughnessy: My Lords, I will use the opportunity of my closing speech to offer my sincere thanks to all those in the House who have contributed to the passage of this Bill. I hope that I will not miss out any names from this list, but I want to thank the noble Baronesses, Lady Thornton, Lady Jolly, Lady Tyler, Lady Barker, Lady Wheeler, Lady Finlay, Lady Hollins, Lady Murphy, Lady Watkins and Lady Meacher, as well as the noble Lords, Lord Hunt and Lord Touhig, and the noble and learned Lord, Lord Woolf, for their contributions. I also thank my noble friend Lady Stedman-Scott for her steadfast support. In her first time at the Dispatch Box she was stupendous and set a high bar for future performances. Lastly, I thank my noble friend Lady Barran, who gave us an excellent maiden speech during the passage of the Bill, and congratulate her on her promotion to the Whips' Office.

I believe that, by working together constructively over the past six months, we have much improved the Bill. In doing so, we have provided a system that will protect much better the 2 million people in our society who have impaired capacity. As noble Lords have brought to life during the passage of the Bill, that is something of which many of us have personal experience. I think that there is broad agreement that the current system does not work and needs to be changed, to put the cared-for person at the centre of it. I also believe that during the passage of the Bill through this House, and in response to suggestions and ideas from noble Lords, we have made some significant improvements. Once again I beg to disagree with the noble Baroness, Lady Murphy. We have not made just superficial changes: rather, some really important changes have been made.

The Bill will now apply to 16 and 17 year-olds as well as those aged over 18. We have carefully designed a role for care homes while eliminating conflicts of interest and being clearer about their role in the system. We have been explicit that the person completing assessments must have appropriate skills and knowledge, and a statement to the responsible body must be written. The Bill no longer contains the outmoded and unwanted references to "unsound mind" and we have also strengthened the provisions around appointing IMCAs, including a presumption that they now will be appointed. I hope that in practice that deals with the concern just expressed by the noble Baroness, Lady Barker. We have also made sure that the cared-for person must be consulted so that their voice is heard in

[LORD O'SHAUGHNESSY]
every case, and today we have amended the Bill to enable families and staff whistleblowers to raise concerns much sooner and for those concerns to be acted on.

I should also say that the House has made its own opinion known in defeating the Government on the issue of specifying that arrangements should be necessary and proportionate in order to prevent harm to self, and I can confirm that the Government will not seek to change this position in the Commons. The Government will also carefully consider the amendment passed by noble Lords on rights of information being provided to the person.

The Bill will now move forward to the Commons and I can give some reassurance about several of the issues that noble Lords raised in the last debate. As I say, we have committed to make sure that the amendment passed today will be reflected in the sense of being able to raise concerns at the review stage. We will also provide clarification about referrals to AMCPs, including independent hospitals. That was a commitment I gave on Report and I am very happy to repeat it. It will look not only at independent hospitals but at whether there are other circumstances, and what they ought to be, when a referral to an AMCP ought to be direct.

I should also say a word in response to the noble Baronesses, Lady Meacher and Lady Hollins, about the definition of deprivation of liberty. Again, I can confirm that this is something we intend to deal with in the Commons. I hope the noble Baronesses will be reassured on that. We have achieved a lot, and even if there is more that we wanted to achieve, the contributions of noble Lords have directly influenced the changes that we intend to make in the Commons. So, although it is for those in the other place to pass the amendments, noble Lords should be congratulated on their role in designing them. I hope that they will get support when we move them in the other place.

A further question was asked about the flexibility of reviews by, I think, the noble Baronesses, Lady Hollins and Lady Barker. We will need to consider that. It is worth pointing out that it is a flexibility, not a timeframe, and that it is meant to allow for continuity in situations where the circumstances of the person are not changing. Clearly, safeguards in the system will allow for much quicker reviews if there is a reason for them. Indeed, the amendment we passed today is another way in which such a review could be triggered. So I will certainly take on board the noble Baronesses' points about flexibility, but I think that there are enough safeguards in the system.

I hope that I have answered all noble Lords' questions. I am sure that the conversation will continue. There is much work still to do. I thank the hard-working policy team for their engagement in this process, as well as all the stakeholders who have contributed, given us their thoughts, challenged us at times and as a consequence made this legislation better.

I want to end with some reflection. We know that these are difficult and divisive times in our country and in Parliament, but we have shown through the passage of the Bill that we can work together to improve legislation, reform public services and protect vulnerable people. We should all bear that in mind as we move through the days and weeks ahead. With that, I thank noble Lords for their contributions and I beg to move.

Baroness Barker: My Lords, I do not want to detain the House but I have one or two important things to say. First, the House owes a debt of gratitude to the ministerial team for their work in getting us to this point. The noble Lord, Lord O'Shaughnessy, should take a great deal of the credit for enabling all the things he listed as achievements of the House, going forward. Obviously, the Bill leaves us in a much better state than when it arrived.

There was one contribution by a Member of your Lordships' House that we have not acknowledged but should: that of the noble Baroness, Lady Browning. She has not been able to take part in many of our debates but she made an important contribution when she stood up and said that the Bournewood gap still exists. For all our work, it does, and it will continue to exist until such time as we sit down and really consider mental health and mental capacity legislation, including who makes the decisions about who comes under what piece of law. Until we sort out that gap, people will still be deprived of their liberty. We can call it by a different name, but they will be.

I will ask the Minister to reflect on one thing. Nobody came to this legislation believing that DoLS had to be preserved. Everybody knew that it was wrong. Everybody understands that we need to make greater and better use of the limited professional resources for overseeing the lives of people detained for one reason or another. We should listen to the noble Baroness, Lady Browning, and reflect on what else Parliament may have to do over the next five, six or seven years to make sure that the gap is addressed once and for all so that people are not wrongfully detained.

Baroness Finlay of Llandaff: My Lords, I will very briefly add my thanks to the Minister, the noble Baroness, Lady Stedman-Scott, and the Bill team, for listening. I also thank everyone from outside who brought their own experience, either individually or as part of a professional group, a voluntary sector group or the care home sector. I thank personally those in the Welsh Government who arranged meetings for me and also brought expertise, coming from a different health service framework. That was important because this legislation must apply across England and Wales. So I add my thanks to others.

Baroness Thornton: My Lords, I hope this is the final remark. This is indeed the place where, as the noble Baroness, Lady Murphy, said, we all say how wonderful we are; and I think we probably are. The Minister has set the homework that the Commons needs to undertake to get this Bill into even better shape; it needs to consider length of renewal periods, the interface with Simon Wessely's review, the role of IMCAs, remaining conflicts of interest, impact assessments and implementation, and indeed, the issue of the definition of deprivation of liberty, which the Minister has undertaken to tackle. It also needs to discuss money, budgets and so on, as we have not done so during the passage of the Bill.

I have a few thanks to add to those of other noble Lords. First, I thank the organisations that have given us so much support during the passage of the Bill. If noble Lords cast their minds back to the summer, we were thrown into this Bill at very short notice, as were those organisations. I thank Mencap, VoiceAbility, Mind, the National Autistic Society, the Alzheimer's Society and the Relatives and Residents Association. I must also mention Lucy Series at Cardiff University, who provided some fantastic briefing.

I thank colleagues from across the House who put things on hold over the last few months to respond to the challenge of this Bill. Indeed, the noble Baroness, Lady Jolly, and I were exchanging emails while we were on holiday at the end of the summer. I thank the Minister and the Bill team for their work. I thank the Minister for listening and for always being available. If I am honest, I think that members of the Bill team might have been on a bit of a learning curve about how to deal with legislation in the Lords, but they eventually seemed to get it. We are much nicer here when it comes to dealing with Bills—but Bills are hard work for everybody involved. Finally, I thank my own team. In the Chamber I thank my noble friends Lord Hunt, Lord Touhig and Lady Wheeler, as well as my noble friend Lord Cashman for his support in the early days. Outside the Chamber I thank Molly Critchley and Bernadette Daly, who have been absolutely brilliant. We will meet our Commons team tomorrow to talk about what we think they need to do.

4.02 pm

Bill passed and sent to the Commons.

Tenant Fees Bill

Report

4.02 pm

Clause 1: Prohibitions applying to landlords

Amendment 1

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

1: Clause 1, page 2, line 10, leave out "the person" and insert "a relevant person"

The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con): My Lords, I will first speak briefly on Amendments 1, 2, 5 to 12, 16 to 19, 33, 35 to 41, 60 and 66, which are minor and technical and are intended to bring consistency and ensure the Bill best delivers on its policy intent.

First, while unlikely, as the Bill is drafted a letting agent could conceivably require a tenant to enter into a contract for services with themselves for additional services related to letting, such as providing an inventory. Amendment 5 clarifies that letting agents are prohibited from requiring a tenant or other relevant person to enter into a contract with themselves.

Secondly, it is possible that a relevant person other than a tenant might be a party to a tenancy agreement or an agreement with a letting agent. We have made amendments to Clauses 1 and 2 to be clear that, where a person is acting on behalf of a tenant or guaranteeing a payment of rent, that person cannot be charged a default fee unless otherwise permitted by the Bill.

In the same vein, Amendments 9 to 12 to Clause 4 provide that a term of agreement which breaches Clause 1 or Clause 2 does not bind a relevant person. Similarly, Amendments 33 and 35 to 41 replace the references to "tenant" in Clause 28 as it applies to pre-commencement tenancy agreements and agreements with letting agents with references to "relevant person".

Finally, we want to ensure that we use consistent language and terminology throughout the Bill. Amendment 66 changes a reference to "incorrect and misleading information" to "false and misleading information" to align with other references in Schedule 2. Amendments 16 to 19 ensure that the language on day and date in Clause 11 is consistent, and Amendment 60 makes it clear that the definition of a television licence in paragraph 9 of Schedule 1 applies to the entire Act.

Lord Shipley (LD): My Lords, since we have begun Report I should declare my vice-presidency of the Local Government Association. I simply say that these are helpful and relevant amendments that have our support.

Lord Kennedy of Southwark (Lab Co-op): My Lords, as this is the first time that I have spoken on Report, I draw the House's attention to my relevant interest as a vice-president of the Local Government Association, as the noble Lord, Lord Shipley, did. I thank the noble Lord, Lord Bourne of Aberystwyth, and his officials for a number of the amendments we will discuss, in this group and others. Generally they are very helpful and improve the Bill. That is good news for tenants, and I am genuinely very grateful for that. That is not to say that I agree with everything in the Bill, but I am pleased to say we are making progress. I am very happy to support these amendments and I concur with the noble Lord's comments.

Lord Bourne of Aberystwyth: My Lords, I am very grateful for the noble Lords' support. I beg to move.

Amendment 1 agreed.

Amendment 2

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

2: Clause 1, page 2, line 19, leave out "the person" and insert "a relevant person"

Amendment 2 agreed.

Amendment 3

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

3: Clause 1, page 2, line 38, at beginning insert "subject to subsection (10),"

Lord Bourne of Aberystwyth: My Lords, we are all clear that the purpose of the Bill is to ban agents and landlords from charging unfair letting fees to tenants.

[Lord Bourne of Aberystwyth]
However, in achieving this objective it is crucial that the legislation does not have an adverse impact elsewhere. Amendments 3, 4 and 29 to 31, in my name, ensure that the Bill does not prevent vital work supporting tenants more broadly.

First, Amendments 3 and 4 exclude local housing authorities or organisations acting on behalf of a local housing authority from the definition of "relevant person" under the Bill. I am most grateful to the noble Lords, Lord Shipley and Lord Beecham, for raising this issue during Second Reading. Local authorities have a duty, as housing authorities, to help the homeless to find accommodation. This is set out in the Housing Act 1996, the recent Homelessness Reduction Act and the homelessness code of guidance. We recognise that, as part of this, councils might need to provide support to applicants—financial or otherwise—to access private rented accommodation. This is vital work, and Amendments 3 and 4 ensure that it can continue. These amendments will ensure that local housing authorities can make payments in connection with a tenancy when acting on behalf of a tenant or guaranteeing their rent.

Secondly, Amendments 29 to 31 ensure that the important work of Homeshare schemes, and its parent network in the UK, Shared Lives, can continue. I have said on multiple occasions that the Government strongly support the work of organisations such as Homeshare in matching a licensee, usually a young person in housing need, with a licensor, usually an elderly householder in need of companionship, sometimes combined with some low-level care or assistance. I know that support is shared throughout the House.

The Bill would have unintentionally prevented Homeshare organisations operating by banning payments made by the licensor in respect of the advice and support received from Shared Lives. I reiterate that the intention of the Bill is not, and never was, to undermine or prevent this important and innovative work continuing. I thank in particular my noble friends Lady Jenkin and Lady Barran for taking up this issue and bringing it to the House's attention.

The Government recognise that we must take this opportunity to amend the Bill to ensure that such work is not adversely affected. To do this, our amendments provide for changes to Clause 26 to exclude from the Bill such licences as those granted under a Homeshare scheme. We have specified that an excluded licence will be one granted to the licensee by a licensor who resides in the housing, where particular conditions surrounding the grant, renewal and continuation of that licence are met. These conditions include a requirement for a charity or a community interest company to give advice to the licensee or licensor in connection with the grant, renewal or continuation of the licence and where the licensee provides companionship or companionship and low-level care or assistance, together with one or more payments in respect of council tax or utilities, for example. Such arrangements are indicative of Homeshare organisations.

The amendments will therefore ensure that excluded licences that meet the conditions I have just set out are exempt from the tenant fee ban. I hope that my noble friend Lady Barran will agree that these amendments address the concerns she raised in Committee and that this achieves our shared ambition—one we can all surely support—which is that organisations such as Homeshare can continue doing their fantastic work well into the future.

Lord Shipley: My Lords, the Minister referred to what I said at Second Reading and he is entirely right. I welcome Amendments 3 and 4. They are hugely helpful because they give local housing authorities the flexibility they need to do their job properly, and for that reason they have our support.

Lord Beecham (Lab): My Lords, I join the noble Lord, Lord Shipley, in supporting these government amendments. It certainly is an important function for local authorities. I have to confess—and I refer to my interest as a sitting local councillor—that I am not entirely sure where the funding for this comes from. Do the Government support this financially, or is it left entirely to local authorities? In the latter event, will he look into the extent to which authorities are financing this important element of support for tenants? We certainly support both amendments.

Lord Bourne of Aberystwyth: My Lords, I thank the noble Lords, Lord Beecham and Lord Shipley, for their support. I will write to the noble Lord, Lord Beecham, but I suspect that this money comes from local authorities—although of course it finds its way from successive Governments. I suspect that this is part of their functions, but I will certainly cover that in a letter, if I may. The noble Lord never misses an opportunity to focus on an issue such as this, and I will be very pleased to respond to him.

Amendment 3 agreed.

Amendment 4

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

4: Clause 1, page 2, line 39, at end insert—

"(10) The reference in subsection (9)(b) to a person does not include—

(a) a local housing authority within the meaning of the Housing Act 1985 (see section 1 of that Act),

(b) the Greater London Authority, or

(c) a person acting on behalf of an authority within paragraph (a) or the Greater London Authority."

Amendment 4 agreed.

Clause 2: Prohibitions applying to letting agents

Amendments 5 to 12

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

5: Clause 2, page 2, line 46, at end insert "the agent or"

6: Clause 2, page 3, line 14, leave out "the person" and insert "a relevant person"

7: Clause 2, page 3, line 20, leave out "the person" and insert "a relevant person"

8: Clause 2, page 3, line 23, leave out "person's"

9: Clause 4, page 4, line 21, leave out "the tenant" and insert "a relevant person"

10: Clause 4, page 4, line 23, leave out "tenant" and insert "relevant person"

11: Clause 4, page 4, line 24, leave out "the tenant" and insert "a relevant person"

12: Clause 4, page 4, line 25, leave out "tenant" and insert "relevant person"

Amendments 5 to 12 agreed.

Amendment 13 not moved.

Clause 8: Financial penalties

Amendment 14

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

14: Clause 8, page 6, line 13, after "of" insert "paragraph 3 of"

Lord Bourne of Aberystwyth: My Lords, Amendments 14, 15, 45 to 48, 61 to 65 and 67 to 70 in my name relate to the treatment of holding deposits. I have been sympathetic to some of the arguments put forward by noble Lords on holding deposits, and I agree that more action is needed to address these issues. I propose to do that in the Bill, rather than in guidance or regulations, to improve transparency and enforcement.

4.15 pm

The Bill already sets out clear requirements for holding deposits, including the circumstances in which a landlord or agent may or may not retain a holding deposit. Where a holding deposit is withheld, landlords and agents should be up front with tenants about the reason for this. Amendment 65 introduces a formal requirement for landlords and agents to give written notice to the tenant, setting out why they are retaining the deposit. This notice must be provided within seven days of the landlord or agent deciding not to enter into a tenancy agreement or where the landlord and agent fail to enter into a tenancy agreement within seven days of the deadline for the agreement passing. Introducing a proactive requirement for landlords or agents to demonstrate that they have legitimate grounds to retain the deposit will make it easier for tenants to challenge decisions which they believe to be unfair. Where landlords and agents do not provide reasons for retaining the holding deposit, they will be required to repay the holding deposit to the tenant.

Further, Amendment 61 places an absolute requirement on landlords and agents to refund the holding deposit where they enter into a tenancy agreement for the housing in relation to which the holding deposit is given. At present, if an exception to refund the holding deposit applies but the landlord and tenant subsequently enter into the tenancy agreement, there is no requirement to return the holding deposit. This is not the policy intention. I hope we can all agree that a landlord or agent should forgo their right to retain the holding deposit if they decide to enter into the tenancy agreement, as they have ultimately determined that a tenant is suitable to let the property to.

Amendment 48, which is also in the name of the noble Baroness, Lady Thornhill, relates to the receipt of a holding deposit. The purpose of a holding deposit is to enable both the landlord and the tenant to demonstrate their commitment to entering into a tenancy agreement while reference checks are undertaken. I fully agree with the noble Lord, Lord Kennedy, and the noble Baronesses, Lady Grender and Lady Thornhill, that it is not right that landlords and agents accept multiple holding deposits for the same property. A holding deposit creates a binding conditional contract between landlord and tenant where both parties agree to enter into the tenancy, subject to the satisfactory fulfilment of all pre-tenancy checks. Amendment 48 therefore ensures that a landlord or agent can be in receipt of only one holding deposit at any one time for the same housing and must return any holding deposit already held in respect of a property before accepting another, unless permitted to retain it. To summarise, if a landlord or agent is already in possession of a holding deposit for a particular housing, any other holding deposit paid for that property will be a prohibited payment.

Amendments 14, 15, 45 to 47, 62 to 64 and 67 to 69 are consequential amendments to those I have just described. We have also subsequently realised that a consequential amendment is needed to Clause 11(3)(c) to reflect the changes being made by Amendment 65 to Schedule 2. The consequential amendment is needed to specify the day on which interest is to be payable where reasons have not been provided within the required period and the holding deposit needs to be repaid. It will specify that this date is to be the day after the end of the relevant period within the meaning of Amendment 65. This is a minor and technical amendment and will be tabled as a point of clarification at Third Reading.

Finally, I have given thorough consideration to Amendment 49, tabled by the noble Lord, Lord Kennedy, which proposes that landlords and agents should provide a draft copy of the tenancy agreement before a holding deposit is paid. This issue was also raised in Grand Committee by the noble Baronesses, Lady Thornhill and Lady Grender. I completely agree that landlords and agents should give tenants sufficient time to understand the terms of any agreement before asking them to pay a holding deposit. We have made this clear in our guidance. However, I do not agree that an amendment such as that proposed by the noble Lord, Lord Kennedy, is warranted in this space. As with any contract or agreement, tenants should not pay money if they are not sure what they are signing up to.

Further, this could be difficult for local authorities to enforce. We would need to decide at what point the draft tenancy agreement should be provided before any holding deposit could be taken, and some tenants might choose to enter into agreements quickly and might want to do so. We will use our guidance to reiterate that tenants should be comfortable with the proposed tenancy agreement before they sign it. By paying the holding deposit, the tenant is agreeing to enter into the contract subject to meeting the conditions

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set out by the landlord. Similarly, the landlord is agreeing to rent to the tenant subject to all checks being completed. As I have mentioned, we have brought forward amendments to require that only one holding deposit per property can be paid, to ensure that landlords and agents are sincere in this.

I know noble Lords are concerned about a situation in which a landlord or agent might refuse to share a tenancy agreement in advance, thus forcing the tenant to pay a holding deposit and the tenant potentially being subject to unfair contract terms. I would say that a tenant should be wary of any landlord or agent who acts in such a manner and might be advised to steer clear of their property. However, I wish to reassure noble Lords that the Bill already offers protections in the event that the tenant pays a holding deposit and subsequently discovers an unfair contract term.

First, if the deadline for agreement has not yet passed and the tenant is willing to enter into the tenancy agreement subject to the removal of an unfair contract term which the landlord refuses, a landlord will not be taking all reasonable steps to enter the tenancy. The tenant would therefore be entitled to the repayment of their holding deposit. Amendment 70 clarifies that the holding deposit must be refunded if the landlord or agent imposes a requirement that breaches the ban, or behaves in an unreasonable manner such that it would be unreasonable to expect the tenant or relevant person to enter the tenancy. Secondly, if the tenant enters a tenancy agreement, Clause 4 ensures that any clause that requires the tenant to make a prohibited payment is not binding on the tenant. Thirdly, existing applicable consumer rights legislation ensures that any unfair contractual terms are not binding on the tenant.

I know that noble Lords were anxious for tenants to have early sight of the tenancy agreement to understand any possible default clauses. As will be discussed, we have brought forward amendments to list default fees on the face of the Bill. There will be clear and prescribed circumstances where a default fee can be charged. This mitigates the risk of tenants inadvertently and unknowingly signing up to multiple different default fees. Under existing transparency requirements in the Consumer Rights Act 2015, agents are required to display their fees to tenants on their website and in their offices. Tenants will be able to see whether their agent intends to charge a default fee in the event of a lost key, or other security device, or a late rent payment.

We will use consumer guidance to encourage agents and landlords to share a copy of the tenancy agreement at the earliest opportunity before accepting any holding deposit. Similarly, we will remind tenants of the need to be clear as to what they are signing up to before making any payments. We firmly believe that the amendments we have brought forward—to improve the transparency around the treatment of holding deposits, to ensure that landlords and agents can take only one holding deposit at any one time and to prescribe default fees on the face of the Bill—will address the key concerns raised by noble Lords. I hope that the noble Lord, Lord Kennedy, agrees that this is a reasonable compromise.

Baroness Thornhill (LD): My Lords, I declare my interest as one of the happy band of vice-presidents of the Local Government Association. I agree with much of what the Minister has said, but with specific reference to Amendment 48 I thank the Government for listening and accepting our amendment, moved in Committee, regarding letting agents and landlords receiving multiple holding fees from several people for one property. The arguments for this were well made in previous stages of the passage of this Bill. It has been recognised by pressure groups, by the industry itself—interestingly enough—and now by the Government that taking financial advantage of prospective tenants is totally unacceptable and bad practice. This simple but significant amendment corrects an injustice and will help many for whom navigating the private rental market is already a stressful and expensive business. We look forward to a speedy implementation, which I believe will be in May 2019.

The Earl of Lytton (CB): My Lords, I declare my interests as a vice-president of the LGA and also as a practising chartered surveyor and private rented sector landlord. Mercifully, I have managed to steer clear in a personal capacity of managing agents—at least for the last many years.

I have one query on the way in which the holding deposit arrangements are intended to function. I quite understand the geometry that sits behind this and the reason for it, so I will not go over it again. But let us suppose that a prospective tenant, having been provided with all the relevant information, pays a holding deposit and then, through some reason of default which would allow the agent to retain part or all of that deposit, there develops an argument as to what proportion—perhaps the whole—should be retained or not. That could take some while to resolve. Meanwhile, the agent is debarred from taking a holding deposit from anybody else, even though it may be clear beyond peradventure that the original deal with, and intention of, the tenant, whose holding deposit is still being hung on to, will not go ahead.

