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PARLIAMENTARY DEBATES
(HANSARD)

HOUSE OF LORDS

OFFICIAL REPORT

ORDER OF BUSINESS

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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

Thursday 21 February 2019

11 am

Prayers—read by the Lord Bishop of Chichester.

PC Keith Palmer

Announcement

11.06 am

The Lord Speaker (Lord Fowler): My Lords, I would like to make a short statement about PC Keith Palmer, who tragically died on 22 March 2017. PC Palmer ran towards danger to ensure our safety on that day. He paid the ultimate price for doing the job he loved and we owe him a profound debt of gratitude for his bravery.

Yesterday afternoon, the Police Memorial Trust placed a permanent memorial to PC Palmer at Carriage Gates. Not only will it serve as a lasting tribute to his dedication and his courage but it will ensure that visitors to Parliament never forget his sacrifice and his heroism.

Noble Lords: Hear, hear.

Subordinate Legislation: Transparency and Accountability

Question

11.07 am

Asked by ***Lord Lexden***

To ask Her Majesty's Government, further to their response to the report of the Joint Committee on Statutory Instruments *Transparency and Accountability in Subordinate Legislation*, published on 12 June 2018, what additional consideration they have given to the conclusions and recommendations in the report.

Lord Young of Cookham (Con): My Lords, the Government agree with the report's main conclusions and continue to take steps to ensure that statutory instruments respect parliamentary processes and conventions, are drafted to a high standard and remain accessible to anyone at any time. The committee made one specific recommendation on the free issue procedure, and the Leader of the House of Commons continues to liaise with the National Archives to take that forward.

Lord Lexden (Con): My Lords, diverting briefly from my campaign for justice for Sir Edward Heath, I put down this Question to draw attention to the work of the Joint Committee on Statutory Instruments, of which I am a member, and to the expertise of our quite excellent lawyers, who go through every instrument line by line—indeed, word by word. The committee has been increasingly concerned recently about the number of drafting mistakes being made by departments. Will my noble friend pursue that issue? In the report referred to in the Question, stress is laid on the importance of avoiding delays in publishing instruments and laying them before Parliament. Will Ministers impress on departments the need to ensure that delays do not occur?

Lord Young of Cookham: I pay tribute to my noble friend, those who with him work on the JCSI and the lawyers for their important if unglamorous work in scrutinising subordinate legislation, not least because their work rate has had to increase substantially due to the increased flow of SIs.

On corrections and errors, the Government have laid more than 1,500 SIs in the Session to date, not all related to Brexit. As of a recent report, the committee has for one reason or another reported on 136 of them. In nearly three-quarters of those cases, the Government either made a correction, provided further information or gave an undertaking to do so. On delays, of the 582 SIs considered by the committee since its report in June last year, only one has been reported for an unjustified delay and only one has been reported for an unjustified breach of the 21-day rule. Clearly, we hope to improve on both performances. More resources have been given to departments to improve their performance. I note that in its interim report on the current Session the committee states that,

"the overall percentage of errors in SIs has decreased".

We are working hard to maintain progress.

Lord Rowlands (Lab): My Lords, it has been a privilege to have served on this committee for a number of years; indeed, at various times I have chaired the committee and I was very much involved in the preparation of this report. As the Minister said, scrutinising statutory instruments can sometimes feel a rather remote, distant, especially technical thing to do, but one must never lose sight of the fact that a statutory instrument can seriously influence or affect a citizen's rights or duties, so it is particularly important that statutory instruments are accessible. In our report we make specific recommendations to make sure that statutory instruments and the relevant documents are available and accessible to individual citizens. Paragraph 4.9 says:

"Accessibility to legislation is … of obvious importance for the maintenance of the rule of law".

I hope that the Minister will impress upon the department the significance and importance of making these instruments and relevant documents accessible to citizens.

Lord Young of Cookham: I agree with that section of the report that deals with accessibility. Given their increasing availability on the internet, we hope that statutory instruments are more accessible than they were when they were available only in hard copy. We are in touch with the National Archives, which has responsibility for putting these SIs online, and we have taken on board the one specific recommendation in the report about making sure that those who originally had access to a document that was subsequently changed have access to the change without having to make special efforts to find it. I endorse the words of the noble Lord about the importance of SIs: that is why the JCSI and the Secondary Legislation Scrutiny Committee have a key role to play.

Lord Sharkey (LD): My Lords, we see too many skeleton Bills. The Healthcare (International Arrangements) Bill is the latest example and one of the very worst. These Bills force us to use secondary legislation scrutiny procedures for what should properly be in primary legislation and subject to amendment. Then there is the flood of Brexit SIs, many laid without proper impact assessments or consultations. We debate but we cannot amend and we are unwilling to reject. We have in fact rejected only seven SIs in the last half-century and this does not lend itself to effective scrutiny. Does the Minister agree that we need a thorough review, both of the use of skeleton Bills and of our procedures for dealing with SIs?

Lord Young of Cookham: The noble Lord's question goes slightly broader than the narrow Question about statutory instruments' transparency and accountability. On his first point, it is a matter for the DPRRC to draw attention to primary legislation where, in its view, too many powers are being subjected to subordinate legislation. The House, as it knows, can amend legislation as it goes through, and the Government have indeed amended legislation in many cases where the House has expressed the view that too much has been delegated. The particular Bill the noble Lord refers to is being debated later today. On his other question, about a wholesale review of statutory instruments, that goes slightly broader than this Question and at the end of the day it is a matter for the House and not the Government whether it wants to change the way it scrutinises legislation.

Lord Judge (CB): My Lords, the Minister was present when I suggested on Monday that it was something of a disgrace that it is 40 years—1979—since the House of Commons last rejected a statutory instrument. Can the Minister be persuaded to ask the Post Office to issue a commemorative stamp? That way, we will either remember the process and revitalise it or accept that it has been consigned to the dustbin of history.

Lord Young of Cookham: I am grateful to the noble and learned Lord. I was present in the House of Commons on that historic date but I cannot remember which side I was on, because I cannot remember whether it was before or after the general election in 1979. The noble and learned Lord's suggestion of a commemorative stamp is a good one, but it might be subject to a statutory instrument.

Baroness Smith of Basildon (Lab): My Lords, I add my appreciation of the Joint Committee for the work it does, which is hugely valuable, particularly when we have so many statutory instruments coming forward. However, the noble Lord and the committee rightly made much of avoiding delay, and I make a plea about accuracy. One of the problems with SIs, understandably, is that they cannot be amended. If, in the Government's haste to get so many through in such a short time, they are not accurate, as my noble friend Lord Rowlands said, that has enormous consequences. Can the Minister consider—I do not know whether he knows the answer to this—how many days there are between an SI being published in draft form and its being debated? That is when there is an opportunity to pick up any inaccuracies. Does he think that sometimes, they come through a little more quickly than one would anticipate is necessary to allow proper scrutiny prior to their being tabled?

Lord Young of Cookham: Affirmative resolutions cannot come into effect until they have been debated in both Houses, while negative ones should be laid in draft 10 days before they are made and 21 days before their coming into force. Those 10 days are to give the committee time to recommend a change from a negative to an affirmative resolution. In the 48 cases where it has made that recommendation, the Government have agreed. On errors, as I said in response to an earlier question, the overall percentage of errors in SIs has decreased and we are working hard to maintain progress.

GP Partnership Review

Question

11.16 am

Asked by ***Baroness Thornton***

To ask Her Majesty's Government what steps they will take to implement the recommendations of their report *GP Partnership Review: Final Report*, published on 15 January.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Baroness Blackwood of North Oxford) (Con): My Lords, we recognise the huge contribution that general practice and the partnership model has made to patients over the lifetime of the NHS. We wish to thank Dr Watson for the report of his independent review, and we are currently considering his recommendations. We are planning to publish a formal response in due course.