I can see that this could put an undesirable element of drag into the situation. I can also see that it might be the godmother of unforeseen consequences, in that the agent may feel that it is becoming a problem—a rather metropolitan problem, if I may say so; I think of zones 2, 3 and 4 of central London as the areas where a lot of this goes on, although I know it is not unique to there. The corollary to that is that the agent may say, "I'm not going to take a holding deposit at all. It is on a first-come, first-served basis. I have various people interested and the first who comes through my door with the relevant boxes ticked gets it". That does not seem at all helpful either. That does not happen in my part of leafy Sussex, because we do not deal with things in that way and do not have that sort of high-pressure tenant demand. But I can certainly see it happening in zones 2 and 3 and I wonder what the Minister has to say about how he sees that working in practice, without having some perverse effects on the market.

Lord Bourne of Aberystwyth: My Lords, I thank the noble Baroness, Lady Thornhill, and the noble Earl, Lord Lytton, for their contributions to the debate on this part of the Bill. I thank the noble Baroness very much for her comments and support.

I thank the noble Earl very much for his support and for raising the issue relating to holding deposits. First, as he will be aware, there is no obligation upon an agent or a landlord to operate a holding deposit system if they do not want to do so. It is optional. But where it applies and there is a dispute, if the two parties agree that there is no chance of pursuing the tenancy, it would obviously be open at that stage for the landlord or agent to take another holding deposit in relation to the land in question, as it were, where that matter is truly settled. If it is not settled, a lot will turn on the particular circumstances of the case. If the noble Earl feels that he would like to discuss this further, I will ensure that officials are available to discuss possible scenarios with him. It may be that he wishes to discuss a particular scenario, but in the meantime I commend these amendments to the House.

Amendment 14 agreed.

Clause 10: Recovery by enforcement authority of amount paid

Amendment 15

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

15: Clause 10, page 7, line 33, after "breaching" insert "paragraph 3 of"

Amendment 15 agreed.

Clause 11: Interest on payments under section 10

Amendments 16 to 19

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

16: Clause 11, page 8, line 13, leave out "date" and insert "day"

17: Clause 11, page 8, line 14, leave out "date" and insert "day"

18: Clause 11, page 8, line 17, leave out "date" and insert "day"

19: Clause 11, page 8, line 18, leave out "date" and insert "day"

Amendments 16 to 19 agreed.

Clause 17: Restriction on terminating tenancy

Amendment 20 not moved.

4.30 pm

Clause 21: Enforcement of client money protection schemes for property agents

Amendment 21

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

21: Clause 21, page 14, line 24, leave out from beginning to "subsection" in line 26 and insert—

"The Housing and Planning Act 2016 is amended as follows.

( ) In section 134 (client money protection schemes: approval or designation), after subsection (2) insert—

"(3) Regulations under this section may confer a discretion on the Secretary of State in connection with—

(a) the approval or designation of a client money protection scheme,

(b) conditions which must be complied with by the administrator of such a scheme,

(c) the amendment of such a scheme, or

(d) the withdrawal of approval or revocation of designation of such a scheme."

( ) In section 135 (enforcement of client money protection scheme regulations)—

(a) in"

Lord Bourne of Aberystwyth: My Lords, I shall speak also to Amendments 22, 27, 32 and 71 in my name which relate to client money protection legislation as set out in Part 5 of the Housing and Planning Act 2016, the Client Money Protection Schemes for Property Agents (Approval and Designation of Schemes) Regulations 2018 and the Client Money Protection Schemes for Property Agents (Requirement to belong to a Scheme etc.) Regulations, which are due to come into force on 1 April 2019.

Client money protection schemes ensure that landlords and tenants are reimbursed in the event of a letting or managing agent going into administration, or where the agent misappropriates their money while in their control. This client money can include rent paid by tenants as well as money passed on by landlords for the purpose of making repairs to a property. Client money protection is designed to be the last resort once a tenant or landlord has already pursued the agent directly or exhausted recovery via the property agent's insurance. I take this opportunity to thank the noble Baroness, Lady Hayter, for all the hard work she has done in this area alongside the noble Lord, Lord Palmer, on this important legislation that will give tenants and landlords the financial protection that they deserve.

The client money approval regulations set out the conditions that scheme providers must meet in order to be an approved provider. My officials have been working with scheme providers since the summer to support them in making an application. The requirement regulations require property agents who handle client money to belong to an approved scheme. They are due to be implemented on 1 April 2019.

During our extensive engagement with schemes it has become apparent that certain elements of the regulations do not work as originally intended. I thank noble Lords for their discussion of these points in Committee, which I have considered carefully. I am keen to ensure that the client money protection legislation delivers on our commitment to give landlords and tenants financial security but not in such a way as to impose disproportionate and unnecessary burdens on industry, which could have the adverse and perverse effect of increasing costs for tenants and landlords. The amendments in my name ensure that the rules strike a balance while giving tenants and landlords robust protection. This is so that the amount of cover

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that schemes are required to provide is proportionate, taking into account the availability of insurance and the level of risk posed by members. We are committed to maintaining our published timetable so that mandatory client money protection can come into force on 1 April 2019. Our intention is that, once we have approved sufficient schemes, we will make the requirement regulations and of course they will be made before the relevant provisions in this Bill amending these regulations are commenced.

Turning to Amendments 21, 22 and 17, first, we have clarified that money that has already been protected through a government-approved tenancy deposit scheme is not required to be doubly protected by a client money protection scheme. This was never our policy intent. Secondly, we will not require schemes to pay out where certain risks are excluded by insurers. These policy exclusions typically refer to events such as war, terrorism or confiscation by the state. It was never the policy intent for such unlikely events to be covered. We believe it would be unreasonable to require schemes to pay out where they may be unable to underwrite their risk with insurance because such insurance cover is commercially unavailable.

Thirdly, we are providing that the level of insurance held by schemes is proportionate to the risk of client money loss rather than requiring scheme providers to ensure they can provide cover for every penny held in an agent's client account. We will in guidance ask schemes to determine the appropriate level of insurance cover necessary to cover a worst-case scenario—their maximum probable loss. This allows schemes to consider controls that their members have in place as well as the amount of client money that is at risk. We will challenge schemes' calculations through our assessment of their applications for approval to ensure that they are robust.

Fourthly, we are specifying that client money protection schemes can allow limits per individual claimant and scheme aggregate limits that are at least equivalent to the scheme's maximum probable loss. Allowing schemes to set a limit per individual claimant ensures that they are not required to pay out without limit. It will ensure that more sophisticated large corporate landlords take responsibility for the control of client money held on their behalf. The Financial Services Compensation Scheme has similar individual claim limits, and we are seeking to replicate this accepted practice. It is, of course, vital that consumers are aware of any such limits and we are requiring schemes and their members to be transparent with clients about the limits of protection. The limit would be designed to be more than sufficient to cover likely claims, but if it became apparent that that was no longer the case, the limit would need to be changed.

We expect schemes to act reasonably and to apply to amend the scheme rules if it becomes apparent that their level of cover is no longer sufficient. Any scheme that cannot demonstrate that it has obtained sufficient cover to pay out on all likely claims will not be approved. Allowing both individual and aggregate limits ensures that tenants and landlords have sufficient financial protection, which is the purpose of client money protection, but not in such a way that would have a disproportionate impact on the industry.

Further, for a transitional period of 12 months taking us to 1 April 2020, we are permitting agents to join a scheme if they are making all efforts to apply for a client account but have not yet obtained one. We fully expect all agents to hold their client money in a separate account to ensure that client money is suitably protected. As the Government work with the banking industry, we do not wish to impose unrealistic barriers around a client account that agents are unable to meet by 1 April 2019.

Finally, the duty to enforce the requirement for letting agents to belong to a client money protection scheme is set out in Regulation 5 of the client money protection schemes for property agents regulations. We have therefore clarified in Amendment 32 that the lead enforcement authority set up under the Bill can also enforce the regulations. Amendment 71 is a consequential amendment to the title of the Bill.

Without Amendments 21, 22, 27, 32 and 71, there is a risk that certain scheme providers will be unable to comply with the regulations and therefore leave the market, or that the costs of cover will increase substantially for agents, which could have knock-on consequences for landlords and tenants.

I am proposing these amendments to this Bill to ensure that implementation of mandatory client money protection is not delayed and can be delivered as promised from 1 April 2019. I thank the noble Baroness, Lady Hayter, for giving attention to these matters and raising her concerns.

I also address Amendments 23 to 26, which the noble Baroness tabled. I understand her concern that if notice is served on a scheme without any reasons requiring the scheme to amend its rules within 30 days, the scheme may be unable to comply and feel that it has no other option but to wind up its operation. Clearly such a situation would be in neither the Government's nor the scheme's interest.

However, I do not believe that the amendments tabled are necessary and as such do not propose to accept them. Specifically in relation to the timeframe and the giving of reasons, the Government are bound by general public law obligations which include acting transparently and fairly and supplying reasons for decisions. I am happy to reaffirm that. We could not seek arbitrarily to serve notice without having discussed our concerns and options with the scheme. The notice is likely to be the final step in the process, having explored with the scheme what amendments would be required. The 30-day notice period is subject to a different period being set out in the notice and therefore we do not believe that Amendment 26, which amends the timeframe, is necessary.

Nevertheless, as noble Lords will appreciate, the Secretary of State needs to be able to serve a notice to compel schemes to make changes where, for example, there has been a significant change in the size for a scheme. With an increase in the membership base, it might be necessary to increase the cover. It is on that basis that I hope that the noble Baroness will understand that I cannot accept her proposal but, with the reassurances that I have given, I hope that she will not press the matter.

Baroness Hayter of Kentish Town (Lab): My Lords, first, I thank the Minister for his sympathetic and speedy response to the issues that I, along with the noble Lord, Lord Palmer of Childs Hill, with the support of the noble Lord, Lord Best, who is in his place, and the noble Lord, Lord Deben, who is not in his place at the moment, raised in Committee about how the department was implementing these otherwise very welcome plans to introduce mandatory client money protection for letting agents. It was because the noble Lord, Lord Palmer, and I had worked very well with the Minister on that initiative that we were concerned that the whole thing was going a bit pear-shaped because of the introduction of unrealistic requirements on the main providers of CMP protection. But, thanks to the Minister—I have to thank him for that—the department moved very rapidly, as it is well able to, and responded to make the significant changes that the Minister has now introduced. We both thank and congratulate the people who drafted those changes. They will, of course, help ensure that both RICS and ARLA can continue to protect both landlords and tenants through their schemes.

There was just one area on which I sought clarification, which is indicated in the amendments to which the Minister has already responded. I know that these have been discussed with RICS, ARLA and officials. I am getting nods from the Box. The government amendments introduce a power, as has been said, for the Secretary of State to serve notice on scheme administrators, requiring them to amend their scheme rules in respect of the cover they may hold. We consider this a sensible addition because it ensures that appropriate cover will be in place and, importantly, it will prevent arbitrage between the different schemes. That is something that we had not thought of but we are very grateful that officials did so.

As has been noted, our concern is with the current wording, which we did not feel gave sufficient clarity on how such a scheme, where it proved necessary, could close in an orderly manner where the Secretary of State's justified requirements proved unworkable. The amendments I tabled were therefore to clarify that schemes may alternatively close in an orderly manner in such a scenario, rather than leaving administrators open to a lot of uncertainty. I know that the Minister appreciates those points, as we have heard. It was a backstop—if I may say that—that we were looking for: something we hoped would never be needed but should be there in case. I think the Minister has given the reassurance needed about flexibility and the use of normal other legislation to ensure that such reasons are given, and in the right way. I am getting nods from other people on that point.

Although I tabled the amendments, they were clearly only a bit of final tidying up. We are very pleased and grateful that, as a result of what we raised in Committee, it has been possible to bring this forward in such a timely manner that we can go ahead on 1 April not just, unfortunately, to leave the European Union, but, perhaps a little more importantly, to have client money protection in place.

Lord Flight (Con): My Lords, I refer to my interest as a modest landlord, as declared in the register. The new rules to protect rent paid by tenants to agents do not protect landlords fully. Letting agents will have to join the new government-approved client money protection insurance scheme, but changes proposed by the Government as to the level of insurance held by these schemes will not cover the full value of rental money held by agents. I cannot see the point of that. Is it not in the interests of all parties for the insurance effectively to cover all potential liabilities? The scheme will not pay out in some circumstances; it will be able to cap the amount it pays out. Surely it would be more sensible for the scheme to provide for full protection.

Lord Palmer of Childs Hill (LD): My Lords, first, I thank the Minister for his incredible help and support in getting this legislation through, and the noble Baroness, Lady Hayter, who has done a lot to make this Bill work.

I want to pick up on a point made by the noble Lord, Lord Flight, because it is one of the questions that arises from these amendments. Perhaps I may tackle it by dealing with the level of insurance required, which is what the noble Lord, Lord Flight, was talking about. The best way of looking at it is perhaps to think about what the Residential Landlords Association —the RLA—has recently said. It advises, consequent to the changes to the legislation, that to help reduce the risk, landlords should spread their properties across a number of agents so that they reduce the need to go over whatever insurance limits were agreed with each one. The RLA summed this up by saying:

> "Otherwise we will encourage landlords to ensure that they do not put all their eggs in one basket and spread the risk".

Are the Government aware of landlords spreading their risk rather than keeping it with one agent, and what will the Government's attitude be? I believe that is the point raised by the noble Lord, Lord Flight. This is a great improvement to the legislation but I would like the Minister to respond to my question.

4.45 pm

Lord Bourne of Aberystwyth: My Lords, I thank noble Lords who have participated in the debate on this part of the legislation and turn to the various contributions. I thank the noble Baroness, Lady Hayter, very much for her support, for bringing this forward and for the characteristic grace with which she has dealt with the matter today. Our calculations have been made on the best assessment of the highest probable loss; that should be the basis for deciding cover. We have also taken heed of the fact that, for example, for bank deposits there is a maximum amount currently protected; it would be somewhat perverse if this were a higher amount. Such matters have influenced what we seek to do. It is not the maximum loss; we have taken heed of the highest probable loss, as is the customary arrangement. We also have to take account of what the industry can bear and what is in the interests of all tenants and landlords; that is what has guided us.

On landlords seeking more than one form of cover, I will write to the noble Lords, Lord Flight and Lord Palmer of Childs Hill, so that they get the full picture. With that, I commend the government amendments in this group and reject the others.

Amendment 21 agreed.

Amendment 22

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

22: After Clause 21, insert the following new Clause—

"Client money protection schemes: approval and designation

(1) The Client Money Protection Schemes for Property Agents (Approval and Designation of Schemes) Regulations 2018 (S.I. 2018/751) are amended as follows.

(2) In regulation 2 (interpretation), in the definition of "client money"—

(a) in paragraph (a), for "agency", in the second place it occurs, substitute "management", and

(b) at the end of paragraph (b) insert ",

but does not include money held in accordance with an authorised tenancy deposit scheme within the meaning of Chapter 4 of Part 6 of the Housing Act 2004 (see section 212 of that Act);".

(3) In regulation 4 (amendments to an approved scheme), after paragraph (3), insert—

"(4) This regulation does not apply to an amendment made in accordance with a notice served under regulation 8(1D)(b)."

(4) In regulation 5 (conditions which must be satisfied before approval may be given)—

(a) in paragraph (1)(a)(iii), for "and without any deduction" substitute ", subject to paragraph (1A)",

(b) in paragraph (1)(c)(i), for "administration of the scheme" substitute "failure of scheme members to account for client money to persons entitled to that money",

(c) after paragraph (1) insert—

"(1A) The Secretary of State may determine that the condition in paragraph (1)(a)(iii) is satisfied where the rules of the scheme have the effect that the scheme administrator is required to make good M's liability—

(a) only up to such amount as the Secretary of State considers appropriate,

(b) only if or to the extent that M's liability can be made good without exceeding such aggregate limit on the liability of the scheme as a whole as the Secretary of State considers appropriate, or

(c) only if M's liability arises in relation to a risk that the Secretary of State considers it is appropriate for the scheme to insure against.", and

(d) after paragraph (2) insert—

"(2A) The rules of the scheme are to be treated as complying with paragraph (2)(f) if they provide that, until 1 April 2020, they have effect as if they required scheme members to make all reasonable efforts to hold client money in a client money account with a bank or building society authorised by the Financial Conduct Authority."

(5) In regulation 8 (conditions with which scheme administrators must comply)—

(a) in paragraph (1), after "practicable" insert "—

(a) after that member joins the scheme, and

(b) after the scheme rules are amended under paragraph (1D)(a) or in accordance with a notice served under paragraph (1D)(b).",

(b) after paragraph (1) insert—

"(1A) Paragraphs (1B) to (1E) apply if the rules of the scheme have the effect of requiring the scheme administrator to make good the liability of a scheme member—

(a) only up to a certain amount,

(b) only within an aggregate limit on the liability of the scheme as a whole, or

(c) only in relation to certain risks.

(1B) The certificate provided under paragraph (1) must include—

(a) information about the amount referred to in paragraph (1A)(a),

(b) information about the limit referred to in paragraph (1A)(b), or

(c) details of where to find information about the risks referred to in paragraph (1A)(c),

as the case may be.

(1C) Paragraphs (1D) and (1E) apply if the Secretary of State considers that—

(a) the amount referred to in paragraph (1A)(a) is no longer appropriate,

(b) the limit referred to in paragraph (1A)(b) is no longer appropriate,

(c) it is no longer appropriate for the rules of the scheme to exclude liability in relation to one or more of the risks referred to in paragraph (1A)(c), or

(d) it is appropriate for the rules of the scheme to exclude liability in relation to one or more risks that are not among the risks referred to in paragraph (1A)(c).

(1D) The Secretary of State may—

(a) where the Secretary of State is the scheme administrator, amend the scheme rules with the effect that the amount, the limit or the risks are replaced with such different amount, limit or risks (as the case may be) as the Secretary of State considers appropriate;

(b) in any other case, serve a notice on the scheme administrator requiring that person to amend the scheme rules with the effect that the amount, the limit or the risks are replaced with such different amount, limit or risks (as the case may be) as the Secretary of State considers appropriate.

(1E) The scheme administrator must comply with a notice served under paragraph (1D)(b)—

(a) within the period of 30 days beginning with the day on which the notice is served, or

(b) within such longer period beginning with that day as the Secretary of State may specify in the notice.",

(c) after paragraph (3) insert—

"(3A) The scheme administrator must maintain insurance that—

(a) covers any foreseeable liability which may arise in connection with the failure of scheme members to account for client money to persons entitled to that money, and

(b) is appropriate with regard to the size and number of scheme members and the amount of client money held by scheme members.

(3B) Before renewing the scheme's insurance, the scheme administrator must obtain the approval of the Secretary of State to the type and amount of insurance.

(3C) The Secretary of State may approve the renewal of the scheme's insurance only if the Secretary of State is satisfied that, if the insurance is renewed as proposed, the scheme administrator will continue to comply with paragraph (3A).",

(d) in paragraph (5), at the end of sub-paragraph (a) for "; and" substitute ",

(aa) where paragraph (1B) applies—

(i) information about the amount referred to in paragraph (1A)(a),

(ii) information about the limit referred to in paragraph (1A)(b), or

(iii) information about the risks referred to in paragraph (1A)(c),

as the case may be, and", and

(e) after paragraph (6) insert—

"(7) In this regulation, references to renewing a scheme's insurance (however expressed) include obtaining new insurance.

(8) Paragraphs (2), (3B), (3C) and (4) do not apply where the Secretary of State is the scheme administrator."

(6) The amendments made by this section are without prejudice to any power to make an order or regulations amending or revoking the regulations mentioned in subsection (1)."

Amendments 23 to 26 (to Amendment 22) not moved.

Amendment 22 agreed.

Amendment 27

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

27: After Clause 21, insert the following new Clause—

"Client money protection schemes: requirement to belong to a scheme etc

(1) The Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019 are amended as follows.

(2) In regulation 2 (interpretation)—

(a) in the definition of "client money"—

(i) in paragraph (a), for "agency", in the second place it occurs, substitute "management", and

(ii) at the end of paragraph (b), for "; and" substitute ",

but does not include money held in accordance with an authorised tenancy deposit scheme within the meaning of Chapter 4 of Part 6 of the Housing Act 2004 (see section 212 of that Act);", and

(b) at the end of the definition of "regulated property agent", insert ";

"scheme administrator" has the same meaning as in the scheme approval regulations (see regulation 2 of those regulations); and

"scheme approval regulations" means the Client Money Protection Schemes for Property Agents (Approval and Designation of Schemes) Regulations 2018."

(3) In regulation 3 (requirement to belong to a client money protection scheme), omit paragraph (2).

(4) In regulation 4 (transparency requirements)—

(a) before paragraph (1) insert—

"(A1) Paragraph (1) applies if the scheme administrator of an approved or designated client money protection scheme provides a certificate under regulation 8(1) of the scheme approval regulations to a regulated property agent.", and

(b) in paragraph (1)—

(i) in the words before sub-paragraph (a), for "A" substitute "The", and

(ii) omit sub-paragraph (a).

(5) The amendments made by this section are without prejudice to any power to make an order or regulations amending or revoking the regulations mentioned in subsection (1)."

Amendment 27 agreed.

Clause 23: General duties of the lead enforcement authority

Amendment 28 not moved.

Clause 26: Interpretation

Amendments 29 to 31

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

29: Clause 26, page 17, line 27, at end insert—

""excluded licence" means a licence which is granted to a licensee by a licensor who resides in the housing where—

(a) a charity or community interest company gives advice or assistance to the licensee or the licensor in connection with the grant, renewal or continuation of the licence, and

(b) the only consideration for the grant, renewal or continuation of the licence is—

(i) the provision by the licensee of companionship to the licensor, or such provision together with the provision by the licensee of care or assistance (other than financial assistance) to the licensor, or

(ii) provision of the kind referred to in sub-paragraph (i) together with one or more payments in respect of council tax, a utility, a communication service or a television licence;"

30: Clause 26, page 17, line 42, at end insert "unless it is an excluded licence"

31: Clause 26, page 18, line 18, at end insert—

""television licence" has the meaning given by paragraph 9(2) of Schedule 1;"

Amendments 29 to 31 agreed.

Clause 27: Consequential amendments

Amendment 32

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

32: Clause 27, page 20, line 6, at end insert—

"(6) In regulation 5 of the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019 (enforcement)—

(a) in paragraph (1) omit ", subject to regulation 8(3)",

(b) after that paragraph insert—

"(1A) Paragraph (1) is subject to—

(a) regulation 8(3), and

(b) section 24 of the Tenant Fees Act 2018.", and

(c) in paragraph (3), after "the Secretary of State" insert "or the lead enforcement authority (if not the Secretary of State)".

(7) The amendments made by subsection (6) are without prejudice to any power to make an order or regulations amending or revoking the regulations mentioned in that subsection."

Amendment 32 agreed.

Clause 28: Transitional provision

Amendment 33

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

33: Clause 28, page 20, line 30, after "tenant" insert "or a relevant person in relation to the tenant"

Amendment 33 agreed.

Amendment 34 not moved.

Amendments 35 to 41

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

35: Clause 28, page 20, line 35, leave out "the tenant" and insert "a relevant person"

36: Clause 28, page 20, line 41, leave out "tenant" and insert "relevant person"

37: Clause 28, page 21, line 2, leave out "tenant" and insert "relevant person"

38: Clause 28, page 21, line 5, leave out "tenant" and insert "relevant person"

39: Clause 28, page 21, line 10, leave out "tenant" and insert "relevant person"

40: Clause 28, page 21, line 15, leave out "tenant" and insert "relevant person"

41: Clause 28, page 21, line 20, leave out "tenant" and insert "relevant person"

Amendments 35 to 41 agreed.