Baroness Thornton (Lab): I thank the noble Baroness for that Answer. The *GP Partnership Review* makes seven key recommendations, including: an increase in the number of GPs and funding for those roles; an expansion of the range and capacity of healthcare professionals working with GPs, such as developing the role of practice nurses; focusing on general practice in medical training; and recommendations to deal with an unsustainable workload. Those are all laudable aims. What puzzles me is the context in which these aspirations can be delivered. Some 78% of EU doctors working in the UK are not reassured by the Prime Minister's commitment to protect the rights of EU citizens, and 35% of EU doctors are considering leaving the UK and moving to another country. The tier 2 visa cap means that 1,500 applications for healthcare workers were rejected by the Home Office last year, and indeed more GPs are retiring, leaving or going part time than are entering the profession. So is there a plan to remedy the existing shortfall and the impending shortfall, which threaten and will continue to threaten patient care and safety?

Baroness Blackwood of North Oxford: I thank the noble Baroness for her Question. She is absolutely right that recruitment and retention of GPs is a core priority for the Government. That is exactly why funding for GPs in the long-term plan was increasing at a rate higher than in the rest of the NHS, at £4.5 billion. That is also why we have a target to recruit 5,000 more GPs. I am pleased to report that HEE has reported that we recruited a higher number of GPs last year than ever before. We also have some core recruitment schemes to increase GP retention: the GP Retention Scheme, the Local GP Retention Fund, the GP retention service and the Releasing Time to Care programme, with £30 million in funding. However, we accept that this is a challenging thing to achieve, and we are working hard to improve our performance.

Lord Forsyth of Drumlean (Con): My Lords, on the subject of GPs retiring, what are the Government going to do about the fact that many GPs are retiring once they reach the age of 55 because their final salary pension scheme exceeds the £1 million limit, which the Government successfully reduced from £1.8 million, and then come back as locums, costing the health service even more? That affects not only GPs but a number of people elsewhere in the public sector, who are behaving completely rationally because they suddenly find themselves being taxed at 55%.

Baroness Blackwood of North Oxford: I am not able to talk about other parts of the public sector, but we recognise that there are legitimate concerns here, and we are working with the BMA and NHSE as part of our work on the recruitment and retention of GPs and consultants, and considering what mitigations, if any, would be appropriate.

Baroness Jolly (LD): My Lords, this was indeed a good and welcome report. The Royal College of General Practitioners welcomed the findings, but noted that the profession was concerned about red tape surrounding appraisals, CQC inspections and now GDPR, which are all getting in the way of patient care. Who is responsible for squaring the circle between improving patient care and GP regulation and accountability?

Baroness Blackwood of North Oxford: The noble Baroness is absolutely right: we want to free up GPs to do exactly what they have been trained to do, which is to care for patients. That is why, as part of the GP contract, we have included funding to ensure that they can claim for any additional costs that they may have under GDPR. It is also why we put in the long-term plan that we want to recruit an extra 20,000 staff who can provide the other services, such as administrative services, that GPs are sometimes caught up doing when they should not be.

Lord Winston (Lab): My Lords, the list of things that the Government intend sounds very impressive. I have a simple question. Communication is particularly important to general practitioners, who may see 90 or 100 patients with abdominal pain, one of whom may have a cancer of the colon. That is one of the major problems. Has the noble Baroness ever sat down and had informal conversations with general practitioners who are threatening to retire, or are retiring, early to understand how they feel about it?

Baroness Blackwood of North Oxford: I absolutely have had a large number of conversations with general practitioners who have struggled. In my previous role as a Member of Parliament, I visited a large number of general practices in my constituency. I am also the daughter of a doctor and I have a rare disease, so I spend a lot of time in the NHS as a patient and, perhaps, as a mystery shopper—so I assure the noble Lord that I have extensive experience of the NHS. I would not claim, however, to understand what it is like to be a general practitioner, so I would always hope to learn by continued experience of listening to their experiences and challenges.

Lord Foulkes of Cumnock (Lab Co-op): My Lords, why does the Minister think that the reality that we see every day in the outside world differs completely from what she says at the Dispatch Box?

Baroness Blackwood of North Oxford: I do not think that that is the case. I think we are making good progress. It is a challenging picture for general practitioners; that is exactly why, since the New Year, we have introduced the long-term plan to increase funding for the NHS, and in particular for general practice. We have introduced this review with support from the department, new GP practice with support from the BMA and the new GP IT Futures plan so that we can bring in the most innovative technology for GPs so that they can bring the best and most innovative care to patients.

Universal Credit: Free School Meals

Question

11.23 am

Asked by ***Lord Bassam of Brighton***

To ask Her Majesty's Government whether they intend to reconsider recent changes to access to free school meals following their decision to delay the roll out of Universal Credit.

The Parliamentary Under-Secretary of State, Department for Education (Lord Agnew of Oulton) (Con): My Lords, the continuing provision of free school meals to children from out-of-work or low-income families is of the utmost importance to this Government. Due to the generous transitional protection we put in place, no child eligible for and currently receiving free school meals will lose their entitlement as a result of the universal credit rollout. Even more children will benefit by retaining eligibility through the protection.

Lord Bassam of Brighton (Lab): My Lords, it is estimated that there are 5 million children now living in poverty in the UK, so is it not time for the Government to consider using the pause in the rollout of universal

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credit to reconsider their mean-spirited free school meals policy? What assessments have they made of the number of families who are in work poverty who do not qualify for free school meals but for whom the cost of school meals causes genuine daily hardship?

Lord Agnew of Oulton: My Lords, I dispute the noble Lord's assertion on the number of children living in poverty. The DWP estimates that 300,000 fewer children are in poverty now than prior to 2010. On eligibility he will know that, through the introduction of infant free school meals, another 1.5 million children are now in receipt of them. I give credit to our coalition partners, the Liberal Democrats—particularly the noble Baroness, Lady Garden—for helping to bring that in. We are in a better place than we have ever been before.

Baroness Corston (Lab): My Lords, the Minister referred to the fact that 300,000 fewer children are in poverty. Can he be truthful with the House and say that that is his assessment in relation to abject, rather than relative, poverty? That makes a huge difference. Talking about only people in destitution, rather than those who are poor, is misleading.

Lord Agnew of Oulton: My Lords, the Government should support people in the most vulnerable state. That is why we used the same statistics as the DWP, which produces annual estimates and said that the rate of material deprivation for children has never been lower than the current figure of 11%.

Baroness Boycott (CB): My Lords, will the Government consider rolling out the free school meals programme more widely in the next few months as we go through Brexit? Indications suggest that food prices will rise, rather than go down. There are categories of children whose parents are in dire poverty but they do not receive free school meals. All children of parents living here under immigrant status do not get free school meals either. For families in poverty, they are a true lifeline. Will the Government think about rolling them out, at least for the summer term while some of this settles down?

Lord Agnew of Oulton: My Lords, it might be worth pointing out this week's ONS statistics, which show a rather more positive figure on employment: 32.6 million people in this country are now employed. That is 167,000 more than between July and September 2018, and 440,000 more than a year ago. We take child poverty very seriously. We also encourage schools, through the use of the pupil premium, to encourage additional recruitment to the programme.

Lord Addington (LD): My Lords, does the Minister agree with the general agreement that a good diet improves performance at school? Taking that on board, would not an Education Minister encourage his colleagues to make sure that more children got free school meals, not fewer?