Schedule 1: Permitted payments

Amendment 42

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

42: Schedule 1, page 24, line 12, leave out "the amount of six weeks' rent," and insert "—

(a) the amount of five weeks' rent, where the annual rent in respect of the tenancy immediately after its grant, renewal or continuance is less than £50,000, or

(b) the amount of six weeks' rent, where the annual rent in respect of the tenancy immediately after its grant, renewal or continuance is £50,000 or more,"

Amendment 42 agreed.

Amendment 43 not moved.

Amendments 44 to 48

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

44: Schedule 1, page 24, line 14, at end insert—

"( ) "five weeks' rent" means five times one week's rent,"

45: Schedule 1, page 24, line 20, leave out "A" and insert "Subject to sub-paragraphs (3) to (6), a"

46: Schedule 1, page 24, line 25, leave out "But if" and insert "If"

47: Schedule 1, page 24, line 27, leave out "this paragraph" and insert "sub-paragraph (3)"

48: Schedule 1, page 24, line 29, at end insert—

"(5) A payment of a holding deposit is not a permitted payment if—

(a) the landlord or letting agent to whom the deposit was paid has previously received a holding deposit ("the earlier deposit") in relation to the same housing,

(b) the landlord or letting agent has not repaid all or part of the earlier deposit, and

(c) none of paragraphs 5 to 11 of Schedule 2 have applied so as to permit the landlord or letting agent not to repay the earlier deposit or the part that has not been repaid.

(6) The reference in sub-paragraph (5)(a) to a landlord or letting agent receiving a holding deposit does not include the landlord or letting agent doing so before the coming into force of Schedule 2 ."

Amendments 44 to 48 agreed.

Amendment 49 not moved.

Amendment 50

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

50: Schedule 1, page 24, line 31, leave out "A" and insert "Subject to sub-paragraphs (3) to (8), a"

Lord Bourne of Aberystwyth: My Lords, I shall speak also to Amendments 51 and 53 to 57 in my name, and to Amendment 54, which is in my name and that of the noble Baroness, Lady Grender. These relate to payments made in the event of a default under Schedule 1 to the Bill.

As noble Lords will be aware, the Bill permits landlords and agents to charge default fees where a tenant fails to perform an obligation or discharge a liability arising under or in connection with the tenancy. This provision has been subject to much debate and discussion, and I have welcomed noble Lords' valuable contributions on it—in particular, those from the noble Baroness, Lady Grender, and the noble Lord, Lord Kennedy.

I maintain that we should not seek to remove default fees provision from the Bill entirely and that landlords and agents should be able to recover certain costs sustained during the tenancy where the tenant is at fault. However, I have listened carefully to the representations that have been made and I appreciate the concern that landlords and agents might seek to use the default fees provision as a backdoor to charging tenant fees. This is certainly not something that we want to see happen and, although the Government have already taken considerable steps to minimise abuse, I agree that more can be done.

I believe that there are two main instances where tenants may be required to pay a default fee: if they lose their key or other security device giving access to the housing or if they fail to pay their rent on time. With that in mind, our amendments specify that these are the only circumstances under which a landlord or agent can charge a default fee. Amendment 54 will ensure that landlords and agents cannot write arbitrary default fees into tenancy agreements and makes very clear to tenants, landlords and agents where a default fee can be charged.

Landlords or agents will be able to require a default fee for the late payment of rent where the payment has been outstanding for 14 days or more. Amendment 56 sets out that landlords or agents will be able to charge interest at no more than an annual parentage rate of 3% above the Bank of England's base rate for each day that the payment is outstanding. Any amount above this will not be permitted; it will be a prohibited payment.

With respect to the charging of a default fee to cover the costs associated with replacing a lost key or other security device, any such charge must not exceed the landlord's or agent's reasonable costs incurred and must be evidenced in writing to the person who is liable for the payment. The amount of any payment

which exceeds the reasonable costs to the landlord or agent in respect of the default will be a prohibited payment. I believe that the risk of such a list being incomplete is mitigated by the provision in Clause 3 to bring forward amendments to the list of permitted payments through affirmative regulations, should this prove necessary.

I take this opportunity to speak to Amendment 52, tabled by the noble Lord, Lord Kennedy. This amendment seeks to provide that if one tenant loses their key or pays their rent late then other tenants in a joint tenancy cannot be held accountable. I am afraid that I cannot agree to such an amendment. Joint tenants are jointly and severally liable for the rent and for maintaining the property. That is the essence of a joint tenancy. If one joint tenant does not pay the rent, the landlord can seek repayment from all the other tenants. This is what tenants agree when they sign a joint tenancy and Amendment 52 would introduce a significant change as to how joint tenancies work in that regard. It would risk unfairly penalising landlords and unsettling the law in an established area.

With regard to a lost key, tenants will, again, be jointly responsible for the keys in the same way as they are all responsible for any damage to the property. Of course, tenants can make their own arrangements, and I am sure that the person who loses the key will generally be the one who makes any associated payment, but the tenants are all responsible to the landlord for the keys. It would be a significant change to alter this position and one that could be quite hard to enforce if there were disagreements between the tenants about who lost the key.

Finally, it has never been the intention that the Bill should affect a landlord's or agent's right to recover damages for breach of contract. Amendment 57 clarifies this position and ensures that such payments will not be outlawed under the ban. I am aware that there has been some concern about this provision and would like to provide reassurances now, as well as explaining why I cannot accept Amendment 58. Given that we are now listing default fees in the Bill, it is important that we include the provision permitting charging for damages. Otherwise it could be interpreted that we are prohibiting contractual damages. This would not be fair and would be a significant and substantial change to existing law.

Amendment 58 has no substantive effect. I believe that the intent of the noble Lord is to ensure that any damages payments are reasonable and evidenced in writing. It is not necessary to provide an amendment to this effect. In general, damages are meant to put the innocent party back in the position they would have been in had the contract not been breached—nothing further. No reasonableness test is therefore needed, nor appropriate. Similarly, to enforce a damages claim landlords or agents are required to go to court or to seek to recover them from the tenancy deposit. In both cases, they need to provide evidence to substantiate any claim. There is already a large amount of case law dealing with what is appropriate in a contractual damages case. I assure noble Lords that the inclusion of the damages provision is not a back door to default charges, as was suggested by the recent Citizens Advice briefing. Its analysis of this situation is inaccurate.

Regardless of whether an amount is specified, Clauses 1(6)(b) and 2(5)(b) prohibit an agent or landlord attempting to insert a clause requiring a payment—for example, saying that if you do X, you must make a payment—except in so far as this is permitted by paragraph 4 of Schedule 1, as amended. Both the examples of types of damages given in the Citizens Advice briefing do this and would therefore be banned under the Tenant Fees Bill. I appreciate the concerns raised by the noble Lord and seek to reassure him about this. I believe we had sought to agree that I could give reassurance on this at Third Reading, but I understand that we have not been able to come to any agreement about not voting. Perhaps the noble Lord will be able to give that reassurance shortly, or am I getting inaccurate information?

Lord Kennedy of Southwark: Absolutely inaccurate.

Lord Bourne of Aberystwyth: Right. Perhaps the noble Lord will be able to cover that.

As I have said, long-standing case law supports the courts not enforcing clauses that have no relation to the loss actually sustained, which in most cases would constitute an unfair contract term under applicable consumer law. The amendment proposed by Citizens Advice in its briefing would have no substantive effect. It is already the case in the Bill as drafted that the relevant person may recover the amount, or part, of damages where a claim for damages has been determined by the court or settled by agreement between the parties.

I believe the amendments in my name will help protect tenants from spurious charges by making it very clear when a default fee can be charged. I also remind noble Lords that we have made a number of significant amendments to respond to all the key concerns raised to date. I believe the amendments proposed in my name provide a fair compromise. I hope noble Lords agree with this, and I know it is in our interests to proceed with this vital legislation. I beg to move.

Baroness Gardner of Parkes (Con): I apologise to the House; I would have spoken earlier, but it did not seem that Amendment 42 was actually moved. Even now, I think it is appropriate to mention my concern about that. Why cut back to five instead of six weeks? I declare my interest, which is in the register. Many landlords find that, towards the end of a tenancy, the tenant pays nothing and they are well out of pocket—even if they have six weeks' rent—if the property is damaged, which happens more frequently than one would hope. I cannot see that it is worth making the major differentiation between five and six weeks. I was perfectly happy with six weeks, and I thought it was fair that everyone should be in the same position.

5 pm

Lord Flight: My Lords, I similarly would like to speak to Amendments 42, 43 and 44, on tenancy deposits. The objective for everyone is to have a fair balance that works. I note that, at Second Reading in the Commons, the Secretary of State referred to the then proposal of six weeks as,

[LORD FLIGHT]
"a balance of greater protection to tenants while giving landlords the flexibility to accept higher-risk tenants".—[*Official Report*, Commons, 21/5/18; col. 642.]
I also note that Scotland has an eight-week as opposed to a six-week arrangement.

I urge the Government to think again on this issue. Reducing the security deposit to five weeks' rent rather than six leaves scope for unfairness to landlords. There is always the risk that, at the end of a long tenancy, the tenant will leave the property in a poor state or will have had pets. Cutting the deposit to five weeks' rent will quite likely leave the landlord out of pocket. In turn, that will make landlords more cautious about the tenants they take on, at a time when the need for more rented accommodation is acute. This is not a huge issue, but the Government's previous proposition of six weeks was the sensible and fair balance. I do not understand why they have moved to five weeks, and nor does the industry—having not been consulted or advised about this, it feels somewhat mistreated by the Government.

Lord Shipley: My Lords, if I might, I will intervene at this stage to speak to Amendment 43, which is what we are currently talking about. In the flurry of amendments not being moved, no debate took place, but the issue has now been raised by two noble Lords.

My name is attached to the amendment that refers to five weeks, and I think it is the right conclusion. I want to thank the Government for having agreed a change from six weeks to five. At Second Reading and in Committee, we went through every option: from the Scottish model of eight weeks to my probing amendment proposal of four weeks. As I recall, the Government at that stage said the figure would be between the four weeks we requested and the eight weeks that apply in Scotland.

There is a lot of money at stake here for tenants. Having heard from the perspective of landlords, I would like to speak on behalf of tenants. For a large number of poorer people, a change from five to six weeks could make finding that level of deposit a strain. Anything that can be done to minimise that strain is a good thing. The figure was described as being "up to" six weeks, but the fact that it is now five weeks will be of benefit to a large number of tenants. Because it covers the difficulty that, in some months, four weeks may not be a month and many people operate tenancy agreements on a monthly not weekly basis, it is legitimate for the Government to propose that we go to five weeks. I want to express our support for the Government's decision.

The Earl of Lytton: My Lords, I beg to differ slightly from the conclusions of the noble Lord, Lord Shipley, although I well understand that this involves a cash-flow issue for tenants. I pay tribute to the noble Baroness, Lady Gardner, for bringing us back to this set of amendments. The Minister himself defended the Government's long-standing line that a six-week deposit was fair. However, as the noble Lord, Lord Flight, said, we seem to have moved away from that without apparent pause for breath.

I declare a non-interest here, as I do not charge deposits for tenants and have not done for a number of years due to special personal circumstances. The industry standard has been six weeks for a considerable time. In my part of Sussex, six weeks' rent represents a figure between £1,200 and £1,800 in general terms. That does not go a long way if, in addition to non-payment of rent—bear in mind that defaults tend to have many heads—the tenant also leaves the property in a damaged condition, including damage to carpeting, kitchen units and electrical wiring.

Given that situation, can the Minister explain why it is now five weeks? If you strip out non-payment of the last month's rent, under this proposal you are left with a single week's rent to cover any other form of loss. Does that represent a fair balance? I am not sure that it does.

Baroness Grender (LD): Perhaps I may ask for clarification: are we now talking about five weeks, or about default?

Lord Bourne of Aberystwyth: My Lords, it might be helpful to the House if I deal with the rental issue first. If anyone wants to speak on that, I suggest they do so now. I apologise that we glossed over it earlier.

If there are no other points on the rental, I shall deal with the issues raised by my noble friends Lady Gardner of Parkes and Lord Flight, the noble Lord, Lord Shipley, and the noble Earl, Lord Lytton.

On the point that we have moved significantly from six weeks to five weeks, yes, it is a movement, but it is scarcely, as the noble Lord suggests, a fundamental shift. It is not as if we are moving from 10 weeks to one week. Perhaps I may provide some reassurance. All the evidence is that most people currently take deposits of between four or five weeks. It is not therefore massively inconsistent with current practice.

At the top end of the market we are retaining the six-week limit for the most expensive properties where the fittings and fixtures may be more costly. It will remain at six weeks where the annual rental is more than £50,000. I hope that provides some reassurance to those noble Lords who have raised the concern.

These are not issues of principle so much as matters of judgment. It is the judgment of Solomon and there will always be some people who disagree with where we are. However, as I say, we have looked at current practice, listened to what outside organisations have said and on that basis we have fixed it at five weeks for most people, but at the top end of the market we have retained the six weeks.

Lord Kennedy of Southwark: My Lords, we have jumped around these groups of amendments today. There appears to be an issue with the printing of the Whip's sheet.

I wish to address my remarks largely to Amendments 50 to 58. Generally, I am happy with what I have heard from the Government today on most amendments, particularly those in this group. The exception is Amendment 57, to which I will address most of my remarks.

Members of this House discuss amendments to Bills all the time, but most are never voted on: they are probing and have been tabled to get answers from

the Government. We go backwards and forwards as we seek to improve the legislation. My Amendment 58 is very much in that vein. The Government have put down Amendment 57, which I fully accept deals with damages and makes it clear that if there are any issues, the terms can be clarified in the future. Somehow, damages are being turned into prohibited payments, and I do not want to do that either, so I am with the Government on this issue.

However, on looking at Amendment 57, we were concerned about the heading, "Payment of damages". We went to the Public Bill Office and talked to colleagues. We are concerned that, as written, it could be deduced—obviously, it is open to argument—that the reasonableness and fairness of such a payment cannot be questioned. It is not so much about going to court, but what happens when people are drawing up agreements and so on. We should remember that we are dealing with tenants and landlords, and the relationship between the two is not always one of equals.

For that reason, I have proposed, as an amendment to Amendment 57, my Amendment 58, which would simply remove the three words of the heading: "Payment of damages". The provision would be retained but the heading would go. Removing the heading would, in effect, add the provision to the previous group, where a protection is provided: actions have to be reasonable, and reference is made to "evidence". That is all my amendment is intended to do. I do not know if this is the right way to do it, but it has certainly enabled us to have this discussion today.

I tried to get an assurance from the Government that they would come back at Third Reading and discuss this issue further. It may be that people cleverer than me can come back with a better amendment. All I am trying to do is ensure that tenants are treated fairly and properly. I was happy to come back to this issue at Third Reading, and gave an assurance that we would not vote on it. I have the text message to prove it on my phone; I do not know what else I can say. To then be told that I did not give such an assurance—that is just not the case. I am really upset about this.

All I want to do is get this right. I do not want the Bill to become law and in a year's time, we find the Government saying, "Oh, we made a mistake. We will change it when parliamentary time allows. We should have this on the rogue landlords' database. We did not listen to you last time, Lord Kennedy, but of course you are right. When parliamentary time allows, of course we will put it right". My intention is to get this right today. I have given that commitment and I have the text message, so I cannot see what the problem is in coming back at Third Reading in a few weeks' time and getting it right. We are not going to vote on it, but I think the position should be clarified.

Baroness Grender: My Lords, I will come on to damages in a moment, but first perhaps I may take us back to the celebratory moment on this group of amendments: the fact that there has been a significant change on default. This has been welcomed loudly and clearly by those who lobby most for tenants. This is an extremely significant change which this House has introduced through a government amendment to which I have added my name. It specifies what a default fee is: it is now going to be for a key or a security device or for late payment on interest for rent.

I know that we are trying to sort out the damages issue, but I want to thank the Minister and in particular his Bill team. I am sure that they will read this tomorrow in the *Official Report*. I also thank Rhea Newman and Poppy Terry at Shelter, Hannah Slater and Dan Wilson Craw at Generation Rent and Caroline Aliwell at Citizens Advice. We have all been working extremely hard behind the scenes with many meetings, for which I thank the Minister and the Bill team, to get to a very good place with regard to default. Our original intention was to get it out of the Bill altogether, but the fact that the wording has been greatly tightened and is now so specific is a very big leap forward. It goes back to the original intention that many of us had when we wanted to propose this Bill in the first place.

Before we go back to the controversial issue of whether a loophole has now been introduced as regards damages, I would like to take a moment to remind us of what has now gone and was going to be charged by landlords, some of whose tenants are on an extremely low income or even no income. One of my favourites is £45 for the procurement of a dustpan and brush. Another is £500 for a reference and credit check, £200 to remove a new set of saucepans that had been left for the next tenant—a lovely example—and £100 for cobweb removal. Those are some examples of things that will no longer be a threat as a result of a loophole, thanks to the extremely welcome change of default.

5.15 pm

As noble Lords who were not in Committee may have gathered, we must now move on to whether there is now an unintended consequence as a result of introducing the issue of damage. We have received conflicting information, including conflicting legal advice, on this. As the Minister will be aware, I asked on several occasions in meetings whether there was confusion between damage and default. My own view is that default is now so clarified that the issue is less of a threat than it was originally.

However, Citizens Advice lawyers are saying that this has created a loophole. As the Minister explained, damages are a standard common-law remedy for breach of contract. They can be determined by a court arbitrator as adequate compensation for a loss once a breach has occurred, unless parties have agreed the meaning in advance via a tenancy agreement. We must ask ourselves whether a landlord or agent could exploit the dual meaning of damages and get around the Act by putting in a clause, for example asking for damages of £25 for every letter or phone call informing a tenant that they are in arrears and saying that this is a permitted payment because it is liquidated damages. We think that this argument is unlikely to work because paragraph 4 of Schedule 1 allows default payments only where there is now a relevant default. As we know, the wording has been tightened a great deal; it is now limited to replacement keys, a security device and interest on rent.

By the way, I am utterly convinced that there is no intention here to create a damages loophole that further exploits tenants. The Bill team and the Minister have

[Baroness Grender]
been working to ensure that the wording is tightened and that there is no loophole. With that in mind, we need an assurance from the Minister by Third Reading about how we will get from here to there, in order to ensure that there is no suggestion that damages can become the new loophole now that default has been tightened up. Our request is simple and straightforward: to have this clarified by Third Reading.

Lord Bourne of Aberystwyth: My Lords, it may be convenient for me to say that I regret any misunderstanding. I too thought that we had an agreement on this matter. Perhaps I may say two things. First, I propose to accept the amendment in the name of the noble Lord, Lord Kennedy. Secondly, I will be very happy to engage in discussions on this issue ahead of Third Reading. As the noble Baroness, Lady Grender, suggested, I am convinced that there is no reason for the noble Lord to be concerned—but I know that he is and so I will be happy to engage in discussion ahead of Third Reading. I hope that that is helpful.

Lord Kennedy of Southwark: I am absolutely delighted. I thank noble Lords for that. There was obviously some confusion, but I am sure that we can get this sorted out by Third Reading. I thank the Minister very much.

Amendment 50 agreed.

Amendment 51

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

51: Schedule 1, page 24, line 31, after second "a" insert "relevant"

Amendment 51 agreed.

Amendment 52 not moved.

Amendments 53 to 56

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

53: Schedule 1, page 24, line 33, after "paragraph" insert ""relevant"

54: Schedule 1, page 24, line 33, leave out from "means" to end of line 36 and insert "—

(a) the loss of a key to, or other security device giving access to, the housing to which the tenancy relates, or

(b) a failure to make a payment of rent in full before the end of the period of 14 days beginning with the date ("the due date") on which the payment is required to be made in accordance with the tenancy agreement."

55: Schedule 1, page 24, line 37, leave out "But if" and insert "If, in the case of a payment required to be made to a landlord or letting agent in respect of a relevant default within sub-paragraph (2)(a),"

56: Schedule 1, page 25, line 1, at end insert—

"(4) If, in the case of a payment required to be made to a landlord or a letting agent in respect of a relevant default within sub-paragraph (2)(b), the amount of the payment exceeds the amount determined in accordance with sub-paragraph (5), the amount of the excess is a prohibited payment.

(5) The amount referred to in sub-paragraph (4) is the aggregate of the amounts found by applying, in relation to each day after the due date for which the rent remains unpaid, an annual percentage rate of 3% above the Bank of England base rate to the amount of rent that remains unpaid at the end of that day.

(6) In sub-paragraph (5) "Bank of England base rate" means—

(a) the percentage rate announced from time to time by the Monetary Policy Committee of the Bank of England as the official dealing rate, being the rate at which the Bank is willing to enter into transactions for providing short term liquidity in the money markets, or

(b) where an order under section 19 of the Bank of England Act 1998 is in force, any equivalent percentage rate determined by the Treasury under that section.

(7) If—

(a) a landlord requires a relevant person to make a payment to the landlord in respect of a relevant default within sub-paragraph (2)(b), and

(b) a letting agent subsequently requires a payment to be made to the letting agent in respect of the same default,

the payment referred to in paragraph (b) is a prohibited payment.

(8) If—

(a) a letting agent requires a relevant person to make a payment to the letting agent in respect of a relevant default within sub-paragraph (2)(b), and

(b) a landlord subsequently requires a payment to be made to the landlord in respect of the same default,

the payment referred to in paragraph (b) is a prohibited payment."

Amendments 53 to 56 agreed.

Amendment 57

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

57: Schedule 1, page 25, line 1, at end insert—

"Payment of damages

_ A payment of damages for breach of a tenancy agreement or an agreement between a letting agent and a relevant person is a permitted payment."

Amendment 57, as amended, agreed.

Amendment 58 (to Amendment 57)

*Moved by **Lord Kennedy of Southwark***

58: Schedule 1, in the heading, leave out "Payment of damages"

Amendment 58 (to Amendment 57) agreed.

Amendment 59

*Moved by **Baroness Grender***

59: Schedule 1, page 25, line 13, at end insert—

"( ) If, in relation to a change of tenant in a shared tenancy, the current tenant or tenants find a suitable replacement tenant, then a payment under this paragraph in excess of £50 is a prohibited payment."

Baroness Grender: My Lords, there is an expression about having your cake and eating it, and this is my attempt to get a little extra icing on the top. It is a

modest amendment which would ensure a £50 cap when there is a change of tenancy and the sharers recruit the new tenant. I wrote to the Minister yesterday to explain my rationale for this. In Committee, we attempted to change a bit more with regard to this cap, which is a floor rather than a ceiling at the moment; we would like it to be a ceiling rather than a floor. But I have now pared it down to have one single purpose.

In a home of multiple occupation—HMO—where people are sharing, when one of the tenants drops out and a new person comes in, they will be charged a sum. Let me give you an example from Generation Rent:

"Each tenant swap included a massive fee for a new tenant of £250".

To us that may sound modest, but when young people are sharing and counting the pennies, it is a heck of a lot. The case study continues,

"hence making it difficult for us to find people to move in. We had to do everything, advertise and do 9 interviews".

Students were not accepted,

"as they did not fulfil agent's criteria to move in unless they have a UK based guarantor".

The fee of £250,

"did not even include a reference check of £90",

or £180 with a guarantor. The case study concludes the fees were,

"£430 in total for a new sharer".

The sharers do the vast majority of the work—people do not want to share with someone they know nothing about, without checking them out, and checking they can pay the rent—and then have to pay for the pleasure of it. This is a tiny, modest amendment, but it recognises that when people share a place and they do the donkey work, there should be a £50 cap on the charge for the change in sharer.

The Earl of Lytton: My Lords, the noble Baroness, Lady Grender, may be pleasantly surprised by the fact that I agree with the vast majority of what she says. She does not need to express too much surprise. However, she will need to define the term "suitable" further. To give her a clue, in commercial landlord and tenant agreements, there is very often an assignment, or something similar, and there is usually a formula of words about an incoming tenant or the assignee being of no lesser standing legally than the outgoing tenant. There will need to be some formula of words there.