Lord Agnew of Oulton: My Lords, as I said in response to an earlier question, the number of children in receipt of free school meals has increased over the past eight years. I agree with the noble Lord that a nutritious diet is essential for young people; that is why, as he will be aware, we encourage breakfast clubs and introduced the sugar tax, both of which aim to create a healthier nutritional outlook.

The Lord Bishop of Durham: My Lords, the two-child limit means that welfare reforms weigh particularly heavily on families with three or more children. What assessment have the Government made of the consequence of changes to free school meals that are set to impact on children with more than one sibling? Does the Minister agree that this policy will effectively harm children from large families through no fault of their own?

Lord Agnew of Oulton: My Lords, the Secretary of State for the DWP announced some changes in the past few weeks. We included the two-child limit in those changes but I am happy to write to the right reverend Prelate if he needs more information.

Lord McColl of Dulwich (Con): My Lords, will the Minister ensure that these meals include whole milk as opposed to that rubbishy skimmed stuff? If children are fed on whole milk, as 8,000 in Canada were, there is no obesity.

Lord Agnew of Oulton: I heartily agree with the noble Lord. It is an extraordinary conundrum that you pay just as much in a supermarket for that thin stuff with the red top as for full-fat milk.

Baroness Goudie (Lab): My Lords, the Minister seems to forget that children are the future of this country. He hides behind the statistics. We should give free school meals to many more children than at present and help children to get those meals at a much younger age, perhaps even when they are nursery. If they are not fed properly now, they will not become healthy adults.

Lord Agnew of Oulton: My Lords, I can only come back to my earlier answers. Over the past eight years we have dramatically increased the number of children benefiting from free school meals, and are now spending £600 million to ensure that infant free school meals are widely available. That has a take-up of more than 86%.

Lord Hamilton of Epsom (Con): My Lords, does my noble friend have the faintest idea where the statistic from the noble Lord, Lord Bassam, comes from; that is, that 5 million young people are living in poverty?

Lord Agnew of Oulton: Unfortunately I cannot answer that question. I think that the Children's Society has come up with a number which again was without true validity. I do not think that that helps the debate.

Lord Watson of Invergowrie (Lab): My Lords, the delay in the rollout of UC is surely a recognition by the Government that inter alia they have not offered proper protection to around 1 million children in poverty who would have become eligible for free school meals under the transitional arrangements. They are expected to miss out, at a cost of around £430 per child. As the noble Lord, Lord Addington, said, teachers know only too well that an undernourished child is in no fit state to be taught effectively. I have to say that the current Secretary of State for Work and Pensions is showing signs of a caring approach that was singularly lacking in her predecessor. Will the Government now adopt the policy consistently advocated by Labour and support all children living in poverty by completing the rollout while maintaining the existing rules under which all universal credit claimants are eligible for free school meals?

Lord Agnew of Oulton: My Lords, we debated this almost exactly a year ago. The key thing which may be being misunderstood is that the provisions we have put in place for children with parents on universal credit are for an expanded cohort of children. More children are now entitled to free school meals than were before universal credit.

Returning Jihadists: Treason Act

Question

11.31 am

Asked by ***Lord Alton of Liverpool***

To ask Her Majesty's Government whether they intend to update the Treason Act 1351 to prosecute returning jihadists.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, to prosecute terrorists for treason risks giving their actions a political status or glamour that they do not deserve, rather than treating them as merely criminals. The Government have just passed the Counter-Terrorism and Border Security Act, which updates terrorism offences and introduces new powers to reflect the threat we face today from foreign terrorist fighters. This will provide the police and the intelligence services with the powers they need to protect the public.

Lord Alton of Liverpool (CB): My Lords, while no one would want to glamorise any of the crimes that we are talking about here, nevertheless does the Minister not agree that those who have justified the murder of other British citizens through, for instance, the bombing of the Manchester Arena in 2017 and people who have taken up arms or given succour to those who have targeted British forces and civilians have betrayed this country, its people, its values and its laws?

Given the conflicting conclusions of the Law Commission reviews of 1977 and 2010, is it not time to provide a solid legal basis rather than the 1351 Act for prosecuting hundreds of returning jihadists, perhaps in line with the conclusions of the Policy Exchange paper by Professor Richard Ekins of the University of Oxford and others, with a foreword by the noble and learned Lord, Lord Judge, which I have sent to the Minister? Would not this, and the creation of a regional tribunal to prosecute for crimes of genocide, demonstrate our unerring and passionate belief in the rule of law, and that those responsible for heinous crimes cannot expect to evade prosecution?

Baroness Williams of Trafford: I totally agree with the noble Lord that anyone committing atrocities such as the Manchester attack—I was in Manchester at that time—should not escape justice. I commend the Policy Exchange paper, and I think that the noble Lord would agree that the Home Secretary has said that he will review all the laws we have at hand. However, if the noble Lord looks at the recent counterterrorism Bill which has now become an Act, I am sure that he will agree that the new powers available in that Act might in the future prevent some of the terrible things that we have seen in recent months. On a regional tribunal, I am not sure how practicable that would be given the situation in some parts of the region.

Lord West of Spithead (Lab): My Lords, I share the view of the noble Lord, Lord Alton. I do not believe that this would glamorise the loathsome things that have been done by these people and I think that it is appropriate that as a nation we show how repugnant and appalling this sort of behaviour is. When I was a Minister, at times it was very difficult to get into court people who should have been tried. This seems to be a way that it could be done. Might it not be easier to update the treason law and show these people to be traitors, which is something that our nation really believes they are?

Baroness Williams of Trafford: My Lords, I hope the noble Lord agrees that the recent legislation has given more powers to the courts to prosecute. I am pleased that the noble Lord supported that Bill through its passage. I agree that the Treason Act 1351 is rather old. It was updated relatively recently—in 1861, I think—but whether a prosecution is justified in individual cases, and whether treason is the appropriate charge, will be a matter for the courts. I am not dismissing it. The Home Secretary has said that he will consider the matter—we keep all laws under review—but whether that charge is brought will be a matter for the courts.

Lord Hodgson of Astley Abbotts (Con): My Lords, during the passage of the Counter-Terrorism and Border Security Bill, to which my noble friend referred, my noble friend Lord Faulks and I tabled an amendment to the Treason Act 1351 to try to give the Government wider powers to deal with the fast-moving challenges to our security that now exist. In asking that the amendment be withdrawn—which it was—my noble friend said,

"in the knowledge that there is ongoing work in the Home Office to examine whether there are further gaps in our law, and in order to help us counter hostile state activity".—[*Official Report*, 31/10/18; col. 1382.]

Could my noble friend update the House on the progress of that work?

Baroness Williams of Trafford: My noble friend is right to raise this matter because we have to constantly keep our laws under review to keep up with the fast-moving methods by which terrorists will seek to destroy the unity of this country. Laws are kept under review. Noble Lords have talked about an espionage Bill and

[Baroness Williams of Trafford]
a treason Bill. Certainly the CT Bill in which my noble friend took part was significant in updating some of our laws.

Lord Paddick (LD): My Lords, yesterday the Minister implied that it was difficult to prosecute those involved with ISIS as we had, in effect, no extradition arrangements with Syria. That is why the Government had to deprive people of their British citizenship. Many of these people want to return to the UK but the Government are preventing them from returning to face justice by depriving them of their citizenship. Is the Government strategy confused or is it just me?

Baroness Williams of Trafford: It might be the noble Lord because it is difficult to prosecute people in Syria, where we have no consular access. People have been prosecuted when they come back to this country and have been put into programmes such as Channel to try to rehabilitate them. There are a number of different remedies available to the Government and the Home Secretary to bring people to justice.