The noble Baroness is absolutely right about this issue. I support her on the principle of this because I have children who have rented accommodation in London and I know exactly what goes on, so I can relate to it. But we need a formula that can be defined in law and determined in some way. It should be determined pretty promptly; it is no good if this goes into some sort of arbitration situation for weeks on end. These things need to be sorted out quickly in the interests of everybody.

That is the only reservation I have: the term "suitable" needs better clarification and definition. The question of suitability to whom and in whose eyes needs to be capable of some sort of resolution.

Lord Young of Cookham (Con): My Lords, the co-pilot is in charge of this last amendment, which relates to the charges that can be imposed for variation, assignment or novation of a tenancy. I am grateful to the noble Baroness, Lady Grender, for focusing the amendment, which we discussed in Committee, on capping fees on a narrower range of circumstances than originally proposed, namely where the outgoing tenant finds a replacement. I agree that this should reduce the costs for the landlord and therefore the amount he can charge, because, as the noble Baroness said, the tenant would have done all the donkey work.

However, we have previously agreed that it is not fair to ask landlords and agents to pay fees arising from the action or request of a tenant that varies the original contract they both signed. The Bill provides that a landlord or agent can charge a tenant for a change of sharer, but such fees are capped at £50 or reasonably incurred costs if higher. We do not want to impose a hard cap on the amount.

Landlords and agents should feel able to agree reasonable requests to vary a tenancy. While we do not expect this charge to exceed £50, it is only fair that where it does so landlords and agents can recover their reasonably incurred costs. Further, we do not want to create a situation—I am sure the noble Baroness does not either—where landlords are reluctant to agree to a change of sharer because they think that they will not be able to recover their reasonable costs. This would not help the tenants, who would be required to break their contract if they wanted to leave.

I understand and support the principle of the noble Baroness's amendment, but I do not think it is necessary. Landlords and agents will need to be able to demonstrate when challenged that their costs are reasonable—for example, if they have incurred a loss in rent from agreeing to a change of sharer. If, therefore, a tenant found a suitable replacement who took over the tenancy and the landlord or agent suffered no loss it would not be reasonable to charge for this and any amount charged in those circumstances would be prohibited by the Bill. A landlord or agent could not double-charge rent.

However, to focus specifically on the noble Baroness's amendment, there could be circumstances where, even though the tenant found a suitable replacement—I take the point from the noble Earl, Lord Lytton, that it is suitable for the tenant but not necessarily for the landlord—the costs incurred by the landlord or agent could exceed £50. This could occur, for example, if more significant referencing were needed with the replacement tenant or there were disagreements respecting the return of the tenancy deposit that required additional time and renegotiation. Although we envisage such a scenario to be rare, it would not be fair to penalise the agent or landlord in those circumstances. We also would not want the landlord to refuse the replacement tenant found on the basis that referencing and other pre-tenancy checks were likely to be more complicated.

The landlord or agent is not permitted to charge more than is reasonable, so would have to be able to evidence any such additional costs. Our guidance makes the position under the Bill and existing law clear to tenants, landlords and agents. With these assurances,

[Lord Young of Cookham]
although I understand the disappointment clearly etched on her face, I hope the noble Baroness feels able to withdraw her amendment against the assurances I have given.

Baroness Grender: I thank the Minister for his reassurances. I will stick there, since I have the noble Earl, Lord Lytton, backing something I have suggested. With all the amendments we now have in the Bill, which are extremely welcome, we need it to go through as quickly as possible. With that in mind, I beg leave to withdraw the amendment.

Amendment 59 withdrawn.

Amendment 60

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

60: Schedule 1, page 26, line 14, leave out "paragraph" and insert "Act"

Amendment 60 agreed.

Schedule 2: Treatment of holding deposit

Amendments 61 to 70

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

61: Schedule 2, page 27, line 7, leave out "before the deadline for agreement" and insert "relating to the housing"

62: Schedule 2, page 27, line 10, after "agreement" insert "relating to the housing"

63: Schedule 2, page 27, line 11, at end insert "relating to the housing"

64: Schedule 2, page 27, line 13, leave out "The" and insert "If paragraph 3 applies, the"

65: Schedule 2, page 27, line 17, at end insert—

"_(1) The person who received the holding deposit must repay it if—

(a) that person believes that any of paragraphs 7 to 11 applies in relation to the deposit, but

(b) that person does not give the person who paid the deposit a notice in writing within the relevant period explaining why the person who received it intends not to repay it.

(2) In sub-paragraph (1),"the relevant period" means—

(a) where the landlord decides not to enter into a tenancy agreement before the deadline for agreement, the period of 7 days beginning with the date on which the landlord decides not to do so;

(b) where the landlord and tenant fail to enter into a tenancy agreement before the deadline for agreement, the period of 7 days beginning with the deadline for agreement."

66: Schedule 2, page 27, line 44, leave out "incorrect" and insert "false"

67: Schedule 2, page 28, line 1, at beginning insert "Subject to paragraph 12,"

68: Schedule 2, page 28, line 4, at beginning insert "Subject to paragraph 12,"

69: Schedule 2, page 28, line 12, at beginning insert "Subject to paragraph 12,"

70: Schedule 2, page 28, line 19, at end insert—

"12_ Paragraph 9, 10 or 11 does not apply (so that paragraph 3(c) does apply) if, before the deadline for agreement—

(a) the landlord or a letting agent instructed by the landlord in relation to the proposed tenancy breaches section 1 or 2 by imposing a requirement under that section on the tenant or a person who is a relevant person in relation to the tenant, or

(b) the landlord or a letting agent instructed by the landlord in relation to the proposed tenancy behaves towards the tenant, or a person who is a relevant person in relation to the tenant, in such a way that it would be unreasonable to expect the tenant to enter into a tenancy agreement with the landlord."

Amendments 61 to 70 agreed.

In the Title

Amendment 71

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

71: In the Title, line 6, leave out from "agents" to end of line 6 and insert "; to make provision"

Amendment 71 agreed.

Online Pornography (Commercial Basis) Regulations 2018

Motion to Approve

5.29 pm

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

That the draft Regulations laid before the House on 10 October be approved.

Special attention drawn to the instrument by the Joint Committee on Statutory Instruments, 38th Report, 4th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B).

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde) (Con): My Lords, the Digital Economy Act 2017 introduced a requirement for commercial providers of online pornography to have robust age-verification controls in place to prevent children and young people under 18 accessing pornographic material. Section 14(2) of the Act states:

"The Secretary of State may make regulations specifying … circumstances in which material is or is not to be regarded as made available on a commercial basis".

In a sense, this is a small part of the legislative jigsaw needed to implement age verification: indeed, it is the last piece. I therefore beg to move that the draft regulations and the guidance published by the British Board of Film Classification, which is the designated regulator in respect of these measures, on age-verification arrangements and ancillary service providers be approved.

I bring to the attention of the House the concerns of the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee and

thank them for their work. I will address their concerns in a moment and the Motion to Regret later, but before considering the specific points related to this debate, I want to remind the House of why the Government introduced this requirement.

In the offline world, there are strict rules to prevent children accessing adult content. This is not true of the online world. A large amount of pornography is available on the internet in the UK, often for free, with little or no protection to ensure that those accessing it are old enough to do so. This is changing the way that young people understand healthy relationships, sex and consent. A 2016 report commissioned by the Children's Commissioner and the NSPCC makes that clear. More than half of the children sampled had been exposed to online pornography by the age of 15 and nearly half of boys thought pornography was "realistic". Just under half wished to emulate what they had seen. The introduction of a requirement for age-verification controls is a necessary step to tackle these issues and contributes towards our commitment to making the UK the safest place in the world to be online. I urge noble Lords, in the ensuing debate, to bear this primary objective in mind and help us ensure the commencement of age verification as soon as possible.

The draft Online Pornography (Commercial Basis) Regulations set out the basis on which pornographic material is to be regarded as made available on a commercial basis. The regulations cover material on websites and applications that charge for access and they also cover circumstances where a person makes pornographic material available on the internet for free but that person receives other payment or reward in connection with doing so, for example through advertising revenue. It was clear from debates during the passage of the Digital Economy Act that it was not Parliament's intention that social media sites on which pornography is only part of the overall content should be required to have age verification. That is reflected in the draft regulations we are debating today. We have set a threshold to ensure proportionality where material is made available free of charge. Thus there is an exemption for people making pornographic material available where it is less than one-third of the content on the website or application on which it is made available. This will ensure that websites that do not derive a significant proportion of their overall commercial benefit from pornography are not regarded as commercial pornographic websites. However, should such a website or app be marketed as making pornographic material available, a person making pornographic material available on that website or app will be considered to be making it available on a commercial basis, even if it constitutes less than one-third of the total.

This is a proportionate way of introducing a new policy. I am confident that these measures represent the most effective way of commencing this important new policy, but my department will, of course, keep it under review. Indeed, the Secretary of State must report on the regulatory framework within 12 to 18 months of commencement. In addition, the upcoming online harms White Paper will give us an opportunity to review the wider context of this policy.

We have also laid two pieces of BBFC guidance: the *Guidance on Age-verification Arrangements* and the *Guidance on Ancillary Service Providers*. The guidance on AV arrangements sets out the criteria by which the BBFC will assess that a person has met the requirements of Section 14 of the Digital Economy Act to ensure that pornographic material is not normally accessible by those under 18. The criteria mandate: an effective control mechanism at the point of access to verify that a user is aged 18 or over; strict requirements on age-verification data; a requirement to ensure that "revisits" do not allow automatic re-entry; and prevention of non-human operators exercising the age-verification regime. The BBFC also provided examples of non-compliant features to help interested companies. The latter guidance provided a non-exhaustive list of ancillary service providers that the BBFC will consider. This list is not exhaustive, to ensure that this policy remains flexible to future developments. The BBFC published draft versions of both pieces of guidance and ran a public consultation for four weeks on the content. The draft guidance laid before this House takes account of comments received from affected companies and others.

I turn to the views of the JCSI, to which I referred earlier. We have been clear that although it will be a major step forward, age verification is not a complete answer to preventing children viewing online pornography, and we know that we are doing something difficult. Indeed, we are the first country anywhere in the world to introduce such a measure. We have considered the JCSI concerns carefully. We do not believe that the variation in the language of the legislation, between "met" and "applied", will be difficult for a court to interpret. As for the committee's concerns about the content threshold, the committee anticipates difficulty with the application and interpretation of the regulation. As I have already said, the regulation will not apply in a case where it is reasonable for the age-verification regulator to assume—those words are important—that pornographic material makes up less than one-third of the content. As is stated in the BBFC guidance, the BBFC will seek to engage and work with a person who may be in contravention of the requirement before commencing enforcement action.

I am aware that the committee has also drawn the special attention of both Houses to these two draft pieces of guidance, because in its view they fail to contain the guidance required by Section 25(1) of the 2017 Act and contain material that should not have been included. Section 3, paragraph 5 of the *Guidance on Age-verification Arrangements* sets out the criteria on age-verification arrangements which the regulator will treat as complying with age verification. The guidance then goes on, in paragraph 6, to give examples of features which, in isolation, do not comply with the age-verification requirement. This approach ensures fairness. It takes a product-neutral approach and, rather than recommending a particular solution, sets out principles to encourage innovation. The ancillary services providers' guidance provides a non-exhaustive list of classes of providers which the age-verification regulator may consider as within scope in Section 3, paragraph 3. However, in order to ensure that this policy remains flexible for future developments, it is necessary that this is a non-exhaustive list. Where new

[Lord Ashton of Hyde]
classes of ancillary services appear in the future, the BBFC's guidance explains the process by which these services will be informed.

The guidance includes additional material, as this is a new policy, and the regulator considered that it was important for stakeholders that its guidance set out the wider context in which the age-verification regulator will carry out regulation. This includes valuable guidance on matters such as the BBFC's approach and powers, and material on data protection. We find it somewhat perverse that it should be prevented from including helpful guidance simply because it was not specifically mentioned in the Act.

We are also aware of the Secondary Legislation Scrutiny Committee's special interest report. That committee raised some similar concerns to the JCSI; for example, on the content threshold and the requirements in the BBFC's guidance. The responses to the concerns of the SLSC on these points are the same as the responses we have just given to the JSCI reports.

However, the SLSC also suggested that the House might want to ask what action the Government would take to tackle pornographic material available that does not fall within the criteria set out in the regulations. I appreciate that some pornography is available by means not covered by our regulations. This was the subject of extensive discussion during the passage of the Act. In particular, concern has been expressed about social media platforms. We expect those platforms to enforce their own terms and conditions and to protect children from harmful content. Indeed, the Government have been clear that online platforms must do more to protect users from such harmful content. We will set out our plans for new legislation to ensure that companies make their platforms safer, in the forthcoming online harms White Paper.

I recognise that age verification is not a complete answer but I am proud that this Government are leading the way internationally in our actions to protect children online. I beg to move.

The Lord Bishop of Chester: My Lords, I am pleased to speak in general support of the regulations and guidance. They relate to matters which I and others raised during the passage of the Digital Economy Bill in 2017 and, more broadly, to issues debated by the House a couple of years ago in a balloted debate that I introduced. The subject of that debate was the impact of pornography on our society. While there was some disagreement over the impact of pornography on adults, there was virtual unanimity that children needed to be protected from pornography—as far as this could reasonably be achieved. I seem somehow, by default, to have become the episcopal expert on pornography. I am trying to live that down. It is just the way it has fallen—although I often find myself talking from these Benches about things I have not had much experience of.

The regulations deal with protecting children through the introduction of robust age-verification procedures for accessing at least some pornographic sites. I welcome them but I note that there remains good evidence for believing that adult access to pornography is also often harmful. The recent report on sexual harassment by the Women and Equalities Select Committee in the other place made this point in a new context, particularly in relation to violent pornography. My welcome of the regulations and guidance is also tempered by some questions which they pose, and which I would like to put to the Minister.

My main concern relates to access to pornography on websites that do not charge for access. Provided their pornographic content is limited to one-third of their total content, they are exempted from the regulations. They may not charge but they may make money from advertising and other sources. What is the rationale for choosing one-third and not, say, 10%? Parents really do not want their children to stumble across online pornography and arguably children are more likely to do that if it is a website that does not charge in the first place. Why is it one-third? I realise that enforcement against every site would be a challenge, but surely the obligation to use access by age verification should be on all sites which promote pornography. What we need is a culture change in relation to child protection and not a partial, piecemeal and limited approach, which I fear these regulations, in some respects, provide.

5.45 pm

In this spirit, I also point out that, as the Minister said, social media platforms such as Twitter are not within the scope of the regulations. I am not a tweeting Bishop. It is not something that I engage with much so I speak in some ignorance of just how Twitter works on the grand scale, but I note that just a month ago, a Member of your Lordships' House, the noble Baroness, Lady Kidron, stated that 500,000 pornographic images were posted daily—yes, daily—on Twitter; that was on 12 November at col. 1766. Now, 500,000 is a round figure. I do not know what the figure is but clearly if it is anything like that, there is a whole world there of the promotion of pornography which these regulations do not catch. I believe we will need to return to the role played by social media platforms in conveying pornography. They may be difficult to regulate. It is a difficult and complex area, as the Minister said, but that is not an excuse for not trying our best. I believe there is more that we will need to do.

I welcome the regulations and the guidance, as far as they go, but I am sure there are related issues to which we will need to return in due course.

Baroness Howe of Idlicote (CB): My Lords, I know that the Minister has carefully considered the definition of "commercial pornography", and I am grateful that he has engaged with my comments on previous drafts of the regulations and that we have met in person to discuss these. Further to those conversations, I am happy to say that I support the regulations and the guidance, and certainly encourage other noble Lords to do the same, although I have a number of concerns I would like to highlight.

First, I note that it has taken more than 18 months since Third Reading to get to the point where this House and the other place are considering the regulations to determine what is deemed commercial pornography

and the regulator's guidance on age verification. I hope the Minister can assure us that the full implementation of age verification for pornographic websites is now very close. Indeed, it would be even better if he could tell the House when he expects it to be operational.

Secondly, I note that in its report on the Bill, Sub-Committee B of the Secondary Legislation Scrutiny Committee said that the measures available to the BBFC, as the age-verification regulator, should be applied "fairly and transparently". I certainly hope that they will be. To this end, I ask the Minister to place a letter in the Library nine months after age verification goes live, with an update on the number of websites with AV in place and how many enforcement actions have taken place. I hope that that will be possible.

Thirdly, I cannot address the regulations and guidance that will help give effect to Part 3 of the Digital Economy Act without reflecting on the fact that, thanks to amendments introduced by your Lordships' House, Part 3 will no longer address some very serious problems as effectively as it would have done. When Part 3, as amended, is implemented, there will be nothing in it to prevent non-photographic and animated child sex abuse images, which are illegal to possess under Section 62 of the Coroners and Justice Act 2009, being accessed behind age verification. This is a serious problem. In 2017, 3,471 reports of alleged non-photographic images of child sexual abuse were made to the Internet Watch Foundation, but since none of these images was hosted in the UK, it was unable to act.

Of course I appreciate that technically the amendments to the Digital Economy Bill, which removed from the regulator the power to take action against such material when it is behind age verification, did not have the effect of legalising possession of this material. The 2009 Act remains in place. However, as virtually all this material is beamed into the UK from other jurisdictions, the arrival of the Digital Economy Bill in your Lordships' House meant that for the first time we had a credible means of enforcing that law online. There is no need for a regulator to be in the same jurisdiction as a website that it determines to block.

As I said at the time, greeting the first really credible means of enforcing that law online by removing the relevant enforcement mechanism from key parts of the Bill inevitably called into question our commitment to the law. I appreciate that there is arguably a mechanism for trying to enforce the law: the National Crime Agency can work with overseas agencies if websites with this material are identified. However, the mechanism is slow and expensive, and it remains unclear how it can have any effect if the domestic laws of the countries in question permit non-photographic child sex abuse images. To this extent, it was no surprise to me that in response to a Written Parliamentary Question in September 2018, the Government were unable to say whether the NCA had taken action against any websites, or whether any sites had been removed by overseas jurisdictions. ComRes polling published in the summer shows that 71% of MPs think that the regulator should be empowered to block these sites. Only 5% disagree.

The other loophole, of course, relates to all but the most extreme forms of violent pornography. Given that under the Video Recordings Act 1984 it is not legal to supply this material, it was entirely proper that the Digital Economy Bill, as it entered your Lordships' House, did not accommodate such material. However, amendments were introduced in this House to allow it behind age verification. As I observed at the time, this sent out the message loud and clear that violence against women—unless it is "grotesque", to quote the Minister on Report, at col. 1093—is, in some senses, acceptable.

My concerns about the impact of such material remain and have been mirrored by those of the Women and Equalities Select Committee in its report, which I referred to earlier. Of great importance, it states:

> "There is significant research suggesting that there is a relationship between the consumption of pornography and sexist attitudes and sexually aggressive behaviour, including violence. The Government's approach to pornography is not consistent: it restricts adults' access to offline pornography to licensed premises and is introducing age-verification of commercial pornography online to prevent children's exposure to it, but it has no plans to address adult men's use of mainstream online pornography".

I appreciate that we cannot deal with these problems today. The Government must, however, urgently prioritise how to address them. They could deal with the matter very quickly if they were to make time for my very short two-clause Digital Economy Act amendment Bill, which addresses the matter in full. With these caveats, I warmly welcome the regulations and the guidance.

Baroness Benjamin (LD): My Lords, I welcome the Government's decision finally to lay this guidance and the regulations for the House's approval. It has not come a moment too soon. As the Minister knows, I have been concerned for some time that we should progress implementation of Part 3 of the Digital Economy Act and stop dragging our feet while harm is being done to our children. Almost every week, I hear of cases of children as young as four experiencing the traumatic horror of accidentally discovering pornographic material online. This can be devastating for young minds, causing them anxiety and depression.

This is ground-breaking child protection legislation and we should be proud, because it will be the first of its kind in the world. The UK is leading the way in online safety and setting an example for other countries that are looking to introduce similar controls. We can demonstrate that it is possible to regulate the internet to ensure that children can be protected from online pornographic material that we would never let them near in the offline world.

There is an abundance of evidence showing how harmful this material can be and, significantly, that children often do not seek it out but stumble across it. Research by the NSPCC found that children are as likely to stumble across pornography by accident as to search for it deliberately. Also significantly, the NSPCC reports that children themselves support age verification. Eighty per cent of young people felt that age verification is needed for sites that contain adult content.

The age-verification regulator, the British Board of Film Classification, has been working on implementing the legislation for a number of months and has kept

[Baroness Benjamin]
me briefed on its progress. I am confident that it will successfully deliver age verification in the UK to prevent children stumbling across and accessing pornography. Its guidance sets out principle-based standards which will encourage even more innovation and allow for new means of age-verifying consumers in the future. This is important because if this regime is to work, age verification needs to be robust and privacy must be protected.

My concern, as always, is with child protection, but I recognise the need to ensure that this regime is seamless enough to prevent commercial incentives to avoid compliance. For this reason, I am pleased that the BBFC has said in the annex to the guidance that it intends to introduce a voluntary scheme to bring in a higher privacy standard than the GDPR—which is already of a high standard.

I would like the Minister to reassure us that this scheme will be in place shortly and that the Government will fully support it. It is most important that, as the age-verification regulator, the BBFC will have a range of enforcement powers, including requesting ancillary service providers and payment service providers to withdraw their services to non-compliant websites, and instructing internet service providers to block them. These powers should be highly effective in achieving the legislation's objectives and should be used as swiftly as possible to encourage compliance. I ask the Minister: how will the Government encourage ancillary service providers, who can only be "requested" to take action, to co-operate fully with the BBFC? I have been told by the BBFC that PayPal, Visa and MasterCard have already indicated that they will withdraw services where there is non-compliance. I also welcome the support that I understand will be given by the ISPs and mobile network operators. Their role will be crucial.

6 pm

While I welcome the regulations and guidance before us today, I want to put on record my great sadness that when Part 3 is implemented under their direction, this will not block non-photographic child sex abuse images, which it is illegal to possess. The vast majority of non-photographic child sex abuse images accessed within the UK, which can be computer generated and incredibly lifelike, are beamed into Britain from websites in other jurisdictions beyond the easy reach of UK law, or indeed the Internet Watch Foundation. Instead of seizing what was an effective enforcement mechanism for our non-photographic child sex images legislation, sadly, amendments were put forward to prevent the regulator using the one enforcement tool which could work in addressing this problem: IP blocking. Rather than waiting for the review of the terms of Part 3 in a year or 18 months' time, I urge the Government to take action now by giving time to support the very short Digital Economy Act amendment Bill of the noble Baroness, Lady Howe. It has only one or two clauses—we might discount the clause dealing with extent—and could address this issue.

I am also disappointed that the regulations before us do not cover all online pornography, for example on social media and through search engines. There is plenty to be seen out there. I understand that the BBFC is set to report back to Government 12 months from these regulations entering into force, and annually thereafter. I believe it may recommend alternative or additional means of achieving the legislation's child protection objectives. I look forward to seeing what recommendations it makes to protect children further online and to help make the UK the safest place for children to be online. I can assure your Lordships that I will be monitoring its progress closely.

I would welcome an assurance from the Minister that the Government will take a flexible and proactive approach if changes need to be made to reflect changes in technology or behaviour. This is such an important child protection measure that we must all give it the support it deserves. Children should not be able to access pornographic material. While this law might not stop all access, it will act as a speed bump to save a child's mind from being blighted for life. I often visit Rye Hill prison near Rugby, which houses only sex offenders—over 680 of them. Many of them say to me that they wish they had not been exposed to pornography at an early age, and would do anything to prevent children today being able to do the same and thereby becoming addicted to porn.

This has been like running a marathon but we are nearing the finish line and taking huge strides in the right direction, as this sets a fundamentally important precedent in online regulation. As I always say, childhood lasts a lifetime, so let us give children happy memories as they go forward.

Lord Morrow (DUP): My Lords, I first apologise to the House that I missed the first two minutes of the Minister's contribution. I would like to make some comments. Some have already been said and I hope that by repeating them, it will not lessen their impact. I am pleased to join other noble Lords in supporting the Government on bringing these regulations and the guidance before the House to implement age verification. However, I have some questions about implementation.

First, I note that the regulations apply to all pornographic websites that charge a fee or, if access is free, where there is benefit in some other way from pornographic content, perhaps through advertising. In cases of the latter, at least one-third of the site's content must be pornographic for it to be required to provide AV, unless the website specifically markets itself as providing pornographic content, in which case AV requirements apply regardless of how much pornographic material is made available. This arrangement has caused Sub-Committee B of the House of Lords Secondary Legislation Scrutiny Committee to ask two key questions, which I put to the Minister today. First, how will the BBFC measure pornographic content on a free website so that it can come to a determination that one-third of the content is pornographic? Secondly, how will we protect children from pornography on free websites where less than a third of the content on the site is pornographic?

It seems to me that, in introducing this legislation, the Government have very properly recognised that it is not appropriate for children to stumble upon online pornography; they should be protected from this material

through age verification. Having conceded this point, however, what justification can there be not to protect children from accidentally stumbling across pornography on a free site where 30% of the content is pornographic? Is there not a sense in which children are more likely to stumble accidentally on pornographic content located on websites with other content than on a site that is completely focused on providing pornography?

Turning to the guidance document, I note that page 9 suggests that age verification may not need to be conducted every time someone visits a website. Does this mean that if a child uses a computer that has previously been age verified by a parent, they will automatically be able to access adult sites without any further checks to establish that the computer is being used by an adult? What protections will be applied to prevent this happening? Moving on to page 7 of the guidance, I note that a website found to be in breach of the age-verification requirements will be given a "prompt timeframe for compliance". However, what does "prompt" mean in practice? Will a website be required to rectify the deficiency within a day, a week or a month, or maybe longer? I hope the Minister will be able to make that clearer.

One of the enforcement mechanisms that has caused some questions is the ability to issue fines. At Second Reading of the Digital Economy Bill, almost two years ago to the day, I raised some practical questions about how fines would work in practice, as many of the sites are based overseas. I remind your Lordships that, when that Bill was in Committee in the other place, the Government said that it was possible in some circumstances to fine sites in other jurisdictions. They said:

> "We want to be able to fine non-UK residents—difficult as that is—and there are international mechanisms for doing so. They do not necessarily reach every country in the world, but they reach a large number of countries. For instance, Visa and other payment providers are already engaged in making sure that we will be able to follow this illegal activity across borders".—[*Official Repor*t, Commons, Digital Economy Bill Committee, 20/10/16; col. 217.]

I tabled some probing amendments in Committee here on 2 February 2017 about the use of fines, which I was then concerned would have "limited utility". I can conclude only that the Government have come to the same view, as they are not proposing to bring those parts of the Act into effect. However, given that at the time of the Bill the Government were adamant that the ability to fine was needed, I hope there will be an analysis of the effectiveness of the other enforcement mechanisms going forward and that, if there is a gap that could be met by fines, the Government will bring the fining provisions into effect and designate a regulator to collect the fines—something the BBFC is not designated to do.

Finally, I echo what other noble Lords have said about non-photographic child sex abuse images, which it is illegal to possess under the Coroners and Justice Act 2009, and all but the most violent pornography, which it is illegal to supply under the Video Recordings Act. As I said at the time, I believe that a terrible mistake was made in moving amendments to prevent the regulator blocking this illegal content. I am pleased that Section 29 of the Act requires a review of the Part 3 definitions 12 to 18 months after the implementation of that part, which could make good this shortfall. This delay, however, is too long. I call on the Government to address this shortfall in the new year by making time for the Digital Economy Act amendment Bill proposed by the noble Baroness, Lady Howe. It is a very short Bill, the substance of which is all in a single clause. Crucially, however, that clause addresses all the presenting issues. I very much hope that the Government will seize this opportunity.

Lord Paddick (LD): My Lords, I have some concerns about the regulations before us, although I have to say that the Government are trying to do something that is very difficult, if not impossible, which is to regulate the internet. I am perhaps not as enthusiastic as my noble friend Lady Benjamin on this.

These regulations do not adequately protect children from pornography or, to use the Minister's words in his introduction, they are not the complete answer. No system of age verification can do that as, as other noble Lords have said, pornography is available on sites other than commercial pornography sites and the potential controlling measures could not in reality be used for those other sites. Asking UK internet service providers to block Tumblr and Twitter is not a runner in the real world, and these are free-to-use services, so asking financial institutions not to take payments for non-compliant sites would not work either.

In fact, using a virtual private network to appear to be in a country that does not have age verification is a free and easy way to get around any age-verification process. As the noble Lord and my noble friend said, we are the first country to try this and therefore there are plenty of countries that one can pretend to be in in order to get round the system.

Age verification without statutory guidelines to protect the privacy of adults seeking to access legal pornographic material on the internet is a significant threat to people's privacy but, having said that, the arrangements that the British Board of Film Classification has made around a voluntary code, where certification is given to companies providing age verification to give people some confidence that their privacy will be protected, is a second-best but welcome measure.

These measures, in addition to creating the risks to privacy and failing to thwart curious and determined young people, are of use in preventing children accidentally stumbling across pornography, as my noble friend Lady Benjamin said, but only on commercial porn websites. Does the Minister feel that this could as easily be achieved by making it mandatory for websites that contain pornography, whether one-third or more of the website, to have "Adult only" warnings before the browser of the internet can access pornographic images as opposed to an age-verification system?

The other use of these regulations is an attempt to restrict access to extreme pornography, which is a bit like Brexit—it is not enough for some and goes too far for others, as the noble Baroness, Lady Howe of Idlicote, indicated. I am not sure that, as some have suggested, age verification limits access to educational LGBT+ resources; I am not sure that commercial porn sites contain such beneficial information. As I

[Lord Paddick]
have said before and will say again, what is really needed is compulsory, age-appropriate, inclusive sex and relationship education for all children, including telling even very young children what they should do if they encounter online pornography—that is, to turn off the computer immediately and inform a parent or guardian—as that is unfortunately something that will inevitably happen despite these regulations.

My overall message is that we should not delude ourselves that these measures are going to be wholly effective in preventing children viewing online pornography or that they will adequately protect the privacy of adults seeking to access legal material on commercial porn websites and that as a result we should be careful that we do not lull ourselves into a false sense of security just by passing these measures.

6.15 pm

The Earl of Erroll (CB): My Lords, I want to say a few words before the summing up. We need to remind ourselves that the purpose of these regulations is to protect children, including those coming up to adulthood. We are trying to prevent them thinking that some fairly unsavoury habits that are not medically good for them are normal. That is the challenge. These websites have teaser adverts to try to get people drawn into pornography sites to buy harder-core or more detailed pornography. We are not trying to do anything about people who are willing to enter into a payment arrangement with the site but to make sure that children are stopped at the front end and are prevented from seeing the stuff that will give them the wrong impression about how you chat to a girl or a girl chats to a boy and how you behave with members of the same sex or the opposite sex in a sexual relationship. We need to be quite quick on this sort of stuff because if we are going to try to stop this being widespread we need to block it.

There is an awful lot of guff in this. It has taken a long time for these regulations to get here—we really expected them about a year ago. I do not know what DCMS has been doing during this time. I know it had some draft guidelines a long time ago, but perhaps they were so young that they were uneducated too and tried to learn about these things—I do not know.

The point about the adverts is they sit there in front. We are probably going to have buttons on the front of the website stating that people have to verify their age. That will take people off, probably to third-party sites which know them and anonymously verify that they are over 18 and that is when they can get into the website. However, the website is going to want to put something up for that first encounter. I wonder whether this is not an opportunity to think positively and perhaps put up something about understanding the beginning of a relationship and how you can get excited and go forward without going to the harder aspects which involve penetrative sex et cetera. There may be an opportunity there. That is a bit of a red herring because we are talking about the regulations, but it may be a positive thought for the future.

The thing that worries me particularly is paragraph 2.5 of the BBFC guidance which refers to sites that are,

"mostly frequently visited, particularly by children",

and are,

"most likely to be sought out by children".

Social media may not be marketed as carrying or giving access to pornography, but it does so on a huge scale. This one-third rule is very odd because it is easily abused. There are about 39 million UK users of Facebook, so do we say that if 12 million are putting up pornography that is okay because it is under the one-third threshold? Earnings would be very hard to measure, given Facebook's turnover, so how are we going to do the one-third? It is very odd. The purpose of this is to protect children, so I do not think we should be having very high thresholds to let people get away with it.

There are two things that really worry me. Paragraphs 2.6, 2.7 and 2.8 of the guidance are on enforcement. It is going to be very slow. By the time the BBFC has sent out a warning and it is received, given another notification, published this, waited for the website to write back, et cetera, how long will it take? Websites that want to get round it will game the system. If they start doing that, the big websites—they are on side with this and want to help because they have got teenage children and are not paedophiles but are trying to sell adult pornography to adults and therefore want to help, believe it or not—will lose too much business; they will have to go with the flow and play the same game, in which case the whole thing will get wrecked.

If the Internet Watch Foundation, without a true legal basis, can get sites blocked immediately, why cannot we, with proper law? Everyone has had warnings about it. The whole of the industry around the world has apparently been talking about it for the past year. The BBFC has spoken at such events. Everyone knows, so I cannot understand why we cannot act more quickly and go live from day one. If anyone does not comply, that is bad luck. We could set up some pre-notification stating: "If you do not comply by tomorrow, you have had it".

The other matter is the certification scheme, which is voluntary. A big hole is that because this is under a DCMS Bill, it could not touch privacy and data security. That is an ICO responsibility. The security of people's data is regulated elsewhere, and the ICO has only recently started to show an interest in this, because it is overloaded with other things. There is now a memorandum of understanding between the BBFC and the ICO, which is very good. They could be brought together in a certification scheme. The BBFC cannot enforce data security and privacy, because that is an ICO responsibility, but a certification scheme could state that a site cannot be certified unless it complies with all the legal standards—both the Data Protection Act 2018, which the ICO is looking at, and the BBFC rules on age verification for websites and providers. That could be good.

If your Lordships want to know how to do it, I fear I shall give a plug for the British standard for which I chaired the steering group, BS 1296; it includes a whole section on how to do the GDPR stuff, as it was

then called. We could not mandate it in the British standard because other standards mandate it, but that tells you how to do it.

The certification needs to be clear, otherwise there will be a whole lot of wishy-washy stuff. I am not sure that a voluntary scheme is a good idea, because the BBFC will have a lot of hard work trying to check sites that decide not to comply, so it will have to certify them by another method. That will be difficult.

However, at the end of the day, there is a lot of willingness between all the parties to try to get this to work. The world is watching us—quite a few other countries are waiting to see whether this will work here. That will help enormously. We should try to get a lot of cross-stakeholder information and co-operation, a round table of all interested parties from child protection all the way through to those running the adult sites. Perhaps some good could come out of that. Certainly, everyone wants to help the BBFC and DCMS, the parent body. Everyone wants to help the ICO. We would like to get this to work: there is a lot of good will out there if only we could get moving to make it work properly.

Lord Clement-Jones (LD): My Lords, we on these Benches want the regulations and draft guidance to come into effect. The child protection provisions are a significant element of the Digital Economy Act which, although not entirely in line with what we argued for during its passage, we supported in principle at the time and still do, while realising, as my noble friend Lord Paddick said, that they are not the conclusive answer to children's access to pornography. As he also said, a number of areas need to be addressed in the course of today's debate.

For a start, as several noble Lords said, it seems extraordinary that we are discussing these sets of guidance nearly two years after the Digital Economy Act was passed and nearly a year after the Government published their guidance to the regulator, the BBFC. What was the reason for the delay?

Next, there is the question of material that falls within the definition of being provided on a commercial basis under the Online Pornography (Commercial Basis) Regulations, the subject of today's debate. Several noble Lords mentioned this. As drafted, they do not currently include social media or search engines and on these Benches, we regret that the Government have decided to carve out social media from the definition. This is a potentially significant loophole in the regime. It is important that it is monitored and addressed if it damages effectiveness. It is in particular a major concern that social media and search engines do not have any measures in place to ensure that children are protected from seeing pornographic images.

The Secretary of State's guidance to the AV regulator asks the BBFC to report 12 to 18 months after the entry into force of the legislation, including commenting on the impact and effectiveness of the current framework and changes in technology which may require alternative or additional means of achieving the objectives of the legislation. In addition, under Section 29 of the Digital Economy Act, 12 to 18 months after the entry into force of the scheme, the Secretary of State must produce a report on the impact and effectiveness of the regulatory framework.

This is therefore a clear opportunity to look again at social media. The Government have made some reference to legislating on social media, but it is not clear whether they intend to re-examine whether the definition of commercial pornography needs to be broadened. Can the Minister assure the House that this will be dealt with in the internet safety White Paper, that the Secretary of State's report will cover the level of co-operation by services such as social media and search engines, which are not obliged to take enforcement action on notification, and that, in doing so, it will firmly tackle the question of access by children to pornography via social media?

Next is the question of resources for the age-verification regulator. This is a completely new regime, and with fast-changing technology, it is vital that the BBFC, as the AV regulator, has the necessary financial resources and stable grant funding to meet the important child protection goals. Can the Minister assure us that the Government will keep resources available to the BBFC in its AV regulator role under review and undertake explicitly in the Secretary of State's annual report to deal with the question of resources enabling the BBFC to carry out its work?

Next is the question of the BBFC having chosen to adopt a voluntary scheme. On these Benches, we welcome the voluntary scheme for age-verification providers referenced in annexe 5 to the draft *Guidance on Age-verification Arrangements*. In fact, it bears a striking resemblance to the scheme that we proposed when the Act was passing through Parliament, which would have ensured that a scheme involving third-party companies providing identity services to protect individual privacy and data security would be engaged. As I recall, the noble Earl, Lord Erroll, helped greatly in convening providers of digital identity schemes to show what was possible. I think he is still ahead of us today.

Our key objections were that what was originally proposed did not sufficiently protect personal privacy. The BBFC is to be congratulated on establishing the certification scheme. As I understand it, it already expects all the major providers to undertake the certification process. Furthermore, because the scheme is voluntary, these assessments will be for foreign-based as well as UK providers, which is a major achievement and could not be accomplished with a UK statutory scheme.

The key to the success of the voluntary scheme, however, is public awareness. I hope that the Minister can tell us what DCMS is doing to support the promotion of the BBFC's kitemark in the three months before the scheme comes into effect.

Next, there are the JCSI criticisms set out in its report on 28 November. This House rightly always takes the criticisms of the JCSI seriously, and the Minister set out a careful response to them. I do not always pray a government memorandum in aid, but the BBFC was following the Secretary of State's guidance to the AV regulator. Under the terms of Section 27 of the Digital Economy Act, as a result of amendments

[Lord Clement-Jones]
in the Lords during its passage, the BBFC was charged with having regard to the Secretary of State's guidance. The JCSI suggests that the BBFC could have chosen to ignore "incorrect" Secretary of State guidance, but that would have put it in an impossible position.

I shall not adumbrate all the different areas, but the inclusion of what was necessary in compliance with Section 27, the advice on best practice, the annexe setting out the voluntary scheme and the role of the ICO all seem to be helpful as part of the guidance and proportionate in terms of what the AV regulator prioritises.

There are a number of other aspects of these sets of guidance worthy of mention too. As we have heard, this age-verification framework is the first of its kind in the world, and there is international interest in it. Are the Government discussing with the BBFC what lessons there are in terms of encouraging robust AV for younger age groups and for other types of potentially harmful content? Will the Government use the expertise developed by the BBFC as the age-verification regulator in the internet safety White Paper?

6.30 pm

Finally, although we have not had the benefit of the arguments of the noble Lord, Lord Stevenson, because of the way in which procedures today have operated, I come to the criticisms made by the noble Lord on the failure to bring Section 20 into effect. I agree in principle that it would be desirable to have the full set of powers envisaged by the Digital Economy Act, but it seems that the BBFC is very confident of its current enforcement powers, particularly in relation to ensuring that payment service providers cut off services under Section 21 for those who are non-compliant, as my noble friend Lady Benjamin mentioned, and of course, the last resort—the powers requiring ISPs to block access to material under Section 23 of the Digital Economy Act. Either of these will have major consequences for non-compliant providers of pornographic material.

I very much look forward to hearing the Minister's response. Of course, this guidance and these regulations are not the be-all and end-all and not the total solution, but I very much hope that they will form part of the solution.

Lord Stevenson of Balmacara (Lab): My Lords, this has been a very good debate, and I thank the Minister for his introduction, which allows us to range quite widely over the issues in play. I would observe—and I would not have it any other way—that over the last couple of years, the noble Lord, Lord Ashton, and I, and, indeed, one or two noble Lords who have spoken today, have spent a great deal of time together discussing and debating legislation and regulations which might apply to all pornography, and specifically in relation to protecting children. Some people bond over a coffee, football, the arts or shared hobbies; we do it with porn. In that sense I am with the right reverend Prelate who felt that he had to live it down in some way. I share his pain.

We have covered a lot of ground in this area and, although on the surface it is quite a narrow issue, getting the balance right between personal liberty and necessary regulation is never easy, and it is particularly hard to do given the technological changes that we are witnessing—in particular, the way in which information is now flowing through the internet.

I have been reading back some of the debates we had on the Digital Economy Act, as have others, and at some of the original regulations that we have already looked at which appointed the BBFC as the AV regulator. I want to make it clear that we do not want to hold up these statutory instruments—as noble Lords have already mentioned, they are already quite delayed. I have come to a provisional conclusion that what we have before us will not achieve what the Government intend, and may actually have unintended consequences and run the risk of stalling other, better alternatives, which I think we may have to consider in due course. Others have said this before, but it is worth repeating: these regulations are not future-proof; they are not comprehensive; they do not catch social media; they do not deal with overseas providers; they will not deal with non-photographic images and other more elaborate ways in which pornography is now being purveyed; and they do not bind together the companies involved to try to find a solution.

I will go through the regulations and make comments which are very similar to those that are already there and I will speak a bit to my own regret Motion. I will come back at the end of my remarks to where I think we need to go if we are going to take this issue further.

The general point on which I wish to start, before going on to the points raised by the scrutiny committees, is the argument I made before that a lot of the difficulty we have today with these regulations stems from the fact that we are trying to give statutory powers to a body that is essentially a private company. This is compounded—this comes up in the committee reports —by the fact that Parliament is not used to seeing regulations over which it has no direct authority, because they will be implemented through an arrangement between the department and a private body: the BBFC. In a sense, we are reading largely independent guidelines, fulfilling a mandate agreed within legislation but not subject to the specific scrutiny of this House, or indeed of the other place.

The BBFC is not a statutory body. It has no royal charter, so it cannot be assumed that it will act in the public good. It has a reasonable record, and it has statutory responsibility for videos and DVDs—but its work, for example in classifying films shown in the cinema, is done without any statutory authority. Will this issue be picked up in either the White Paper or the review which the Minister mentioned in his introduction?

My second point relates to the first in the sense that we have still not bottomed out the question of appeals that might arise as a result of the decisions being taken by the BBFC. We tried in the Digital Economy Bill to exert considerable pressure on the Government to get a separate regulator appointed as an appeals body. Indeed, we suggested that Ofcom would have been appropriate. Now we have a situation where the BBFC is the organisation of preliminary determinations and the body of first instance, but it is also the body for appeals. In principle, I do not think it is right that any body, statutory or otherwise, should be both judge

and jury in its own cases. I look forward to hearing the Minister's response. Can this be reviewed as part of the process?

Thirdly, we are skating round the question of what exactly is obscene material. Why do we have two existing definitions—one that is repeated in full in the documents before us but also one that derives from the definition of extreme pornography which is in another Bill? We had a good discussion about this during the DEA. The noble Baroness, Lady Howe, mentioned some of the ideas that were considered and turned down at that time, but it was also raised in the Data Protection Bill—so it will not go away. I think that in the review that is coming, it is really important that we nail what exactly we are trying to say. Either it has to be done in terms of perception or in terms of physical activities. I do not think that it can be both.

Turning to the instruments themselves, on the electronic communications one, which was referenced by Sub-Committee B of the Secondary Legislation Scrutiny Committee and the Joint Committee, the issue seemed to be, as has already been said, the rather odd definition of a "commercial basis". We are looking for assurances from the Minister in relation to how that will apply, particularly in relation to children who come across internet sources which do not fall within the criteria specified. The second point, which has also been picked up, is the question of one-third of the overall content, which is a very odd way of trying to approach what I think is a sensible idea—that there should be some de minimis limit on what is considered a commercial provider of pornography, but measuring it in the way that has been suggested. Even with the comments made by the department to the committee, the Government have not taken that trick. I look forward to the Minister's comments in the hope that he will deal with some of the examples given by the Joint Committee, which seem to raise issues.

On the AV guidance contained within the statutory instrument on that matter, again there are suggestions from both committees. The first point is the rather nuanced one made by the Secondary Legislation Scrutiny Committee that, as the BBFC has not provided an exhaustive list of approved age-verification solutions, the Minister himself should explain more fully the types of arrangement which were deemed adequate. He may find that that is better done by correspondence.

The question raised by several speakers of why the Government have not brought forward the power under Section 19 to impose financial penalties is the focus of my regret Motion, and I shall deal with that now. Both Sub-Committee B and the Joint Committee found this a very strange decision, and others have mentioned it as well. I hope that the Minister will be able to respond in full. The argument is very straightforward. Since we have doubts about the whole process and the concerns that exist are about the lack of effective solutions to protect children, one would have thought that the only way in which we can make progress on this is to ensure that the regulator has the effective firepower to get compliance if required to do so. It is interesting that in the documentation, and in the other regulation before us, search engines are fingered. Providers of IT services and providers of advertising can be hit. It is clear from the parallel situation in the gambling world that the support of the payment providers has been absolutely crucial in stamping out illegal practices there. Why have the Government not taken these powers?

On the same issue, but approaching it from the other end, I had problems with the guidance about a non-compulsory, additional, voluntary, non-statutory assessment and certification of age-verification solutions package, which is shown in annexe 5 of the documents before us. I gather that it will be an external agency, probably one of the large auditing firms. I found this very difficult to understand, and would be grateful if the Minister could explain what exactly is going on here. How is it that the ICO, an independent statutory body, is down as having developed this solution in consultation with the BBFC? If that is the case, it seems that its independence has been compromised and I do not see how that can work. In any event, adding another non-mandatory voluntary system seems to be just another way of complicating an already difficult area, as well as raising considerable issues of privacy along the lines raised by the noble Lord, Lord Paddick. Is this a wise step to take at the very start of a new venture? The whole question in relation to making a success of this seems to be in doubt. Will the Minister comment?

Finally, during the debate we held on the first order in this clutch of statutory instruments, which confirmed the BBFC as the age-verification regulator, the Minister confirmed that it was not the BBFC's job to determine whether what is being offered on its sites to adult users is lawful. Can the Minister confirm that, despite the slightly ambiguous wording in some places in the draft guidance, the role of the BBFC is, as stated in the regulations, limited to assessing that a person offering such services,

"has met with requirements of section 14(1) of the Act, to secure that pornographic material is not normally accessible by children and young people under 18"?

In conclusion, I ruminated earlier about whether this was the right approach, given the need to get a proper grip of the situation. Let us put in context the fact that, through the Data Protection Act, we have set up and now brought to fruition a data ethics and innovation commission, which will deal with issues of personal data, privacy and the way in which they interrelate. We have begun to see the new, age-appropriate design approach to the way in which internet service providers have to look after the rights of children who get on to their sites. We have discussed the precautionary principle in relation to internet services more generally.