Lord Cormack (Con): My Lords, is not "a fast-moving Home Office" the ultimate oxymoron?

Baroness Williams of Trafford: I do not think so, my Lords.

Offensive Weapons Bill

Order of Consideration Motion

11.38 am

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

That the amendments for the Report stage be marshalled and considered in the following order:

Clause 1, Schedule 1, Clauses 2 to 35, Schedule 2, Clauses 36 to 47, Title.

Motion agreed.

Healthcare (International Arrangements) Bill

Committee (2nd Day)

11.39 am

Relevant documents: 39th and 47th Reports from the Delegated Powers Committee, 18th Report from the Constitution Committee

Clause 5: Regulations and directions

Amendment 26

Moved by ***Lord Marks of Henley-on-Thames***

26: Clause 5, page 3, line 36, leave out paragraph (e)

Lord Marks of Henley-on-Thames (LD): My Lords, the amendments in this group concern the Henry VIII powers in the Bill. Without going into the details of the drafting of my amendments, because they hang together, I make one central point. It is my contention that, given the breadth of the powers as they currently appear in the Bill, the only Henry VIII powers enabling the Secretary of State to make regulations amending, repealing or revoking primary legislation or EU retained law should be those that are limited to consequential, supplementary, incidental, transitional, transitory or saving provisions. That is quite a wide category for these powers in any case. If when the Bill comes back on Report the Government have changed their position, and the Henry VIII powers in the Bill are limited to those which they can justify in accordance with what I might call a conventional approach to permitting secondary legislation to amend, revoke or modify limited categories of primary legislation, we may change our position.

For the moment, however, we stand by the position taken by the Delegated Powers Committee, which described the Henry VIII powers in the Bill in trenchant terms:

"The Bill contains a Henry VIII power to amend or repeal any Act of Parliament ever passed".

The power may be used for the purposes in Clause 5(3), but those powers are no narrower than the purposes of the Bill as a whole:

"Regulations under section 2 may amend, repeal or revoke primary legislation (a) for the purpose of conferring functions on the Secretary of State or on any other person (including conferring a discretion); (b) to give effect to a healthcare agreement".

These purposes are scarcely narrower, and to describe them as limiting is to misuse the English language. The committee pointed out that the Minister does not give any indication of what primary legislation might in future need to be amended. She said that there may be a need to confer functions on healthcare bodies at some stage in future, to which the committee's robust and, I suggest, accurate response was that the time to confer functions on such bodies is when those bodies are created.

We should all remember why such powers are called Henry VIII powers. Their name is a reference to the Statute of Proclamations of 1539, which effectively enabled the Crown to govern by decree, ordering that proclamations should be obeyed as though they were made by Act of Parliament. Writing in the 18th century in his *Commentaries on the Laws of England*, Sir William Blackstone—after whom the great human rights set of chambers of which the noble Lord, Lord Pannick, is a member is named—described the Act as a statute,

"calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed".

Those words are as true now as they ever were.

I suggest that when it comes to primary EU retained law, the principles are the same. The Constitution Committee report draws attention to the distinction specifically drawn in Section 7 of the EU withdrawal Act between retained direct principal EU legislation and retained direct minor legislation, on which less stringent conditions are imposed for its modification. In this Bill, the Government have simply ignored the distinction.

The Constitution Committee said:

"One of the purposes of drawing this distinction was to make it possible for subsequent Acts of Parliament to afford greater protection to retained direct principal legislation, such as by requiring delegated powers that amend it to be subject to the affirmative procedure".

It continued, in bold:

"We recommend that clause 5 be amended to reflect the distinction drawn in the European Union (Withdrawal) Act 2018 between principal and minor retained direct EU legislation".

The report drew attention to the fact that the committee had made the same recommendation in its report on the Trade Bill and that the Government, in their response to that report, had accepted it. It went on:

"We recommend that the Government ensures that all future bills that provide for the amendment or repeal of retained EU law include the distinction between principal and minor retained direct EU legislation".

First, why have the Government not accepted the committee's recommendation on this occasion, and, secondly, will the Government commit to complying with the committee's general recommendation in the future?

11.45 am

I agree with the point made by the Delegated Powers Committee and often made in this House that, if a power is too wide and its delegation is inappropriate, those fundamental defects cannot be cured by making them subject to the affirmative rather than the negative procedure. If they should not be there, they should not be there, and packing them up in an affirmative procedure box does not make them more acceptable.

In other contexts, the noble Baroness has shown herself to be sensitive to the distinction between primary and secondary legislation. Only yesterday, in answer to the suggestion from the noble Baroness, Lady Deech, that regulatory change might be appropriate to alter the 10-year limit for the storage of frozen eggs under the Human Fertilisation and Embryology Act 1990, she said that she did not agree,

"that the regulatory route … would be appropriate, as it was not envisaged at the time of the legislation".

She went on to say that,

"given that this is such sensitive legislation",

the Government and she,

"believe that continuing with primary legislation is appropriate".—[*Official Report*, 20/2/19; col. 2265.]

I urge her to bring pressure to bear on other members of the Government to extend that kind of sensitivity to this Bill, and to accept that the principle is applicable here and that allowing for future regulatory change to primary legislation on an unrestricted basis, as this Bill does, is unacceptable and unconstitutional. I beg to move.

Lord Lansley (Con): My Lords, I shall speak to Amendments 37 and 39 in this group, which are in my name. The noble Lord, Lord Marks, has helpfully introduced them in the point he made towards the latter part of his remarks about the distinction made in the EU withdrawal Act between retained direct principal EU law and retained direct minor EU law.

As the noble Lord said, that principal EU legislation should be subject to the affirmative procedure was recommended for the Trade Bill. That was accepted by the Government but has not been incorporated into this legislation. My Amendments 37 and 39 would do precisely what the Constitution Committee recommended on Monday. Happily, I tabled my amendments last week, rather than waiting until after Monday, as that would have been rather late. The amendments would allow the Government to indicate their support for this process. I hope that they are drafted correctly and that they would do the job, but, even if they do not, we will have the opportunity for that to be remedied on Report. I hope that my noble friend on the Front Bench will say that it is the Government's intention to make this change.

Participating in the Committee stages of both the Trade Bill and this Healthcare (International Arrangements) Bill gives one an opportunity on occasion to make a positive comparison between the two. However, it is getting confusing. The Trade Bill is intended to roll over existing agreements and specifically does nothing else. Members—not least on the other side—are spending much of their time trying to persuade the Government that it should include reference to how things should be agreed in the future. The Bill before us creates a power not only to roll over existing agreements but to make new ones. On Tuesday, much time was spent on Members of the House arguing that this was inappropriate and should be left to future legislation. As they say: you cannot have it both ways. But it seems that in this instance, at least on this specific point, we can ask Ministers to change the Bill for this purpose.

I commend to the Front Bench Amendments 37 and 39, which would incorporate an affirmative requirement for amendments to retain direct principal EU law.

Lord Foulkes of Cumnock (Lab Co-op): My Lords, I strongly support the amendment of the noble Lord, Lord Marks, and everything he said. I fear that, given the welter of things happening in politics at the moment, this kind of Bill is getting through without proper scrutiny and that many people, in both Houses, do not realise the importance and far-reaching implications of what we are considering. We are therefore very grateful to people like the noble Lord, Lord Marks, for drawing attention to this issue. I am astonished that this has apparently got through unchallenged in the other place. Many of my colleagues—with the notable exceptions of my noble friend Lady Thornton and her colleagues on the Front Bench—have not realised what an urgent matter this is.