Finally, I will pose a question to the Minister. We have in front of us top-down, traditional approaches to regulation: setting limits, engaging in the possibility of serious action if the limits are breached, and making sure that—as far as possible—we are able to contain a situation that we think is now unacceptable. However, the only way to get by on this is if the companies themselves are involved, so a duty of care approach might be much more fruitful as a way forward. I would be grateful for the Minister's comments on that.

Lord Ashton of Hyde: My Lords, I thank noble Lords for their contributions and for the myriad questions which I will try to answer, in a slightly random order. It is important that we take a bit of time to discuss these; as many noble Lords have said, this is the start of something quite complicated. As I said at the beginning, we ought to bear in mind that we are trying to protect children. In the debates during the passage of the Digital Economy Bill, the Government always acknowledged that they would not have a complete solution, as many noble Lords said and as I mentioned during my opening remarks. We will take on board noble Lords' comments. Indeed, we have shown—this is a partial answer to the question of why it has taken so long—that we have consulted quite widely; we have discussed the wording of the regulations themselves and the guidelines; and the Secretary of State's guidelines to the BBFC, which the noble Lord, Lord Clement-Jones, mentioned, were available during the passage of the Digital Economy Bill.

We have tried to involve people, which is right given that we are at the beginning of something unique in the world. When we come to talk—I put a certain amount of emphasis on this—about social media and some of the areas that we do not cover in these regulations, we will look at those either in the review to come within 12 to 18 months or in the online harms White Paper. We are still discussing that White Paper and are still open to ideas about what it should include. I am pleased to say that the Secretary of State will make a meeting available to all Peers to discuss what they think should be in the White Paper. We will do that as soon as we can; I will let Peers know about it in due course.

6.45 pm

I turn to the regret Motion tabled by the noble Lord, Lord Stevenson. The concern pertains to the fact that the regulations and BBFC guidance do not bring into force the provisions of the Digital Economy Act 2017, which would have given the regulator powers to impose a financial penalty on persons who have not complied. The noble Lord, Lord Stevenson, is not the only noble Lord to have mentioned that.

The regulator will have powers to issue enforcement notices and enforce these through civil proceedings such as proceedings for an injunction, and to give notice to payment service providers, ancillary service providers or direct internet service providers to block access to non-compliant material. It will have the flexibility to exercise these powers on a case-by-case basis, depending on what it thinks will be most effective. I say to the noble Earl, Lord Erroll, that, while there is no plan to block sites on day one, because a proportionate approach that gets people on side without needing to do so is preferable, the regulator will have the power to do that if it wants to. The Government and the BBFC believe that these powers will provide a sufficiently strong incentive to comply with the age-verification requirement. As we have said, there is a mandatory requirement for a review within 12 to 18 months. The Secretary of State already has the power, in the Act, to extend the powers of the BBFC if necessary.

I turn to some of the specific questions asked by noble Lords—I apologise for the slightly random order. The noble Lord, Lord Clement-Jones, asked whether the Government are discussing with the BBFC other possible forms of verification for younger groups. We will work with the industry to ensure its terms and conditions are upheld. We will also work with the tech sector to identify new approaches. The joint DCMS/Home Office White Paper will be published this winter and will set out a range of measures which could include that; however, as I said, this has not yet been fixed. We welcome noble Lords' input.

The noble Lord, Lord Stevenson, has always had concerns about the BBFC and he mentioned those not only during the passage of the Act but when we designated the BBFC earlier this year. On appeals, it has considerable experience of administering an independent appeals procedure for the classification of film. We published the BBFC's proposed appeals arrangements when the designation proposal was laid. It is important to note that the independent appeals panel will not include the regulator, the Government or affected industries. I believe there has not been a successful appeal from the film side for nearly 10 years, so we are content with the way things stand.

We are relying on the fact that the BBFC is a respected organisation with expertise in classifying content; it has done so for cinema releases since 1912 and for video content since 1984. It has a trusted reputation and is good at making difficult editorial judgments and giving consumers, particularly parents and children, clear information about age-appropriate content.

We feel that the existing financial enforcement powers will be okay, but of course we will be able to look at that in the review. The noble Earl, Lord Erroll, asked whether enforcement will take too long. A wide range of regulatory sanctions is available and there has already been engagement with ISPs. Based on that engagement, we are confident that the sanction will be effective. The wording of the Secretary of State's guidance to the regulator stresses the need to take a proportionate approach and that is what is intended.

Several noble Lords mentioned the timeline and asked why it has taken so long to put the regime in place. The number of questions raised in this debate and the potential critiques of where we could have improved the overall regime show why it has taken so long. We have tried to consult and to get as much consensus as possible. We have always said that this is not a perfect solution, but age verification will make a substantial difference and prevent many children accidentally stumbling across pornography. To that extent, we think that it is a good thing.

There is no legal deadline for bringing the requirements into force but we are now in the final stages of the process. If your Lordships agree to these age verification arrangements, we will have reached the end. Following parliamentary approval, we will ensure that there is a sufficient period for the public and industry to prepare for age verification. I think we have said that there will be a minimum of three months, so we anticipate that enforcement will begin around Easter 2019, give or take some weeks.

The noble Lord, Lord Clement-Jones, mentioned resources, and we will obviously keep an eye on that. We understand that if a regulator is asked to do something but has inadequate resources, that is suboptimal. I thank the noble Lord for his remarks on the JCSI. We will, as he suggested, also take into account the experience that has been developed by the BBFC and will have regard to that for our White Paper if we think it appropriate.

The noble Lord, Lord Paddick, talked about privacy. It is of course crucial that users are able to verify their age in a way that protects their privacy. I do not know whether there was some misunderstanding on the part of the noble Earl, Lord Erroll, but the age-verification procedures have to meet the requirements of the Data Protection Act and the GDPR. That is a given, and the ICO will make sure that that is the case. We wanted an even better standard of protection. We will effectively have a gold standard to build trust, but every age-verification site will have to obey the GDPR, so in any event a strong privacy and personal data protection standard will be in force. The age-verification solutions that offer the most robust data protection, as set out in the gold standard, will be set following an independent assessment and will be published on the BBFC website for everyone to see.

Many noble Lords talked about the definition of extreme pornographic material. This was debated extensively—I will not forget it in a hurry—during the passage of the Bill. It is not within the scope of this debate, focusing entirely on the definition of commercial availability. However, because the primary legislation requires the Secretary of State to consult on the definitions before publishing a report on the impact and effectiveness of the regulatory framework, I think that is where we can continue that discussion. I assure noble Lords that we will revisit this issue. I suspect that I do not need to give that assurance and that it will be brought up anyway, but I assure the noble Baroness, Lady Benjamin, that we will be flexible and proactive.

Lord Stevenson of Balmacara: I am sure that the noble Baroness, Lady Howe, was about to leap to her feet but, to save her doing so, I mention to the Minister that he did not answer the question which she posed, and which was picked up by the noble Baroness, Lady Benjamin, about whether he would find time for the excellent two-paragraph Bill which she has in process and which would solve many of these problems.

Lord Ashton of Hyde: I had not forgotten that. It would obviously be difficult for me to commit to finding the necessary time but I will take that back to the department. I am not sure that it is currently within the plans of the Chief Whip to bring forward that legislation but I will ask. I understand the point that is being made but, as I said, the issue may well be covered within the review. I am afraid I cannot go any further than that tonight.

As for ancillary service providers, the BBFC and the DDCMS have been engaging with several companies. They have already agreed to act, as doing so is in line with their current terms of service. Therefore, we are optimistic that the voluntary approach will work, and of course that will be reviewed.

The right reverend Prelate, the noble Earl, Lord Erroll, and others talked about the rationale for choosing one-third of content as the appropriate threshold. During the passage of the Bill, it was established that the focus should be on commercial pornography sites and not on social media. There were good reasons for that but I do not want to revisit them—that is what was decided. The one-third threshold was regarded as proportionate in introducing this new policy where sites make pornography available free of charge. However, websites that market themselves as pornographic will also be required to have age verification, even if less than a third of the content is pornographic.

A third is an arbitrary amount. It was discussed and consulted on, and we think that it is a good place to start on a proportionate basis. We will keep this matter under review and, as I said, it will be one of the obvious things to be taken into account during the 12 to 18-month review. The noble Lord, Lord Morrow, asked how it will be measured. It will be measured by assessing the number of pieces of content rather than the length of individual videos. It will include all pornographic images, videos and individual bits of content, but the point to remember is that the threshold is there so that a decision can be made on whether it is reasonable for the regulator to assume that pornographic content makes up more than one-third of the entire content. This will be done by sampling the various sites.

The noble Earl, Lord Erroll, asked about ISP blocking and suggested that everyone would try to game the system to get out of meeting the requirements. That is not what we believe. The BBFC has already engaged with ISPs and we are confident that this will be an effective sanction. The wording in the guidance indicates that the regulator should take a "proportionate approach". However, we are grateful for the noble Earl's help. I am sure that he will also help during the review and later in the process when it comes to online harms. I see that he wants to help now.

The Earl of Erroll: It is not the ISPs that I am worried about; it is the websites that will game the system on notification, appeals and so on. That is the bit that will take a long time.

7 pm

Lord Ashton of Hyde: We are confident it will work, but we will have to see when it comes to the review. It is an arbitrary figure that we came to by consensus. I will leave it at that.

The noble Lord, Lord Paddick, talked about education for children about sex and relationships. We are extending that by making relationships education compulsory in all primary schools. Relationships and sex education is compulsory in all secondary schools and health education compulsory in primary and secondary schools. We understand that it is important. Together with the protection of children we are introducing today, we will have to keep an eye on it. I notice that the DCMS committee in the other place is launching an inquiry into, among other things, the effects of social media on people's attitudes, including those of children. In a

[Lord Ashton of Hyde]
sense, we are all learning as we go, because the technology is developing. It is something we are aware of and keeping an eye on, and we take the point.

As for the big issue of the evening, and why social media sites are not in the scope, that was a decision taken after a debate during the passage of the Digital Economy Bill. We did not want to prevent the benefits of social media sites. But I confirm to the noble Lord, Lord Stevenson, that we will consider that in the online harms White Paper. Noble Lords will be welcome to add their thoughts on that very soon—either just before or after Christmas.

As noble Lords have mentioned, there is a memorandum of understanding that clarifies the role of the ICO and what powers it will have instead of the BBFC. The BBFC will administer the voluntary certification scheme that will hold AV services to the highest standards of privacy protection and cybersecurity. We expect the vast majority of AV services to seek accreditation. Furthermore, the BBFC will inform the ICO of any non-certified age-verification solutions it finds, and the ICO will be able to take a look at them. Even if they do not want to apply for voluntary certification, the ICO will make sure they are subject to the full rigours of the GDPR.

I have covered most of the main points; I will look at *Hansard* and write to noble Lords if I have not covered any. I think it is evident from all the contributions from across the House that this is a complex and novel policy that requires sensitive handling. Having listened to all contributions and heard limited support for the regulations as they stand, albeit with some suggestions for improvement, I remain of the view that these regulations set out clearly what will fall within their scope. I think the guidance from the BBFC sets out clearly how it will assess the requirements of Section 14 and clarifies the BBFC's approach to payment and ancillary service providers.

We are on the verge of doing something important that has the potential to make a real difference to the experience children have online and to make the internet a safer place for them, so I finish where I began. We are here to protect children, and for that reason I ask the noble Lord, Lord Stevenson, to withdraw his Motion, or indeed not to move it, and respectfully ask the House to approve the two guidances and the statutory instrument.

Motion agreed.

Guidance on Age-verification Arrangements

Motion to Approve

7.04 pm

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

That the draft Guidance laid before the House on 25 October be approved.

Special attention drawn to the instrument by the Joint Committee on Statutory Instruments, 39th Report, 4th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B).

Motion agreed.

Online Pornography (Commercial Basis) Regulations 2018

Guidance on Age-verification Arrangements

Motion to Regret

7.04 pm

Tabled by ***Lord Stevenson of Balmacara***

That this House regrets that the draft Online Pornography (Commercial Basis) Regulations 2018 and the draft Guidance on Age-verification Arrangements do not bring into force section 19 of the Digital Economy Act 2017, which would have given the regulator powers to impose a financial penalty on persons who have not complied with their instructions to require that they have in place an age verification system which is fit for purpose and effectively managed so as to ensure that commercial pornographic material online will not normally be accessible by persons under the age of 18.

Lord Stevenson of Balmacara (Lab): I am tempted, but I will not move.

Motion not moved.

Guidance on Ancillary Service Providers

Motion to Approve

7.04 pm

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

That the draft Guidance laid before the House on 25 October be approved.

Special attention drawn to the instrument by the Joint Committee on Statutory Instruments, 39th Report, 4th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B).

Motion agreed.

Operation Conifer

Motion to Regret

7.04 pm

Moved by ***Lord Lexden***

That this House regrets the failure by Her Majesty's Government to institute an independent inquiry into Operation Conifer conducted by the Wiltshire police into allegations of child sex abuse against Sir Edward Heath; and calls on Her Majesty's Government to make proposals for an independent review of the seven unsubstantiated allegations left unresolved at the end of Operation Conifer.

Lord Lexden (Con): My Lords, first, I welcome my noble friend Lady Barran to the Front Bench for what I think is her first debate in that important place.

As a reasonably loyal supporter of the Government, I derive no pleasure whatever from bringing forward this Motion, which levels serious criticism at them. My object is to provide an opportunity for the House to consider the Home Office's wholly unsatisfactory

response to the numerous requests for action made to it over the 14 months since the outcome of Operation Conifer became known.

In answering a series of Questions in this House, my noble friend Lady Williams of Trafford has made it absolutely clear to your Lordships that the Home Secretary does not believe that he should do anything at all to help put an end to the grave injustice that has been done posthumously to Sir Edward Heath. As a Knight of the Garter, Sir Edward was honoured by inclusion in the highest order of chivalry in our land. In death he has been dishonoured as the result of a deeply flawed police investigation into allegations of child sex abuse made against him.

The now notorious Operation Conifer conducted—misconducted, in the judgment of many people—by Wiltshire Police took two years and cost £1.5 million, of which £1.1 million came out of Home Office funds, placing responsibility for the operation's very existence firmly with the Government. At its conclusion, seven of a total of 42 allegations made against Sir Edward were left open, neither proved nor disproved. Immense damage has been done to Sir Edward's reputation. It will remain indelibly stained until the seven allegations have been cleared up.

I know of no one who does not regard this as a flagrant injustice. In today's debate, we need to be absolutely clear about the Government's stance. So I ask my noble friend: do the Government accept that Sir Edward Heath is the victim of a terrible injustice, which must be corrected? This is the first of four questions I shall put to the Government this evening.

I shall not dwell in detail on Operation Conifer. I do not think anyone has stepped forward to praise it. It has attracted only criticism—from legal experts, from informed commentators and from all those who believe in fairness, conspicuously represented in all parts of this House. One of the most memorable features of this remarkable police operation was the aggressive, belligerent behaviour of Wiltshire's then chief constable, Mike Veale. Grave doubt was cast on his impartiality. He became the subject of widespread notoriety when he was quoted in a national newspaper as saying that he was "120 per cent" sure that Sir Edward was guilty. A statement by Wiltshire Police that followed was notable for its careful wording.

It is now clear that Mr Veale is not a man who believes that complete truthfulness is a requirement for the job of chief constable. An inquiry by the Independent Office for Police Conduct censured him in September this year for giving a false account of how he came to destroy his mobile telephone, an instrument widely thought to have contained information damaging to him in relation to Operation Conifer. Yet he remains a chief constable, translated from Wiltshire to distant Cleveland. The processes by which the most senior police officers are appointed in our country can contain puzzling elements. Cleveland's reputation was not exactly outstanding, even before Mr Veale joined it.

Before the outcome of Operation Conifer was published in October last year, it was already obvious that an independent inquiry would be needed. In June 2017, Mr Angus Macpherson MBE, Wiltshire's Conservative Police and Crime Commissioner, said that,

"an independent review of the evidence, perhaps by a retired judge, is required".

Months of uncertainty followed.

In October, Mr Macpherson stated that he hoped that the Independent Inquiry into Child Sexual Abuse would conduct the review that was needed. He added:

"Should the inquiry prove unable or unwilling to take this task on, I will reiterate my earlier call for the government to establish a judge-led review of the evidence".

Rebuffed by the inquiry, Mr Macpherson was urged on a number of occasions to exercise the power he himself possesses to set up an inquiry. For a time he said he would; then he reneged on that commitment. Since April this year, it has been absolutely clear beyond the slightest doubt that this Conservative commissioner will not do his duty to a deceased Conservative statesman.

So we come to the worst aspect of this most distressing case: the evasion of responsibility. Mr Macpherson plainly deserves strong censure. However, all possibilities of securing redress for Sir Edward are not dashed by his dereliction of duty. In answer to several Oral Questions, my noble friend Lady Williams has stated that the Government have the power to set up the independent inquiry which, they fully accept, ought to be held. That is a crucial point on which the House needs to be absolutely clear. So I ask the Government to confirm that they do indeed have the power to establish an inquiry. That is the second of my four questions to the Government this evening.

Assuming that the answer is in line with the answers that have been given to recent Oral Questions, the Government could readily take action to secure justice for Sir Edward. However, they too evade responsibility. They constantly seek to pass it back to Mr Macpherson, despite his repeated repudiations of it. On 12 November, in answer to an Oral Question from me, my noble friend Lady Williams stated:

"Any review or inquiry, should one be carried out, should be a decision of the PCC".

A few moments later, she repeated the point in answer to the noble Lord, Lord Thomas of Gresford, saying that,

"an inquiry is a matter for the police and crime commissioner".—[*Official Report*, 12/11/18; col. 1690.]

A grotesque version of pass the parcel has been played with a deceased statesman's reputation.

Why on earth should a Member of the Government keep saying things that cannot produce any progress because the commissioner in question will not bestir himself? It can only be because the Government are determined not to exercise their power to institute an inquiry. Confirmation that this is indeed the case has seeped out in very brief comments made by my noble friend Lady Williams. Replying to a debate on 28 June, she told the noble Lord, Lord Armstrong of Ilminster, that,

"it would not be appropriate for the Government to step in".—[*Official Report*, 28/6/18; col. 281.]

In a Written Answer to me on 29 October, she said:

"The Government does not consider there to be grounds for the Government to intervene".

[LORD LEXDEN]

Those are no more than bald assertions. They are not explanations of why this Conservative Government have followed a Conservative commissioner in denying justice to a deceased Conservative statesman. So I ask the Government now: what are the reasons—the detailed factors—that have led them to make no use of their power to institute an inquiry? That is the third of my questions this evening.

7.15 pm

The second part of my Motion to Regret calls on the Government to make proposals for an independent review of the seven unsubstantiated allegations left unresolved at the end of Operation Conifer. If they will not do their proper duty and institute an inquiry into the whole of Operation Conifer, the Government should at least clear up the unresolved allegations that have inflicted such grave damage on Ted Heath's reputation. As the Lord Speaker put it in a recent article:

"We should not be content to allow the slur of unsubstantiated allegation to cloud his reputation".

That is the central issue with which we are concerned in this debate.

Three or four of the allegations have already been shown to be groundless. Could it be that none of the seven is any more credible than the 35 that were dismissed in the course of Operation Conifer? Could it be that Wiltshire Police wanted to leave the seven hanging in the air in order to avoid having to admit that a great deal of money had been spent, and much police time employed, without achieving anything at all? In view of the severe criticisms that have been made of Operation Conifer, it is not easy to put such suspicions out of one's mind. The case for an independent review is surely overwhelming.

Sadly, the Government do not agree. Yet again they employ evasive, weasel words, saying that there are no grounds to justify review or intervention by government. That is what my noble friend Lady Williams told me in response to my last Oral Question calling for justice for Ted Heath on 12 November, citing a letter by the Home Secretary a month earlier on 10 October, even though that letter makes only passing reference to the request for a review of the seven unsubstantiated allegations. It does not provide a clear, unequivocal answer to it.

One ground for action above all surely stares the Government in the face: justice for Ted Heath. So I ask them to explain clearly and in full the reasons why they are resisting the right and honourable course in the absence of a full Conifer inquiry: namely, independent scrutiny of the unproven allegations that are besmirching a dead statesman's reputation. Whatever the Government's reasons may be, I call upon them now to reconsider them. That is my fourth, and most important, question to the Government this evening.

Four questions: the answers given to them by the Government will show whether or not they are at last prepared to heed the calls for justice made so strongly and so often in all parts of this House.

Lord Armstrong of Ilminster (CB): My Lords, I support the Motion to Regret so ably and forcefully moved by the noble Lord, Lord Lexden.

I have no complaint about the thoroughness with which Operation Conifer was conducted. It spent two years, as the noble Lord, Lord Lexden, said, and £1.5 million. It interviewed a great many friends and colleagues of Sir Edward Heath, and staff and protection officers who had worked for him, and not a single one thought that Sir Edward Heath had been a child abuser.

They interviewed me for over an hour. I was interviewed by two well-spoken young women—one of them, I think, a police officer; the other was said to be an expert in child abuse, whatever that means—and they were chiefly interested in my duties as principal private secretary to Sir Edward Heath when he was Prime Minister. They spent so long on it that I wondered whether they were hoping that I would say that one of my duties was to procure children for Sir Edward to abuse. If they were expecting that, they were disappointed. I said that I never suspected anything; never even wondered whether he might be a child abuser. In fact, as we know, he was far too cautious and protective of his political and personal reputation to have gone in for anything so risky, even if he was minded that way.

One interviewer said to his interviewee that the investigation was a farce; that the only reason why he was doing it was that he was being paid to do it. So my complaint is about the judgment of the senior officers who initiated and supervised the inquiry. The final responsibility there, of course, must lie with the then chief constable of whom the noble Lord, Lord Lexden, has spoken. They permitted themselves to announce that they were investigating Sir Edward Heath by means of a televised statement made outside his house in Salisbury, thus ensuring that from the very beginning the operation was conducted in full public glare. Later there was the episode to which the noble Lord, Lord Lexden, referred, when the chief constable was quoted as saying that he was 120% sure of Edward Heath's guilt. If he said anything of the kind he was going grossly beyond any responsibility of a chief constable. The duty of the police is to investigate, to collect evidence and to follow the evidence where it leads, but not to pronounce verdicts. The fact remains that the allegation in the newspaper was never categorically denied.

Their decision to publish a summary report and to hold a press conference at the end of the investigation was an unusual—indeed, I would say unprecedented—course to which they were forced by the fact that the whole investigation had been made public. As we have heard, about 90% of that report was given over to justifying the decision to conduct the investigation and then disposed of 35 of the 42 allegations which had been received, I think all or most of them made after the announcement outside Arundells, and left the seven unresolved allegations to which the noble Lord has referred. Four of them are clearly without foundation, and that is probably true of the other three. One wonders whether seven were left unresolved in order to ensure that Sir Edward Heath remained under suspicion.

Hence the need for an independent inquiry. The police and crime commissioner said that he would welcome an inquiry but not one initiated by him.

That was because, he said, this is a national matter. The Home Secretary, when the noble Lord, Lord Hunt of Wirral, and I went to see him, refused to conduct an inquiry because it is a local matter. I do not know of any way in which one can resolve this dilemma. Is it a national matter or is it a local one? They do not seem to be able to agree.

This is a matter of justice for Sir Edward Heath and it ought not to be left in its present state. I believe that there is probably no one who now thinks that Edward Heath was a child abuser. What is needed is to nail that down. The best way to do that would be to hold an independent inquiry. If that is not to be done, what is needed in order to reinforce the conclusion is an authoritative statement that the information available on this matter, including Operation Conifer, does not satisfy the standards of probability that would justify a decision to prosecute. That may be as far as we can get at this stage because Sir Edward has been dead for 12 years and his reputation has been grossly undermined and clouded by the injustice that has been done to him through Operation Conifer.