I arrived late on Tuesday and was unable to participate in the debate on the first amendment. I missed the wonderful speech by the noble and learned Lord, Lord Judge. He raised the issue again at Question Time today and was answered by the noble Lord, Lord Young of Cookham, who is with us. Astonishingly, as the noble and learned Lord, Lord Judge, said on Tuesday and said again today:

"The harsh reality is summarised in the fact that it is exactly 40 years since the other place rejected a statutory instrument—40 years".—[*Official Report*, 19/2/19; col. 2172.]

For the last 40 years, we have been dealing with legislation without the ability to amend it. Whether the procedure is affirmative or negative—I will come to that later—does not matter: we have not had the opportunity to amend it. What happens? The statutory instrument is drawn up by civil servants and put forward to Parliament by the Government. What is Parliament asked to do? You have to agree it or

[Lord Foulkes of Cumnock]
not—and if you do not agree it, you get threats. You get people saying, "This is a killer amendment" or, "This is a killer resolution". That happened yesterday, I think, on a couple of statutory instruments, and the amendments were not moved in the end.

So we have a take it or leave it situation with statutory instruments, unlike with primary legislation. When the subject was raised, the noble Lord, Lord Young of Cookham, said that it was a much wider issue—it had been raised in the wider context. A trickle of SIs has become a flood. More and more issues that ought to be dealt with by primary legislation are being dealt with by secondary legislation. The more that happens, the bigger the transfer of power from the legislature to the Executive. That is exactly what the Government are doing. I ask them to think carefully. This Conservative Government will not be in power for ever. I hope some people agree with me on that—somebody say, "Hear, hear".

A noble Lord: Hear, hear!

Lord Foulkes of Cumnock: Thank you. I wonder what the noble Baronesses, Lady Blackwood and Lady Manzoor, and the noble Lord, Lord Young, think of the possibility of my good friend Jeremy Corbyn bringing in legislation through statutory instrument after statutory instrument without any ability for scrutiny by a Conservative Opposition. That has to be thought about. This is a parliamentary democracy and people have to think about that and about what they are storing up for themselves. That is exactly what is happening.

I go back to the excellent speech by the noble and learned Lord, Lord Judge. He said:

"A late Victorian, or maybe Edwardian, professor of history described Henry VIII as 'the mighty lord who broke the bonds of Rome', but even Henry VIII was compelled to do it through express, primary legislation enacted in the Reformation Parliament. On one view, it may be a misdescription to call this a Henry VIII clause. Bearing in mind that it applies to both UK and EU primary legislation, perhaps in this context it is a Henry XVI clause".—[*Official Report*, 19/2/19; col. 2171.]

That was a wonderful description.

Earlier, at Question Time, the noble and learned Lord said that we might issue a stamp commemorating 40 years since the last statutory instrument was overturned by the other place. We all thought that was very amusing and it was a lovely description, but it is a very serious matter. I understand the take it or leave it approach to appropriate secondary legislation, but when the issues considered ought to be dealt with through primary legislation, we get into very dangerous territory indeed. I hope the Minister, in the context of this Bill, and the Government, in the wider context of other Bills, will realise the constitutional implications of what they are proposing and that their short-term political expediency will have some long-term consequences that they might live to regret.

Lord Butler of Brockwell (CB): My Lords, I agree with the noble Lord that our parliamentary processes for dealing with statutory instruments are unsatisfactory—in particular, that we cannot amend them. But is not the remedy in Parliament's hands? If we were a little bolder and rejected some statutory instruments, it would not be difficult for the Government to reintroduce them in an amended form. The amendment could be very slight. It seems that statutory instruments are necessary, particularly when we are dealing with all those that result from our leaving the European Union. Therefore, we need to look very carefully at the parliamentary process for dealing with them. It seems, as the noble Lord, Lord Young of Cookham, said at Question Time, that this is in Parliament's hands. We could be bolder and achieve the objective of amending statutory instruments by rejecting some of them.

Lord Mackay of Clashfern (Con): My Lords, it is important to realise that statutory instruments are a very useful way of dealing with particular situations, but of course, it is extremely important that the powers to make these instruments are properly scrutinised and narrow. As the noble Lord, Lord Wilson of Dinton, said on the previous day this Bill was being considered, in his day parliamentary counsel would say, "What do you want to use this for?" If the reply was, "I'm not sure", they would say, "Well, in that case I'm not drafting it until you know what it is for".

Noon

It is extremely important that these provisions are not too wide. Two questions have been raised in connection with this Bill, one of which was raised by my noble and learned friend Lord Judge and spoken to by others, including the noble Lord, Lord Wilson. The second question concerns the scope of the Bill. It is said that this is a Brexit Bill. Well, it is, in the sense that it is occasioned by the need for a provision dealing with this matter having arisen from Brexit, but I see no reason why the scope of the Bill should be restricted to other European countries, nor why this problem cannot also be addressed in relation to other possibilities, so long as the powers given are properly restricted. The amendments that the noble Lord, Lord Marks, referred to are examples of provisions that are much too wide. The problem is that if you try to do this too widely, you damage the argument for the scope. If the Bill properly restricted the powers that arise in connection with really intimate and particular matters, you would support the argument for the wider scope.

My experience of the amending of statutory instruments, which is rather long, is that if the thing has to be amended, it is much better to send it back and let it be reconsidered. That is the real purpose of the way the system was developed: that you do not allow an instrument to pass which is defective; rather, you should throw it out and let the Government amend it.

Lord Foulkes of Cumnock: I was going to intervene in the speech of the noble Lord, Lord Butler, but this applies equally here. I have to be careful not to give away too many secrets and internal arrangements, so this is a purely theoretical example. Certainly that can be done, but if a Chief Whip tells you that voting against this is a fatal Motion and urges you not to do it, when that kind of situation builds up it is very difficult. It may well happen. It may already have happened, without giving too much away.

Lord Mackay of Clashfern: If a defect was pointed out in a statutory instrument, I would consider that a matter for stopping it going forward. Most of the arguments I have heard in recent times do not point to

any mistake in an instrument. They are more theoretical. I do not wish to examine them in detail—I have done that once—but it is important. That is what was proposed when these instruments were originally laid. It is much easier to amend an instrument by taking it back and starting again than with an Act of Parliament. That is the appropriate procedure for correcting a defective instrument, and it happens, not necessarily formally, but quite often instruments are withdrawn when a mistake is pointed out; they get round to writing it again and hopefully the second time it is improved.

Lord Hope of Craighead (CB): My Lords, it is perhaps worth mentioning Amendment 28 in the name of the noble Lord, Lord Patel, which was covered by the noble Lord, Lord Marks of Henley-on-Thames, because he directs our attention to a quite extraordinary provision. On page 3 of the Bill at line 40, we are asked to approve Clause 5(3), which allows regulations to be made amending, repealing or revoking,

"primary legislation … for the purpose of conferring functions on the Secretary of State or on any other person".

That is extraordinarily wide. I can understand conferring powers on the Secretary of State but why "on any other person", given that the subsection then adds "(including conferring a discretion)"? That really is the most extraordinarily broad provision, which should be looked at very carefully.

Lord Patel (CB): I thank my Convenor, the noble and learned Lord, Lord Hope, for bringing attention to my amendment. I will be briefer than brief because the noble Lord, Lord Marks of Henley-on-Thames, not only introduced my amendment but spoke to it. My purpose in tabling Amendment 28 was to bring attention to exactly what the noble Lord and the noble and learned Lord have just said: it is an extraordinary power to take. I fear that it is this kind of power that led the Constitution Committee to suggest that the only way for Parliament to scrutinise the Bill subsequently might be to introduce such a draconian provision as a sunset clause; I say draconian because I am worried that it may have other implications. As I said on Monday, I worry that that will affect what the agreements in the future might do, particularly with the EU. But we will no doubt have another opportunity to discuss that.

Lord Lansley: For completeness, in relation to Amendment 28, which would remove subsection (3), it should be recognised that the power to which the noble and learned Lord, Lord Hope, referred is for the purpose of giving effect to a healthcare agreement. It is not for any other purpose, so if it was not in pursuance of a healthcare agreement the power would not be available. Albeit that healthcare agreements may in themselves be relatively wide-ranging, the power can be used only for that purpose.

Lord Patel: My Lords, I am not too sure about that because the Delegated Powers and Regulatory Reform Committee said in its report:

"The Minister does not give any indication of what primary legislation might in future need to be amended".

Lord Lansley: But subsection (3) is clear: this is a power to amend primary legislation,

"for the purpose of conferring functions on the Secretary of State … to give effect to a healthcare agreement".

The noble and learned Lord will know that that at least limits the scope.

Lord Hope of Craighead: The noble Lord, Lord Lansley, raises an interesting point. It is something that should be clarified by better drafting. Splitting things into subheads, as is done frequently throughout the Bill, tends in some ways to open up the arguments to which the noble Lord, Lord Patel, has drawn attention. As I think I have mentioned to the Minister outside the Chamber, the way these provisions are drafted in this cumulative form is rather unfortunate because if they are read together in a single sentence they can be narrowed down, whereas if they are separated out it suggests that paragraph (a) has a life of its own, so one may wonder what "any other person" can possibly refer to. I hope that the Minister will take these points away and ask the draftsmen to look more carefully at how the Bill is drafted, particularly when using that style of drafting.

Baroness Thornton (Lab): My Lords, this has been a very powerful and useful debate to have as a precursor to the one we are about to have, where we will again address the nature of the powers in the Bill. I enjoy it very much when noble Lords such as the noble and learned Lord, Lord Hope, use the words "rather unfortunate". Of course, in House of Lords-speak, which the Minister will become accustomed to, it is a very serious thing to say of a piece of legislation that its drafting is rather unfortunate. I want to say how much I appreciated the interventions from the noble Lord, Lord Butler, and the noble and learned Lord, Lord Mackay of Clashfern, to whom I always listen most carefully.

My noble friend Lord Foulkes referred to discussions that may take place outside this Chamber on whether statutory instruments should be referred back, but actually we know from the past that, when your Lordships become exercised about a statutory instrument, we see threats in the press about our existence and, "How dare they!". That is a serious problem, so I think there is an issue that we need to address that is broader than just this Bill.

Lord Butler of Brockwell: It seems to me that the situation is exactly the same with amendments to primary legislation. Governments will often put pressure on their Back-Benchers to support it, but very often the Government are defeated on amendments and legislation is thereby improved. I cannot see why the same thing should not happen with statutory instruments.

Baroness Thornton: The noble Lord and I absolutely agree about that, and the noble Lord is quite right. I am not saying that one would bow to that pressure at all. Your Lordships' House has a proud record of persuading the Government to change both statutory instruments and primary legislation with regard to the powers that it has.

[Baroness Thornton]

I shall say one final thing. It is not the case that these issues were not raised by my honourable friends in the House of Commons; in fact, they were. Indeed, the Delegated Powers Committee's first report on the Bill was quoted extensively in Committee in the Commons; unfortunately, the votes were not there to carry its effects through. We might think about changing that at a later stage in the Bill.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Baroness Blackwood of North Oxford) (Con): My Lords, I thank the noble Lord, Lord Marks, for Amendments 26, 29, 30 and 31, the noble Lord, Lord Patel, for Amendment 28, and my noble friend Lord Lansley for Amendments 37 and 39, and all noble Lords who have participated in this debate, which has been very robust.

These amendments seek to address concerns raised about the ability to make consequential changes to primary legislation using regulations under the Bill. I reassure noble Lords that the Government have been listening closely to these concerns, some of which—as the noble Lord, Lord Marks, put it—were trenchantly expressed earlier in Committee, and I want to continue these conversations as we move towards Report.

That said, I would like to take this opportunity to provide some context to the approach we have taken in the Bill. The Henry VIII powers in this Bill are not free-standing; they flow directly from the delegated powers in Clause 2(1)—which I know has also met with a little bit of disapprobation. The noble Lord, Lord Butler, recognised the importance of parliamentary scrutiny, and we do as well. We recognise the concerns over the Henry VIII powers, and the Bill has been drafted to ensure that regulations making such changes would all be subject to the affirmative procedure. The intention of including this power to make consequential changes to primary legislation is simply to ensure that healthcare agreements are implemented in an efficient and effective way.

There is a broad legislative landscape which currently implements reciprocal healthcare arrangements with the EU. It currently includes EU law, as well as domestic primary and secondary legislation. In implementing future comprehensive healthcare agreements, it may be necessary to amend different types of legislation so that we can operationalise things domestically. In the past when we have implemented international healthcare arrangements, amendments were needed to primary legislation. For example, when we implemented the EU cross-border healthcare directive in 2013, we needed to insert discrete new sections into the National Health Service Act 2006. With that specific experience in mind, we felt it was important that the Bill was able to amend primary legislation because it seemed likely that it would be necessary in order to implement future agreements, albeit in very restricted circumstances and subject to the affirmative procedure.

We can give some reassurance that this is not a stand-alone power and it will not need to be used in the vast majority of regulations made under the Bill. Our intention in including this was only to ensure that the statute book is coherent when implementing future arrangements under the Bill. I recognise that there is serious concern from noble Lords on this matter, and am grateful for their thorough scrutiny so far. I give my reassurance that the Government have listened carefully and we will welcome further discussion on this critical issue before Report.

On my noble friend Lord Lansley's Amendments 37 and 39, it is only right that parliamentary time is allowed for regulations that need enhanced scrutiny, but it is not appropriate for all regulations. The concept of retained EU law was introduced in the European Union (Withdrawal) Act 2008. The issue of the status of retained EU law was considered during the passage of that Act, which I am sure my noble friend was involved in. As a result of those considerations, the EUWA set out bespoke rules determining how types of EU retained law might be modified. This was set out in Section 7 of and Schedule 8 to that Act, as I know the noble Lord is well aware. Crucially, the EUWA does not require that all amendments to retained direct principle EU law must be subject to the affirmative procedure. That is true both in relation to regulations made under the EUWA and regulations made under other pieces of legislation, such as this Bill. As such, I hope noble Lords will agree that it is reasonable that we should follow the rules set by the Act—which ultimately was debated and passed by this House—in order to ensure coherence. The EUWA gives flexibility for future legislation to provide for this level of parliamentary scrutiny, which is considered appropriate. That is what we have done in this Bill.

12.15 pm

I shall certainly—as the noble and learned Lord, Lord Hope, has said—be considering all the issues that have been raised in this debate, and taking them away. I hope that the context that I have given of the strictly limited intended use of the Henry VIII powers and the reasoning that we have used for EU retained law has been helpful; and that our commitment to engage with noble Lords further on this critical matter will mean that the noble Lord is able to withdraw his amendment.

Lord Foulkes of Cumnock: The Minister has been very helpful and said that she will consider the points raised. Am I raising my hopes too high by expecting that the Government may come forward with some amendments on Report?

Baroness Blackwood of North Oxford: The noble Lord is right to expect that I will take these questions away and consider them.