Lord Thomas of Gresford (LD): My Lords, I too welcome the noble Baroness, Lady Barran, to the Dispatch Box for the first time in a debate. We look forward to hearing from her many times in the future. I congratulate the noble Lord, Lord Lexden, on the immense tenacity that he has shown on this very important issue which concerns the reputation of one of the statesmen of this country. I did not know Sir Edward Heath; I never met him. The only connection I can possibly cite is that when Sir Alistair Graesser, who some noble Lords may recall, lived in my house before I bought it from him, Sir Edward Heath spent the night there. That is the most I can ever say about my connection with him.

We have to start with Operation Marble. In March 2015, the Wiltshire Police made a referral to the Independent Police Complaints Commission to investigate a suggestion that a criminal court case may have been dropped in 1994 to protect Sir Edward Heath. It was based upon the recollection of a former senior officer who in August 1992 as a young detective constable had been involved in an undercover operation into the existence of a brothel at an address in Salisbury. It was his job to go to the brothel to demonstrate that a Ms Myra Ling Ling Forde was willing to offer sex for sale. Ms Forde was charged with keeping a brothel and when her case was listed to be heard at Winchester Crown Court in February 1994, the officer in question, who has retired, recalled that he was approached by Ms Forde's solicitor and told that if the case proceeded, Ms Forde would notify the media that she had been supplying young boys to Sir Edward. That was his recollection, but he had not recorded anything in his notebook or diary. He said that he was reminded of it 21 years later, after watching a television programme about Jimmy Savile. He named other officers who had been involved in the investigation. Two of them were named in his police notebook as having attended court with him but he said that that was not right because he was there on his own. He said he had telephoned his headquarters in Salisbury about this suggestion, but he could not remember who he had spoken to. The trial of Ms Forde did not take place and he had inferred that this was to protect Sir Edward from these allegations. That is the foundation of it; that is where it all sprang from.

All the case papers had been destroyed in the ordinary course of events both in the police station and in the court. The IPCC carried out an investigation. None of the officers in the case or the senior officers in the police station at the time had any recollection of this alleged threat. The defence solicitor and the defence counsel were both interviewed and they too had no recollection of a threat being made to expose Sir Edward by their client. Prosecuting counsel was Nigel Seed, who has in the interim become a Crown Court judge. He wrote a letter to the *Times* following the commencement of the IPCC investigation in which he stated that there had been three prosecution witnesses in his case. Two of them, who were said to have chaotic lifestyles, had failed to turn up on the morning of the trial and the third was brought to court in custody but refused to come out of the cells to give evidence. Mr Seed did recall that there were members of the press from London hanging about, and he was told that there was media interest in case Ms Forde gave evidence of supplying rent boys to Sir Edward, who lived in Salisbury. Perhaps that is where that detective constable got the idea. But the only evidence left for Mr Seed to prove that the premises were a brothel was a bag of used condoms. He personally had taken the decision to withdraw the prosecution and drop the case. That is exactly what one would expect of a competent counsel who was acting responsibly.

Ms Forde declined to be interviewed by the IPCC in Operation Marble but through her solicitor gave interviews to several reporters for both the national and local press in which she said that Sir Edward was not a client of hers and she had never threatened to expose him. That seems likely because in the following year she was tried and convicted of brothel and prostitution offences and was sent to prison. Even in those circumstances she made no suggestion or threat about exposing Sir Edward. The IPCC concluded that the 1994 case had not been stopped due to any threat of exposing Sir Edward and that it was a complete fabrication. That was the result of Operation Marble. There was no evidence at all that the recollection of the retired police officer after 21 years was correct or true. But on 3 August 2015, as the investigation was just starting, someone in the IPCC decided to issue a press release which contained the following sentence:

> "It is alleged that a criminal prosecution was not pursued when a person threatened to expose that Sir Edward Heath may have been involved in offences concerning children".

At no point until the IPCC press statement had Sir Edward Heath's name been mentioned in anything.

7.30 pm

I have looked at the IPCC statutory guidance. While the identity of the complainant may be withheld from interested persons if he or she requests it, nothing is said about withholding the identity of the person complained against. The guidance is in the process of being revised and, as suggested, will go out for consultation by the end of next January, but there is still nothing there by way of guidance.

[Lord Thomas of Gresford]

Ironically, under the heading "Publishing the report", the Operation Marble investigation report dated 16 March 2016 concludes:

"Further redactions might be made to the report at this stage to ensure that individuals' personal data is sufficiently protected".

That was months after the August 2015 press statement talked about Sir Edward Heath. The very first question for an inquiry is who in the IPCC authorised that press release and why. He or she must have known that this was dynamite in the atmosphere of the Dame Janet Smith inquiry into Jimmy Savile, which started in 2012 and whose report was about to be published. The 3 August 2015 press release led to Wiltshire Police, the subject of the IPCC investigation, making on the very same day its infamous televised media appeal in front of the gates of Sir Edward Heath's house—and so Operation Conifer began.

I will make a number of short points. First, the inquiry was always bound to be incomplete. No police file alleging a crime can be sent to the CPS without the proposed defendant being interviewed under caution. His interview, whether he admits or denies the allegation or exercises his right to remain silent, is an essential part. Secondly, it always was and is the policy of the Crown Prosecution Service not to give any indication of whether evidence of any allegation made against a deceased person meets the threshold for prosecution: whether the evidence produced is likely on a balance of probabilities sufficient to lead to a conviction and whether prosecution is in the public interest. It will not do so. There was therefore never going to be any independent professional assessment of the results of the police inquiry. That is why it was so disgraceful that the chief constable, Mr Veale, announced his conclusion that he was "120%" sure of guilt. That was a dereliction of his duty and I am amazed that he remains in post.

The Operation Conifer summary closure report justifies the expenditure of £1.5 million and the employment of at least 20 police officers on the following basis:

"The role of the police in an investigation into a deceased person is set out in *Operation Hydrant Senior Investigating Officer Advice (2016)*".

The police justify what they did with guidelines published after the inquiry started. The report also stated:

"The advice … references Article 3 of the European Convention on Human Rights … which is an absolute right and declares that, 'No-one shall be subjected to torture or to inhuman or degrading treatment or punishment' … The interpretation of Article 3 (ECHR) by leading counsel retained by Operation Hydrant identifies that the closer the alleged suspect is to the State and the more serious the allegation, the greater is the duty to investigate under Article 3. Due to the public prominence of Sir Edward Heath, and the office that he held as Prime Minister, this is particularly relevant in relation to the decision to investigate the allegations made against him".

No thought appears to have been given to Article 6.2 of the convention:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

Under Operation Conifer, 42 disclosures were made, ranging from 1956 to 1992. That number was reduced to 40 when it was discovered that one man made three complaints, each under a false name. Of the rest, 10 disclosures were made by third parties and not by the alleged victims, three were made anonymously and 19 were undermined by inherent contradictions. For example, one described in detail the nautical theme of Sir Edward's flat long before he took to the waves and became a sailor.

Three disclosures were cases of mistaken identity. I recall allegations made against Lord McAlpine of being involved in the problems in Bryn Estyn. I come from Wrexham, as does my son, who is a BBC journalist. He phoned me on the morning that the allegation was made and said, "They've got the wrong man, haven't they?" We all knew who Mr McAlpine was; he was certainly not Lord McAlpine. He was the president of the local golf club. Mistaken identity happens. The Operation Conifer report said that seven of the disclosures would have led to an interview, but one was suspect because of undermining evidence.

Why do people make such claims? They do so for all sorts of reasons. In a Written Question, I asked how many people claimed compensation under the criminal injuries scheme—they can do so even if an offence is 30 or more years old—but was told that it would take too many resources to find out. Since the actual claims would have been put in since 2015, I find that very hard to believe. I am sure that there is an index of claims for compensation made. We are left in a situation where an obvious injustice has been done as a result of something that somebody vaguely remembered years ago, which was proven completely false in Operation Marble. The sooner we have an inquiry to clear all this up, the better.

Lord Jones (Lab): My Lords, the noble Lord, Lord Lexden, is an historian. He deployed his grasp of detail to great effect, aiming for justice for a British statesman of considerable note. Surely it should be so.

I recollect in June 1970 the first entry of Edward Heath as Prime Minister into the Chamber of the House of Commons, to great acclamation. He wore a blue cornflower in his buttonhole and sported a mahogany tan of great depth. My side of the House was downcast and still in shock. The noble Lord, Lord Lexden, referred to statesmanship. Very soon after that day—not much more than a year—Edward Heath proposed one of the greatest events in Britain's history outside of war: entry into Europe. Of course, there are the tumultuous events of this week concerning our exit from it, but that is something else.

Edward Heath was greatly instrumental in our entry into Europe, aided by his Chief Whip, Francis Pym. I recall the issue being addressed by James Callaghan on that evening in the Chamber. He was making the last Opposition speech and in a crowded House, I spied Chief Whip Francis Pym push his way through the rugby scrum at the Bar of the House and make his way across that space to whisper in the then Prime Minister's ear that the votes were there. That was a historic moment for the House of Commons, and it was historic statesmanship by Edward Heath.

I decided to make my brief intervention on the basis that I owe him some gratitude. For many years, I was an advocate in another place for a community

that had a huge steelworks with some 14,000 employees. The then Secretary of State for Trade and Industry, Mr Peter Walker, said the steel-making in my constituency—in my homeland—was to end. That was an absolutely catastrophic proposal. As a young Member, I had to set about organising campaigns against that proposal. I do not need to remind your Lordships' House of the consequences of mass unemployment. I had the wit to ask the Prime Minister's Private Secretary if the Prime Minister would see me, along with a deputation. The answer was yes. He gave me some two hours in the Cabinet room. I sat opposite the Prime Minister—and a picture of Walpole, the first Prime Minister. Either side of me were humble men, steelworkers, and there was the British Prime Minister. He had been a Minister for the north, I think, and, as a lieutenant-colonel, had commanded the artillery and got to know men of that kind. I was astounded by what I saw and heard of Edward Heath, compared to his national image: he showed courtesy, patience, consideration and encouragement. Unusually for a man such as that, he called for cups of tea for my people. This was perhaps unique—Edward Heath looking after his visitors; he was that sort of man. I place that on the record. As a young Member, I had reason to get that deputation into Downing Street.

As I left, he told me I had done very well. Astoundingly, he then said, "How is your father?" My father had been a full-time employee of the British Labour Party at the time of the 1950 general election. The sitting Member was of my side, but the candidate was an unknown called Edward Heath, who was at that time news editor of the *Church Times*. I see that the noble Lord, Lord Deben, remembers. He may even have been in the Chamber in June 1970—I am not sure. My father subjected Edward Heath to three re-counts. The majority was pretty well the same size as the number of votes the Communist candidate obtained—three figures. This was in 1950, and Edward Heath went on to be Prime Minister.

Given the way a reputation might be traduced and dishonoured, and in the knowledge that Edward Heath was a British Prime Minister of great statesmanship, I felt I ought to acknowledge my debt of gratitude. I hope the noble Lord, Lord Lexden, and the wise and noble Lord, Lord Armstrong, will gain justice some time soon.

7.45 pm

Lord Hunt of Wirral (Con): My Lords, I declare my interests as set out in the register, particularly that I had the honour to follow the noble Lord, Lord Armstrong of Ilminster, as the chairman of the Sir Edward Heath Charitable Foundation. I am delighted with the speech of my former opposite number in the other place, the noble Lord, Lord Jones.

I congratulate my noble friend Lord Lexden, not only on making possible this important debate, and eloquently opening it, but on his dogged pursuit of justice and common sense in the wake of the highly unsatisfactory Operation Conifer. I very much welcome the speech of the noble Lord, Lord Thomas of Gresford, who set out the origins of this nonsense and how it emerged so clearly.

Sir Edward Heath's reputation matters to so many of us, as we have already heard. This is not only because he obtained the highest office in British politics. It is an open secret that politicians can be very exercised by the judgment of posterity. I recall that, in Shakespeare's "Othello", when Cassio is discredited, he cries out:

> "Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial".

The arch-manipulator, Iago, who has personally and insidiously orchestrated the ruin of Cassio's reputation, responds:

> "Reputation is an idle and most false imposition: oft got without merit, and lost without deserving".

Because of a number of unproven accusations against him, and because of the apparent credulousness of Wiltshire Police, Sir Edward Heath's reputation—his good name—was, for a time, in acute danger of being lost for ever, without deserving. I think this is such an important debate.

I believe Ted's name has now been, to all intents and purposes, cleared, but that is no thanks to anyone associated with Wiltshire Police. Spurred on by frankly bizarre guidance from the then Director of Public Prosecutions, that force treated pathetic fantasies and deliberate, knowing lies as the truthful accounts of "victims". Ted could not possibly defend himself against this web of deceit. Fortunately, others can and have defended themselves: Sir Cliff Richard; Paul Gambaccini; Lord Bramall, a hero who served his country nobly; and the late Leon Brittan, who could—and should—have been informed that the cases against him had been exposed as a tissue of lies before he died, but was not.

Ted Heath, who served this country with distinction in peace and in war, is now the real victim. Those who were complicit in creating and sustaining the slur against him must now realise they have lost, comprehensively. None the less, because he is dead, Ted is denied complete justice. He has had no opportunity to defend himself.

I have always admired what I have thought of as the traditional approach to policing, which dates back to Sir Robert Peel: a healthy balance between scepticism and credulity and an approach to investigation that is methodical, thorough, calm, well mannered and, above all else, always led by evidence. When police officers decide they are on some sort of crusade, they overstep a very dangerous line. Of course, the police enjoy operational independence—rightly so—but that cannot and must not mean they are not accountable for their actions.

If we are indeed to sanction full-scale investigations into allegations against deceased persons, we owe it to them to abide by the principle of habeas corpus; as the noble Lord, Lord Thomas of Gresford, reminded us, this is the presumption of innocence, unless and until guilt can be established. That stretches back to Magna Carta and 1215. The officers in charge of Operation Conifer say that they would have investigated and interviewed Sir Edward Heath about those six or seven accusations. The final statement made in a lavishly expensive police operation, although no one now believes it, must have left a stain, a smell, a hint that all was not well—a possible imputation of guilt. Sadly, we know

[Lord Hunt of Wirral]
very little about the seven accusations. That makes it very difficult—almost impossible—for us to subject them to any sort of rigorous examination. I believe that three have already been straightforwardly disproven, but all seven should and could be rigorously scrutinised.

It should be up to the Crown Prosecution Service to consider all the evidence—if indeed there is any evidence, rather than accusations—very much as it would were the accused person alive. The CPS is well versed in knowing the difference between an accusation and evidence. Our conclusion is that a retired judge could easily consider both a prosecution and a defence case. I know many people who would gladly prepare the defence case, but I do not for one moment believe that the CPS would take any of these accusations seriously.

In welcoming my noble friend to the Front Bench, I hope she might disregard what is no doubt the very strong advice that she is receiving from within the Home Office that this move would set an unfortunate precedent. What is unfortunate about asking a retired judge to scrutinise these accusations properly?

It is a well-established rule of this great House to give voice to those who have no voice. In life, Sir Edward Heath had a very distinctive voice and, as we all have cause to remember, he was never afraid to use it. Thanks to his friends and former colleagues, here and elsewhere, although his voice is now stilled, his name has been comprehensively cleared. Other deceased individuals against whom false accusations are made may not be so lucky. We owe it to all of them, as well as to the genuine victims of crime, to ensure that justice is done and seen to be done. That can be now be done only by a proper independent judicial inquiry into these accusations. Ted Heath's name has been cleared, but it has set an unfortunate precedent, which we must address.

Lord Campbell-Savours (Lab): My Lords, I congratulate the noble Lord, Lord Lexden. He has been a doughty campaigner on behalf of someone whom I believe was his friend. The House should also express gratitude to the noble Lord, Lord Thomas of Gresford, who gave us an excellent analytical examination of the past and brought the House's attention to matters of which many of us were previously unaware.

Once again, we are cantering around a course of myth, hearsay and rumour. I have been raising this issue in this House for more than two and half years and we have got absolutely nowhere. Nothing has happened, although I sense a change in opinion in this House towards the events alleged, whereby basically no one now believes them. It is not that I think that the Minister, the noble Baroness, Lady Williams, has been unsympathetic. I think she is caught in the impasse of inexplicable fear at the top of government. There is no credible evidence whatever that a former Prime Minister was involved in child abuse or any other sexual abuse.

The issue is simple: who in authority will have the guts to stand up and say, "We are witnessing a quasi-judicial, historic miscarriage of justice without there ever being a trial"? That is what is so important. That is what a review would be all about. We want the historical record to be corrected in the court of international public opinion.

The Government have taken the position set out by the noble Baroness, Lady Williams, who said:

"The police are operationally independent of government".

That has been referred to before. She went on:

"The Government would step in only where all other avenues had been exhausted".—[*Official Report*, 11/10/18; col. 178.]

We are at that point. All other avenues have been exhausted. The proof of that is set out in the 2018 report of the Wiltshire Police commissioner, who states:

"It remains my hope and expectation that IICSA will have something to say on the strength or otherwise of any evidence against Sir Edward Heath".

He goes on:

"Should IICSA maintain that position"—

of failing to act—

"the Home Secretary should, in my view, order a separate public inquiry with the necessary powers and the remit to establish the facts".

He further states:

"Wiltshire has more than met its national responsibilities, and I will not commission any further work in relation to Operation Conifer".

He goes on to refer to his limited resources.

My problem with all that is that, while I understand the resource argument at the local level, I hesitate over the prospect of an IICSA finding of fact when the accused is dead. If a man is dead, there can be no finding of fact because there is no defence. IICSA's operations are based on hearings. There is no one to hear, apart from the accusers, which takes us right back to the Janner case. Indeed, I note that in all the cases where accusations have been levelled against individuals who are still alive, we have had either apologies or mealy-mouthed statements withdrawing accusations. In other words, attack the dead who cannot respond and run scared of the living for fear of legal action.

The Wiltshire Police commissioner says that the Government should do something, and they should. Sir Edward Heath was not a Wiltshire Council leader; he was a Prime Minister with an international reputation. We either give Wiltshire all the money it needs—not part of the money, as happened before—to draw up the Conifer review, or the Government carry out a judge-led review of the evidence. Anyhow, it should not cost much. There is very little evidence, just hearsay and untruths. The Nick case will prove that.

The powers that be have allowed this whole debate about sexual abuse to become bogged down in political correctness. We are entering a fantasy world where anyone without principle can make a claim of sexual abuse against any other person in the knowledge that there is a presumption that the accuser is to be believed. The whole process is being greatly aided by the sexual offences compensation scheme, otherwise known as the criminal injuries compensation scheme, with legal expenses funded by the taxpayer while the scheme is undermining the credibility of legitimate claimants. All you now need is a vivid imagination, a preparedness to lie and the ability to make the accusation seem realistic by drawing on other cases already on the public record that give credence to your accusation and you are on your way to a windfall.

I give your Lordships an example. Let us take the Janner case. Last week, IICSA informed me of a further accusation against Janner. It came after the collapse of the civil claims against the Janner estate when an unidentified man claimed that,

"he was raped at Dolphin Square"—

noble Lords will recall Dolphin Square—

"whilst in the care of social services by a person he subsequently believes to be Janner".

That is from paragraph 7 of Professor Jay's letter of determination, dated 2 May 2018. Until then there had been no claim by anyone, ever, that Janner was linked to the infamously false Dolphin Square allegations. It is a patent lie, yet this individual, referred to as F54 in the IICSA inquiry, has been granted core participation status in the Janner strand, entitling him to legal representation by solicitors and counsel at huge cost to the taxpayer, running into tens of thousands of pounds. His lawyers will be able to charge for preparatory work leading up to proceedings and representation at a three-week hearing fixed for February 2020. I object, on behalf of the taxpayers of the United Kingdom: it is an outrage and it further affects the credibility of the IICSA inquiry.

8 pm

In that quotation, the reference to a location is a straight lift from the famous Nick's Dolphin Square fantasyland. It would be interesting to know how much this job is worth to the lawyers. Talking about the lawyers, they run a pretty lucrative trade. I have two adverts here that are to be found in *Inside Time*, a publication for prisoners. One reads:

"Child abuse solicitors: helping victims to claim compensation and achieve justice. If you suffered physical psychological or sexual abuse as a child from someone who was in a position of trust, our specialist child abuse lawyers may be able to help you claim compensation and achieve justice".

It goes on to name particular locations, including St Williams, Market Weighton, Manchester care homes, Wales care homes, Leeds care homes and a detention centre. It asks readers to approach one of its lawyers. I have another from the same journal that circulates in prison:

"Child abuse: helping victims achieve justice. The law allows people to make claims for compensation even if the abuse they suffered took place many years ago".

It goes on to say that specialist solicitors are available to help. It does not surprise me that many accusers have substantial prison records. Of course, these are many of the people now making applications for compensation.

Let me tell the House, lest people think we are interested only in the cases of the great and the good, that many cases have passed my desk over the years claiming miscarriages of justice. I must admit that not all have been credible, but one is from a man who lives in modest circumstances in Darwen, Lancashire, a constituency I fought some 45 years ago. This man, now aged 70 and ill, is still in prison, serving a 16-year sentence at HMP Wymott following what I believe to be a miscarriage of justice. The case has been to the cash-starved Criminal Cases Review Commission, which lacks the resources to reopen the case on the scale I believe necessary. He may well die in prison. His case disturbs me. I feel utterly helpless, although I am trying to find a way to have his case reopened. I feel for such cases, while feeling equally for those women whose cases are not properly investigated and where the guilty go free.

I despair over what is happening in the handling of sexual offence cases. I do not know whether we need special investigative bodies, special courts or something else. What I do know is that we need an end to political correctness in decision-making. The case of Sir Edward Heath is a sickening betrayal of British justice. Our judicial system is being brought into disrepute across the world. Our Government—indeed, successive Governments—are frozen in the headlamps of inertia when it comes to sexual offences.

Someone asked me the other day: why get involved in these cases, which risk one's own political reputation? The answer is simple: I, along with others, cannot abide injustice. Here I am, a Labour Peer, defending the reputation of a Conservative Prime Minister, a man I never particularly liked, but one's political preferences are irrelevant when it comes to principle and justice. These cases are riddled with injustice. We are witnessing the destruction of reputations built up in public service over a lifetime, and all because the state is gutless in its obsession with a political correctness which is not even correct and is distorting rational consideration of what constitutes guilt. One day, society will look back at this period in quasi-judicial history, particularly in the area of sexual offences, and liken it to a time when justice was summary, akin to the Dark Ages in the darkest recesses of the past.

Lord MacGregor of Pulham Market (Con): My Lords, I thank my noble friend Lord Lexden for introducing this debate and for everything he has said—with which I agree absolutely and entirely—so forcefully and rightly. What is significant about the debate is that there is a unanimity of view in this House, not only about the injustice but why it needs to be put right, coming from all parts of the Chamber, and I am very glad about that.

I had a close connection for many years with Ted Heath so I must declare an interest. In 1959, I came down from the University of St Andrews, where I had done an economics degree, to King's College London to do a law degree, and I therefore had the summer recess free. Ted Heath was president of the Federation of University Conservative and Unionist Associations—FUCUA, as it was politely known—and I was the chairman that year. He knew I was free so I got a telephone call in Scotland asking me if I would come down to Bexley and, as he put it, "run his ladies" during the election campaign because he was away canvassing and speaking at Central Office and doing all sorts of things. I was delighted to do that.

One of the ladies, who was his secretary at the time, I got to know rather well as she came down quite often from his office in London to campaign with me. One of the great joys of that campaign was that that secretary became my wife. I have always been delighted to say that that is how it started. Ted became godfather to one of our children, so that is my personal interest to declare.

[Lord MacGregor of Pulham Market]

More particularly, I was head of his office when he was leader of the Conservative Party from 1962 to 1965, and I travelled everywhere with him—all over the UK, as well as internationally—on many weekends, as well as working in his parliamentary office, very often very late at night when Parliament was sitting, so I had a very close observation of and relationship with him. In all those years, I never saw the slightest hint of any of the accusations that have been made against him.

As far as I know, there never has been any shred of evidence for the innuendos and accusations. No one has come forward so far—and I do not believe they will in the future—with a single bit of proof. Now at last the identity of Nick—the apparent source of most, if not all, of these latest innuendos—has been revealed. As far as we can judge, he has been revealed as the source of accusations about not only Ted Heath but many others, including other prominent figures. If this is the case, it is astonishing that he was allowed to get away with it for so long—anonymously, while those against whom the claims were made received the full glare of incredibly one-sided publicity.

These are serious matters, as the Chamber has recognised tonight. They go beyond the issue of Ted Heath, but that brings them out dramatically. People who have given a lifetime of public service have had their reputation substantially traduced, while the source, obviously known to the police, was allowed to get away scot free—or, at the very least, to remain anonymous—for so long that the public have been unable to judge whether or not the accusations had any basis of truth.

The *Daily Telegraph* has reported that a review by a retired High Court judge has highlighted more than 40 mistakes that have been made by some police forces. It is high time that we are given more information about all these accusations and how they are being dealt with, so that people such as Ted Heath, who have given a lifetime of public service and made a remarkable contribution to our nation and its history, have these accusations clearly dealt with once and for all, and their reputations properly restored.

I strongly support this Motion and all that has been said in the Chamber so far, and I thank my noble friend Lord Lexden for bringing this issue so forcefully to the House. I warmly urge the Front Bench to take this away and realise that this is the unanimous feeling of the House, which we all feel deeply and strongly, and that it is time that it is put right.

Lord Sherbourne of Didsbury (Con): My Lords, I too pay tribute to my noble friend Lord Lexden, who, as others have said, has been indefatigable in this cause, as indeed have many other Members of the House. I welcome to the Front Bench my noble friend Lady Barran. This is her first debate.

The question which concerns us this evening is: how did we allow the reputation of a former Prime Minister to be so damaged by unsubstantiated allegations, lies, fantasies, false statements, possible perjury and the shamefully prejudicial language of a chief constable? This has happened step by step: allegations are made, so a police officer, who should know better, deliberately positions himself outside the home of Edward Heath, in front of the television cameras, and calls upon victims—that was the word he used, not complainants—to come forward. We then have, as has been said, the then chief constable of Wiltshire, Mike Veale, being quoted as saying he was 120% sure of Edward Heath's guilt. The man formerly known as Nick—now named as Carl Beech—is finally charged with perjury and perverting the course of justice.

We have witnessed a saga of fiction created by fantasies, aided and abetted by gullible police officers, and shockingly given credence by an overzealous chief constable. It is a catalogue of shame. It besmirched the reputation of a former Prime Minister, and throughout, the Government stood idly by. There has been debate after debate in this House, question after question, but from this Government—a Conservative Government—no help or support at all. It is, to put it at its mildest, deeply disappointing.

The way that Operation Conifer was managed, or rather, mismanaged, and looking at how other investigations have damaged other people's reputations—Lord Bramall, Cliff Richard, the late Lord Brittan—raises very serious questions which cause grave disquiet. There is the question of whether and when the police should investigate allegations made against a deceased person. How clear is the guidance as to the circumstances which would justify such investigations? When are they necessary or prudent? When would they be fruitless or, worse still, needlessly damaging to the reputation of a deceased person who cannot defend themselves?

8.15 pm

Then there is the care that the police should take in the language they use. There is the question of the police grandstanding and exploiting television to imply guilt. Then there is the matter of collusion between the police and the media, as in the case of Cliff Richard. It is worth remembering that the judge in that case found that the naming of Sir Cliff as a suspect in a police investigation amounted to a breach of his privacy. This raises a host of important issues.

Then there is the accountability of police and crime commissioners. In Wiltshire, the PCC refused all requests for a full inquiry into Operation Conifer. Mike Veale, the chief constable, has now left Wiltshire for pastures new and the PCC is not standing for re-election. So where, may I ask, is the accountability? How is the much vaunted accountability of PCCs supposed to function in this instance?

All these questions need to be looked at very carefully. There are too many loose ends. There is too much vagueness, too much scope for carelessness and mistakes and for real harm to be done. So this is what the Home Office should do. It should identify all the concerns which Operation Conifer and similar police operations have raised. It should examine carefully what has happened, what has gone wrong and what changes are needed. Because if nothing changes, then at some stage in the future, someone else will find their reputation trashed because of wild allegations. The Home Office has a responsibility to make sure that what happened to Sir Edward Heath does not happen to anyone else.

Finally, I put one small request to my noble friend the Minister. Will she please put before the Home Secretary the *Hansard* of this debate, so that he can read the strength of feeling in this House?

Lord Deben (Con): My Lords, I too have to declare an interest: it is through Ted Heath that I met and married my wife. She worked for him and knew him extremely well. She too was interviewed in the course of this inquiry. The questions that were asked showed specifically what nonsense it was. Did she know of occasions in which young men came secretly to 10 Downing Street? Anyone who knows anything about the way in which a Prime Minister operates and is protected—even in those days—would know what a ridiculous question that was in the first place. I could go through many of them, but I want first to say that although I welcome my noble friend Lady Barran to the Front Bench, I think she has been ill-done-by in being asked to do this, because this is a situation in which the real guilt is with the Government, who have failed to take action, and that is a scandal. May I dare to suggest what would have happened if a Conservative Government had failed to do this about a Labour Prime Minister? Or a Labour Government had failed to take action about a Conservative Prime Minister?

It is a scandal because the Government have failed to understand what their duty is and have shuffled it off to a local area, which knows perfectly well that it would have to pay the cost—the very considerable cost, if it did it properly—and which itself had to be subsidised for the original inquiry that took place under Operation Conifer. The Home Office knows that, and knows perfectly well that only the Government could ensure that there was the kind of inquiry of a national sort which is necessary on this occasion. So why will the Government not do it? They should do so, first, out of loyalty to Britain and to a Prime Minister, leave alone their politics. But secondly, they need to do so because of the actions of the police.

I am a great defender of the police but the Wiltshire Police, and Mr Veale in particular, have let down all the police forces of this country. People say that he went off to Cleveland but just remember that he left at the point at which he was not reappointed, and when it became clear that he might well not be reappointed. He went to Cleveland and has since been found guilty of what was clearly straight lying, which he has admitted. We need to recover the reputation of the police, and the only way to do so is to make sure that they know that they too are subject to the kind of inquiry which we should have here. The tendency to be sceptical about our willingness to look into the misdoings of the police will otherwise be justified.

The third reason why this inquiry must take place is because of all of us. This has happened to Ted Heath but I say to my noble friend the Minister: it could happen to you. It could happen to any of us because it is a tissue of lies, invented either by the malevolent or by the fundamentally ill. As the noble Lord, Lord Campbell-Savours, pointed out, any of us who have dealt with these cases before—the sort of people I had to talk to when we were trying to recover the reputation of Lord Brittan—will have realised that we were dealing with some of the saddest people there were. They had become totally convinced that things had happened which could not have happened, because that was not possible.

I say to my noble friend that there is a very important lesson here. I have no doubt that she has a document in front of her. I could almost have written it myself but I will restrain myself. She will read from that but I want her to say also that this House will not rest. If the Government want to go on with this farce, then again and again we will bring it here until they accept that they have a duty—moral, political and, frankly, out of decent humanity—to take this case up and reveal the truth.

I am not going to argue about whether Ted Heath was in any way guilty; I think it is so obvious that he was not, but that is not what this argument is about. In a sense, we have spent too much time talking about the impossibility of the case in the first place. What we need to do is to say that if we believe in justice, it is justice not just for the poorest or for those who cannot defend themselves but justice for all—justice for the reputation of a man who was our Prime Minister.

Frankly, I ask my noble friend not to tell us that it is an unfortunate precedent or that it is inappropriate, because we are not having it any more. We are going to go on, as my noble friend Lord Lexden has led us again tonight, until the Government accept that it is their duty to all of us to investigate this properly and not to allow the reputation of a great man to be besmirched because they are frightened of the fall out—for there can be no other reason.

I say this to my noble friend: one thing that she could do tonight to is give us a real reason. If she cannot, I hope she will go back, as my noble friend suggested, and say to the Home Secretary that we cannot do this again. We cannot manage it again. The House will not have it again. The Government have got to change their mind.

Lord Cope of Berkeley (Con): My Lords, first, I welcome my noble friend to the Dispatch Box and express my sympathy. She will never have a more difficult speech to make or case to defend.

I have not spoken on this matter before, but I have followed what has been said by others on previous occasions and admire the persistence of my noble friend Lord Lexden, the noble Lords, Lord Campbell-Savours, Lord Armstrong and Lord Thomas of Gresford, and others. I listened carefully to the detail which has been spelled out today and on previous occasions on all this and I shall not repeat it or add to it. I had hoped that, given the strength of the case that was made on previous occasions, this would all have been put right—but it has not been and it will not be until there is an inquiry. So I add my words in calling for an inquiry.

I worked for Ted Heath when he was the shadow Chancellor of the Exchequer in 1965. As a young chartered accountant interested in politics, I was hired by the Conservative Research Department—rather to my surprise and its too, I think—and found myself working night and day to assist him and the team of MPs that he had assembled to debate the extensive tax reforms of the 1965 Finance Bill. It turned out to be the start of my political career.

[Lord Cope of Berkeley]

Sir Edward had a distinguished record, first as a soldier in World War II, then as an MP for more than 50 years and a Minister in successive Governments under four Prime Ministers, and then of course as Prime Minister himself. He earned the right, even above the right of ordinary citizens, not to be unfairly traduced after his death by the police and by those responsible for law and order—but that is what has happened, as was spelled out again today.

The police were of course right to investigate the accusations in the first place—nobody is disputing that, I think—but it is not justice to give up and leave the seven accusations hanging in the air at this stage for a person of his record, or indeed for any other person. We need an investigation, an inquiry, to clear the names of those involved, particularly Sir Edward. But I also think that my noble friend Lord Deben was right that we need an investigation for the sake of the police and their reputation for fairness and straight dealing. That should be important to the Home Office as well as to the police themselves. The way that the particular policemen involved behaved in this case has been set out by others. It left a scar on the reputation of the Wiltshire Police in particular and, by extension, the police as a whole. That should concern even those who do not care about the reputation of the individuals accused. We need to be reassured that the behaviour in this case was an aberration that will not be repeated in other cases.

The police and crime commissioner has failed to use his powers—although he seemed to be about to at one point—perhaps because of the reputation that my noble friend suggested, and the police themselves do not seem prepared to salvage their reputation, so the Home Office, the Government, must set up an inquiry—and the sooner, the better. I add my voice to those calling for a proper resolution to the outstanding accusations.

8.30 pm

The Lord Bishop of Salisbury: My Lords, I thank the noble Lord, Lord Lexden, for his doggedness in persisting with this, and the other Members of the House who have also done so.

I come at this from something of a different angle. We are dealing with an extremely difficult issue as a society. The Church of England knows something about it—but so do we all. This is really difficult stuff. It would not be enough to have an inquiry into the seven unresolved and said to be unsubstantiated allegations. It is about what we have learned from our experience, about good practice, about what has gone wrong and about how we develop things for the future.

The persistence in asking for a review has much more in it, because it is not right to elide from one operation to another in the way that has happened in this debate, where I think some untruths have been spoken—I am sure unintentionally. We are collecting this stuff together and we need forensically to analyse what is going on in these different cases.

There is an opportunity to learn from Operation Conifer for the good of the country—for the good of all of us. Some important principles are at stake. Salisbury has the best of the earliest copies of Magna Carta. No one is above the law. That is a really important principle for us. Victims must have the confidence in every circumstance to make complaints which are then properly investigated by the police.

We do not know the evidence in relation to the 42 allegations, of which seven remain allegations that would have been investigated under caution, because they have not been published. They were viewed by an independent scrutiny panel. That gives us some assurance that there must be something there—but we do not know.

What is to be made of this? There is clearly a problem about the reputation of Sir Edward Heath. That point has been made repeatedly in the House and elsewhere and put well tonight. I am grateful to those who, in the latter stages of the debate, spoke about the reputation of the Wiltshire Police. That matters to me a great deal. It does not help, without evidence, simply to make allegations which do not or will not necessarily stand up. Wiltshire Police's reputation also needs reviewing to get this on to a basis where we can have confidence in one another.

Had Sir Edward still been alive, he would have been interviewed. He is not. The matter would have had to have been decided in a court of law. It cannot be. Would that the Church of England had learned from that. When the Operation Conifer report was published, I felt that that was a helpful principle to establish. But there will be more lessons to learn from it—for both Sir Edward's reputation and for Wiltshire Police, but also for the country at large. In the very difficult process that we are going through, an independent, probably judicial, review would be very helpful to establish what lessons can be learned from this. This is not a matter to be financed just from Wiltshire: the police and crime commissioner has made that clear. This investigation was conducted on behalf of 14 forces. Therefore, it is appropriate to put this as a problem to the Government and to say that a review needs to be undertaken for the good of all.

Lord Tunnicliffe (Lab): My Lords, I thank the noble Lord, Lord Lexden, for securing today's debate. I also welcome the Minister to her place on the Front Bench—and I accompany that with a note of sympathy. One or two noble Lords have asked the Minister to deviate from her brief tonight. I hope they realise that that can be a seriously career-limiting activity.

I will be brief. Your Lordships' House is familiar with the context and details of this issue, as it has been raised a number of times in Oral Questions and debates over recent months. It is a complex area of huge significance to the operation of our criminal justice system, and to our efforts to ensure justice and to prevent and protect against serious crimes of sexual abuse. Victims who come forward—those accused, and the public—must be able to have confidence in our police forces to run just and professional investigations into allegations of this nature. It must be stated that it is right and proper for allegations against a prominent public figure to be investigated, as they would be for a person without such standing. With those investigations, though, comes an increased obligation to be responsible about what information is put into the public domain.

This debate has provided many questions for the Minister regarding noble Lords' concerns over how the operation was managed, the role of the local PCC, and what consideration was given to the establishment and funding of an independent inquiry into Operation Conifer. I look forward to the Minister's reply on these issues.

Following Operation Midland, Sir Richard Henriques published his findings on police handling of that investigation, including analysis of some serious failures. At the time we said that the details of the report should be used to strengthen police procedures for both the investigation and the treatment of suspects—but, crucially, that changes must not be used to downgrade the seriousness of allegations or to make it harder for victims to report a crime. With that in mind, I have two questions for the Minister.

First, can she tell the House whether she is aware of any work to spread best practice between police forces on their operational handling of investigations of this nature, and to prevent the repetition of mistakes such as those that occurred in Operation Midland? Secondly, even while we debate the important issue of access to justice for a person who is accused, we must also keep in our sights the injustices that are faced daily by victims of these crimes. Rape and abuse are woefully underreported and have low conviction rates. The most recent Crime Survey for England and Wales estimated that 83% of people who had been the victim of a sexual offence did not report their experience to the police. Will the Minister update the House on what work is being done to encourage the reporting of these offences, and to ensure that police officers are adequately trained to respond to a victim who discloses this kind of crime?

Baroness Barran (Con): My Lords, I join other noble Lords in thanking my noble friend Lord Lexden for securing this important debate, and I thank all noble Lords for their warm welcome to me at the Dispatch Box. It is a great honour to be standing here, responding for the Government on this very important topic, and I will do my best to respond to the points raised.

In preparing for this speech, I read the various debates and questions on this topic over the past three years; indeed, I have listened to several exchanges since I joined your Lordships' House in July. I have been struck by the strength of feeling about the damage done to Sir Edward's reputation by Operation Conifer—and that strength of feeling was echoed again, very forcefully, by your Lordships tonight. The Government remain genuinely sympathetic to the concerns raised by noble Lords but have made their position clear on several occasions.

As noble Lords know, my right honourable friend the Home Secretary recently gave his own careful consideration to this matter and wrote to the noble Lord, Lord Armstrong, on 10 October. He has considered the case both for a Government-commissioned inquiry into Operation Conifer and for a review of the seven remaining allegations. To answer my noble friend Lord Lexden's question about whether there is anything in law to prevent the Government from commissioning an independent inquiry, I refer to the response of my noble friend Lady Williams of Trafford on 11 October. In it she confirmed that, while there is nothing to prevent the Government from doing so, they would need clear justification.

My right honourable friend the Home Secretary has recognised the strength of feeling on this matter and the issues it raises, but has also thought carefully about the proper role of government. It remains his view that the handling of this is properly a matter for the local police and crime commissioner and that it would not be appropriate for the Government to seek to persuade him how to go about it.

Sir Richard Henriques' review of the Metropolitan Police's handling of allegations against persons of public prominence, which has been referred to in this context, was of course commissioned by the then Commissioner, the noble Lord, Lord Hogan-Howe. It remains the case, therefore, that the Government have no plans to launch an inquiry into Operation Conifer or the seven outstanding allegations. A number of noble Lords have mentioned our inability to hear the voice of Sir Edward in response to these allegations—something on which my right honourable friend the Home Secretary also focused in his letter to the noble Lord, Lord Armstrong. He wrote that:

"the problem that the police encountered was their inability to interview Sir Edward himself in order to secure his account of events. I have every sympathy, but that problem will of course remain and it is not clear to what extent a further review of the existing evidence by a judge or retired prosecutor would resolve this".

I am genuinely sorry to give a reply which I know will disappoint some noble Lords, but it is important to bear in mind the degree of scrutiny to which Operation Conifer has already been subject. This has included Wiltshire Police's own independent scrutiny panel, two reviews by Operation Hydrant, a review of the costs of the operation by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, and an investigation by the Independent Office for Police Conduct into specific complaints about the then chief constable. The findings of Operation Conifer were then made public in the *Summary Closure Report* published in October 2017.

It is clearly disappointing that the investigation was unable to resolve the position in respect of seven of the allegations. I fully understand why this is of concern—noble Lords have put it most eloquently this evening. A man who has served this country at the highest level has had his reputation tarnished and he is powerless to defend himself. However, as I have already mentioned, the missing piece of the jigsaw is Sir Edward's side of the story. Sadly, that is lost to us now and it is not clear that a further review would take us any further forward. However, I reiterate what my noble friend Lady Williams has emphasised so often in this House: that the *Summary Closure Report* makes it clear that no inference of guilt should be drawn from the conclusion that Sir Edward would have been interviewed under caution.

8.45 pm

I would now like to move to the wider issues highlighted by this case. Child sexual abuse is an abhorrent crime, the scale of which we are yet fully to understand. Many in your Lordships' House have witnessed the damage that it causes to those it touches—the victims,

[Baroness Barran]
those accused, their families and their friends. In addressing this crime, we have to balance the need to take victims seriously, conduct investigations thoroughly and avoid unfair damage to the reputations of those alleged to have committed the abuse.

My own experience of working with victims of both domestic and sexual abuse is that for too long they have not felt able to come forward, fearing that they would not be believed if they did. That is quite wrong. Victims need to be treated in a way that helps to build their confidence in the criminal justice system and ensures that their allegations are investigated properly.

The noble Lord, Lord Tunnicliffe, made a very important point about improving reporting, and he asked about the work that the Government are doing to encourage this. Noble Lords will be aware that this Government have prioritised child sexual abuse as a national threat and have provided millions of pounds of extra investment, particularly through the police transformation fund, with the aim of transforming the law enforcement response and empowering police forces to apply their best skills and expertise in tackling the problem. Progress has been made in recent years in increasing victim confidence but we know that there is still significant underreporting, and this remains a major challenge not only for our criminal justice system but for our mental health services in dealing with the long-term impacts of abuse.

Lord Campbell-Savours: The noble Baroness has long professional experience in this area. How does she think we can move forward, protecting the reputation of people who have been falsely accused? Does she have a personal view on that?

Baroness Barran: I do not have a personal view on that but I thank the noble Lord for his question. In a moment I will comment on some of the ways in which we feel that progress can be made in this area.

In the words of the noble and learned Baroness, Lady Butler-Sloss, in an earlier debate on this subject, the police face an "unenviable and difficult task", because they have a responsibility towards the accused as well as the victims. My noble friend Lord Lexden referred in the same debate to the research led by Professor Carolyn Hoyle and colleagues at Oxford University into the impact of false allegations of sexual abuse on those accused, particularly the fear of further allegations. Professor Hoyle rightly points out that this fear of further allegations is not true of other crimes. I know that pre-charge anonymity for suspects is of concern to noble Lords and has been raised by a number of speakers in this debate.

The release of suspects' names to the media is addressed in the authorised professional practice guidance on media relations issued by the College of Policing. This makes it clear that the police will not name those arrested or suspected of a crime, save in exceptional circumstances where there is a legitimate policing purpose for doing so. Naming an arrested person before charge should be authorised by a chief officer, and the Crown Prosecution Service should be consulted. In May 2018, the college updated this guidance to make clear that this also applies where allegations are made against deceased persons. This seems to strike a sensible balance, but it is important that we get this right. The previous Home Secretary therefore asked Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services to carry out a short, targeted review of police adherence to the guidance on media relations, looking in particular at pre-charge anonymity. The inspectorate is undertaking a scoping study this financial year to consider where inspection activity might best be focused. In addition, the College of Policing is consulting on this issue with the National Police Chiefs' Council, the Police Superintendents' Association and the Police Federation.

The Government are genuinely trying to ensure that lessons are learned from the experience of operating this guidance. I hope this will go some way to reassuring my noble friend Lord Sherbourne, the noble Lord, Lord Tunnicliffe, and others who mentioned this.

The Government's position on Operation Conifer remains as set out in the letter that my right honourable friend the Home Secretary sent to the noble Lord, Lord Armstrong, in October. The letter has been placed in the Lords Library. I thank all noble Lords for the careful consideration they have given to this matter. I recognise that the inconclusive nature of the investigation's findings are unsatisfactory for everyone. I will make sure that my right honourable friend the Home Secretary gets a copy of the *Hansard* containing this debate.

I understand that there will be disappointment, especially among the many noble Lords who knew and worked with Sir Edward, but I repeat what I said earlier in my speech: no inference of Sir Edward's guilt should be drawn from the conclusions of Operation Conifer. It is also absolutely clear that those noble Lords who knew Sir Edward well do not have any doubt about his innocence. I share the view of my right honourable friend the Home Secretary that the cloud of suspicion hanging over Sir Edward could be removed only if it were possible to interview him personally, something that, sadly, can no longer happen.

The response to my noble friend Lord Lexden's final question, sadly, is no. We remain of the view that this is a matter for the local police and crime commissioner to handle, and it would not be appropriate for the Government to seek to persuade him how to go about this.

Lord Lexden: My Lords, I perform the traditional duty of thanking all participants in this debate with particular strength and great sincerity. Like many others, I commiserate with my noble friend who had the task of replying to this debate. She will realise at once that she leaves the House entirely and completely dissatisfied.

Across the House, we have been of one accord, united in a common purpose and determined to see justice done in this exceptionally important case, which has quite rightly attracted widespread public attention. A Conservative statesman has been traduced. We must have the truth, and we will get it.

I asked the Government four specific detailed questions about the conduct of Operation Conifer, its dire consequences and the need for an inquiry. What has been said in reply to this debate does not suffice by way of answer. I trust that I will have full answers to all four questions and that they will be sent as soon as

possible to all those who have taken part in this debate and placed in the Library of the House. The most important of the four, as I stressed, was the last, on the seven unsubstantiated allegations. They simply must be examined and cleared up.

Those who care about the reputation of Ted Heath today; those who write and lecture today, this generation and the generations to come, as historians—and I speak as an historian—must have the full, definitive facts. We must have an accurate historical record.

Those who have debated this Motion have made clear their absolute support for it. Among those who have spoken, the Contents have had it without a single Not-Content—and I am content with that clear moral victory this evening in this important debate. I beg leave to withdraw the Motion.

Motion withdrawn.

House adjourned at 8.56 pm.

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