Lord Marks of Henley-on-Thames: My Lords, I am very grateful to the Minister for assuring us that she is listening to the criticisms, that the Government have seen the point of them, and that she will consider them before Report. In those circumstances, I invite the House to accept my withdrawing the amendment. It is not enough to give assurances on how the Government intend to use the powers, for all the reasons we canvassed on Tuesday. It is important that the Government consider how far the powers need to go and how far

they can be limited, in order to achieve the object that the Minister seeks to achieve—and only the object that she seeks to achieve. If the Bill comes back limited in that way, the Minister may well get a much more favourable wind when she seeks to put such a power through on Report.

I also suggest that the Minister asks the noble Lord, Lord Wilson of Dinton, whether there is now a parliamentary barrister acting as parliamentary counsel, who will take the same rather tough view on the extent of powers that are taken as that consulted by him when he was a junior official. It is that kind of rigour that is necessary and must be brought to bear upon the powers.

Regarding the point made by the noble Lord, Lord Lansley, and the response by the noble and learned Lord, Lord Hope, it seems that a greater use of appropriate conjunctions, making clear when "and" is meant and when "or" is meant, would help in Clause 5 and Clause 1. A little bit of English grammar might go a long way to improving this and other legislation. I beg leave to withdraw the amendment.

Amendment 26 withdrawn.

Amendment 27

Moved by ***Lord Lansley***

27: Clause 5, page 3, line 37, at end insert—

"( ) A statutory instrument containing regulations made under section 1 which are not made in respect of continuity healthcare agreements may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, both Houses of Parliament."

Lord Lansley: I am grateful for the opportunity to move Amendment 27, which is linked with Amendment 41. Noble Lords will recall that at Second Reading and again on Tuesday there was considerable debate about the distinction between agreements which are effectively rolled over—existing agreements the purpose of which is to replicate the EU reciprocal healthcare agreement presently in place—and other agreements made under this legislation. In the previous group of amendments, we discussed the Henry VIII power and in what circumstances it should be applied. This is different. From my point of view, this group is about which agreements should be subject to what procedure by way of parliamentary scrutiny where implementing legislation is required in relation to them.

After our debate at Second Reading, it struck me that a clear distinction should be made with what I call "continuity healthcare agreements", which, as one will see if one looks at Amendment 41, are defined as agreements the purpose of which is to replicate the terms of agreements made presently under the EU social security regulations as there specified. Those are continuity healthcare agreements; they are being rolled over. They are not novel and do not bring new issues to bear. I think that their purpose is entirely agreed: we want to make it swift and certain that existing rights under EU reciprocal healthcare are reproduced in future and implemented rapidly. So it seemed perfectly reasonable for those agreements to be subject to the negative procedure. Therefore, if we could define continuity healthcare agreements in Amendment 41, it would enable those that are not continuity healthcare agreements to be subject to the affirmative procedure. That is what Amendment 27 would do; it would require the additional time and scrutiny to be devoted to where there was a new healthcare agreement—or, as it happened, a substantial amendment to an existing healthcare agreement.

I am not sure that the drafting will necessarily meet with my noble friend's approval, but my purpose at this stage to establish the principle that there are two kinds of healthcare agreement. We spent a lot of time on Tuesday arguing whether any extension of the powers beyond existing agreements was desirable and I do not want to re-enter that debate today. However, if we proceed down this path with this Bill, substantially amending existing reciprocal healthcare agreements or adding new ones, we should make a distinction between rollover agreements—that is, continuity healthcare agreements—and those which have substantial changes in them. So I commend Amendment 27 to my noble friend and beg to move.

Lord Foulkes of Cumnock: My Lords, I will make a couple of apologies. The first is to my noble friend Lady Thornton. She is absolutely right about our colleagues in the House of Commons anticipating this problem and the wide powers in this Bill. I accept her correction. Indeed, it was my noble friend who alerted me to the powers in the Bill and got me involved—she may be regretting it now, but I am grateful to her. I apologise also to the Minister for not being able to get to the meeting that she arranged with the noble Earl, Lord Dundee, and the noble Lord, Lord Marks. I was invited, but we had a very long Labour group meeting yesterday. I will not go into any of it in any detail whatever, because I am bound to total secrecy—but you can imagine what fun it was.

I want to deal with the distinction between negative and affirmative instruments. In my previous speech I expressed concern that statutory instruments are being used more and more, and inappropriately. Here, at least affirmative resolutions are better than negative instruments. As things stand, the Secretary of State has very extensive powers through this Bill. As the Delegated Powers and Regulatory Reform Committee said, they are of "breath-taking scope". If all future legislation relating to the Bill were to be laid through a negative procedure, parliamentary accountability and scrutiny would be further—and substantially—undermined. Introducing the made affirmative, as per the amendment, would be in line with the majority of other legislation. Crucially, the Government could not legislate in the knowledge that they would not face parliamentary scrutiny. The Government argue that the absence of scrutiny will relate mostly to administrative actions. However, given the breadth of the Secretary of State's powers, the negative procedure could easily be misused.

In her concluding remarks at Second Reading, the Minister, the noble Baroness, Lady Blackwood, said that she had heard,

"noble Lords' preference for wider use of the 'made affirmative' procedure, which I will reflect on more as we head towards Committee".—[*Official Report*, 5/2/19; col. 1487.]

[Lord Foulkes of Cumnock]

We are in Committee now, so will she tell us the result of that reflection—or will we have to wait further to find out about it? The BMA echoed this stance and insisted that,

"any new powers granted to the Secretary of State are proportionate, subject to thorough scrutiny, and that all regulations are subject to the affirmative procedure in Parliament".

I hope that we will get that assurance.

I return finally to that wonderful speech by the noble and learned Lord, Lord Judge, on Tuesday— I have quoted from it twice or three times already. He said:

"I will try not to bang on any longer".

I will try not to bang on too long as well.

"If we had time and exit day was further away, I should propose that this Bill should be sent packing back to the Government to redraft it and produce a Bill that is constitutionally acceptable".

"Hear, hear", I say to that.

"That option is not open. The healthcare of our citizens in Europe, and EU citizens here, must continue and survive".—[*Official Report*, 19/2/19; col. 2172.]

That is what we face. It is a gun pointed at our head: "If you do not agree to this, we are going to go out of the European Union with a bang and our people will suffer". That gun is being put to our head. It is a pity that it is, otherwise I would support the noble and learned Lord, Lord Judge, in getting rid of Clause 5 altogether. In the meantime, all we can do is try to improve it a bit, and I hope that the Minister will give us an assurance that the statutory instruments will be of the affirmative nature rather than the negative one.

The Earl of Dundee (Con): My Lords, I shall speak to Amendment 34. Reflecting concerns about the wide scope of regulations, it seeks for them to be subject to affirmative rather than negative procedures. That, in turn, would enable Parliament to exercise more scrutiny.

However, this aim should perhaps be viewed in three different contexts. The first context is reciprocal healthcare arrangements between the United Kingdom and the European Union. The second is arrangements between the United Kingdom and countries outside the European Union. The third is other possible ways and means, apart from affirmative or negative procedures, for redressing what so far may appear to be an imbalance, with too many powers given to the Secretary of State and too little influence assigned to Parliament.

On reciprocal healthcare plans between the United Kingdom and the European Union, the Minister will be right to caution that we should retain negative procedures. After a healthcare agreement is in place, those would be better able to avoid uncertainty and time delays in order to protect the interests of all direct participants within the new scheme.

Yet reciprocal healthcare arrangements between the United Kingdom and the European Union are a different matter. Does the Minister concur that in that regard there is a strong case for replacing the use of parliamentary negative procedures with affirmative ones, and that to do so would provide a more acceptable balance between the influence of Parliament, which becomes greater, and not putting people at risk within the new scheme?

12.30 pm

Then, apart from affirmative and negative procedures, other expedients might serve to reduce the perceived anomaly or imbalance that from the Bill the Secretary of State has too many powers and Parliament too few. The noble Lord, Lord Foulkes of Cumnock, has already referred to the noble and learned Lord, Lord Judge, and all other noble Lords who have collectively expressed concern about this. Therefore, might the Minister be able to say in what way and to what extent she could achieve some accommodation between now and Report?

Lord Marks of Henley-on-Thames: My Lords, I will speak briefly to Amendments 35 and 36 in this group, which are in my name. What I say is entirely without prejudice to what I said on the last group: changing the procedure does not make it acceptable for statutes to include fundamentally inappropriate delegations such as are included in the Bill. Nevertheless, we are now considering the Bill and the breadth of the powers as currently drafted, particularly those in Clause 2.

In that context, I draw attention to the use of the ghastly phrase "for example", to which the noble and learned Lord, Lord Judge, drew attention on Tuesday. To allow for the widest possible powers, and then to introduce them in a clause that starts:

"Regulations under subsection (1) may, for example",

showing therefore that the powers are entirely unlimited, is completely unacceptable. However, that is the background against which we are considering the question of the appropriate procedure.

I do not believe that any regulations should be made under the Bill unless they are made by affirmative resolution. Should the Government come back on Report with a Bill in which the powers of the Minister are appropriately circumscribed, there may be a case for some regulations of a minor nature to be amenable to the negative resolution procedure.

In particular, I listened with care to what the noble Lord, Lord Lansley, said when he drew a distinction between rolling over agreements that already exist in the regulations in relation to the EU-EEA-Switzerland agreements and others that we already have, and making new agreements and regulations in relation to them. That may be a point on which a distinction can be drawn, and no doubt the Minister and her colleagues will consider it as a possible distinction. Generally speaking, however, regulations of this type ought to be by affirmative resolution.

If, later on, we are looking at a very different Bill, I ask the Minister and her colleagues to consider the Delegated Powers Committee's *Guidance for Departments* when determining how the procedures should be adopted, which procedure should be adopted, and the criteria that should be applied in choosing them.

Lord O'Shaughnessy (Con): My Lords, I will speak briefly on my noble friend Lord Lansley's Amendments 27 and 41. Noble Lords will know that because of my role as a Minister up until the end of the year, I find some of the provisions in the Bill rather more defensible than do other noble Lords, and I know that that is a minority opinion. Nevertheless, the Minister has said

that she will reflect on the House's strength of feeling, and of course she has much greater wisdom than me on these matters.

I was struck by some comments made by my noble and learned friend Lord Mackay of Clashfern on the last group, when he talked about the scope of the Bill; that is relevant to the context of the amendments laid by my noble friend Lord Lansley. That is the point I was trying to make on Tuesday: there is no reason a priori why the Bill should not have a broader scope. As my noble friend pointed out, in other contexts, the House is arguing that similar Bills ought to, but it follows from that that the functions carried out as a consequence of the Bill are of two distinct types. One concerns what my noble friend called rollover Bills, to provide continuity with the EEA and Switzerland; the other concerns new arrangements—not necessarily with new countries but of a new and deeper kind. Clearly, that will be taking on a relationship that does not have precedent when it comes to dealing with individual countries, even if it has precedent as modelled on those available with the EEA and Switzerland.

My noble friend's logic in thinking about how the regulation-making power ought to reflect that distinction is therefore sound. Clearly, there needs to be sensitivity. That is reflected in the timeliness and urgency of what we need to do for one set of circumstances and what we might want to do with the longer-term global role.

I am sure that the Minister will reflect carefully on the amendments. If the goal of the Bill should be to give us the broad scope, as I still believe, not only to deal with the consequences of leaving the European Union but to build a different, broader, more global set of relationships, which I think is the kind of network the House supports, there is a compelling case for my noble friend's argument for a differentiated approach. Whether the specifics are right, I do not know; others will be in a position to judge. I look forward to hearing the Minister's comments on the amendments.

Baroness Thornton: Listening to the noble Lord, Lord O'Shaughnessy, I reflected on our debates on Tuesday. I think he is again making the argument for two Bills, but there we go. He is quite right about differentiation. I thank the noble Lord, Lord Lansley, for introducing this group of amendments, all of which seek to curb the powers of the Secretary of State under Clause 5. I shall speak to Amendment 33 in this group. It would ensure that amendments are made under the affirmative procedure. We have sought to use the affirmative procedure in the event of no deal, which would enable the Government to bring in replacement bilateral arrangements immediately. That is because we are concerned that delays under the draft procedure would leave British and EU citizens not covered by a health agreement, with serious implications.

This group of amendments point in the same direction and come from every part of the House. They broadly agree with both the Delegated Powers Committee and the Constitution Committee reports. As noble Lords have said, the Henry VIII powers in Clause 5(3) and (4) provide for regulations to amend, repeal, revoke or retain EU law. I very much welcome the fact that the Minister said in our previous debate that she intends to consider what has been said. I will resist the temptation to quote what the Constitution Committee said about this, because I know that noble Lords have read its influential reports at length.

These powers have been mentioned by noble Lords all the way through Committee. Clauses 2 and 5 are particularly worrying, to put it mildly. What concerns me is the Government's reaction to the legitimate concerns expressed so clearly by both those highly regarded Lords committees, on whose advice we depend for our scrutiny of legislation. They overuse the words "flexibility and capability" and argue that the Bill must be forward-looking and needs those powers to provide that flexibility and capability. I was reminded of the previous general election, when the Conservative Party coined the phrase "strong and stable". It did not convince anybody, and I am not sure that "flexibility and capability" is convincing noble Lords as a reason for the powers. It is a good reason for what the Government want to achieve, but as a justification for the powers in the Bill, it is not compelling.

The noble Baroness now seems to have realised that in every part of the House, including on her Benches, we take these matters particularly seriously. That is not because there is a desire to stop the Government acting—absolutely not at the moment. It is because our system of checks, balances and accountability requires legislation to be subject to proper scrutiny, in order to safeguard citizens from the tendency of Governments—all Governments—to charge on and ride roughshod, implementing their wishes without let or hindrance.

I know that some officials see this as a kind of game or tussle to see what they can get away with, particularly at the moment, but as the noble Lord, Lord Wilson, wisely said on Tuesday, you cannot put these powers in because they might just be useful. Although I will resist joining the noble Lord in repeating the words of Margaret Thatcher, I agree with his sentiment that the Bill as drafted breaks all the rules of our constitutional understanding. I hope that the Minister takes that seriously because the challenge before her and the House is to amend the Bill so that it fulfils its primary function: to provide healthcare cover for millions of UK citizens and to ensure healthcare for UK citizens living and working in the European Union and European citizens living and working in the UK. In other words, it is about individuals' lives and their health. We believe that the right amendments, like those defined in this group, will refine the Bill's scope and give the Secretary of State appropriate powers—an achievable task.

Baroness Blackwood of North Oxford: My Lords, I thank my noble friend Lord Lansley for Amendments 27 and 41, the noble Baroness, Lady Thornton, for Amendment 33, my noble friend Lord Dundee and the noble Lord, Lord Foulkes, for Amendment 34 and the noble Lord, Lord Marks, for Amendments 35, 36 and 38. Each amendment speaks to concerns we have heard during the passage of the Bill to date about the breadth of the regulation-making powers and the scrutiny afforded to them.

[Baroness Blackwood of North Oxford]

I wish to open by saying that I listen very carefully to these concerns. I assure the noble Baroness, Lady Thornton, that I see this process as neither a game nor a tussle. The suite of measures on reciprocal healthcare we are introducing is intended entirely to reassure UK citizens living in Europe and elsewhere, and EU citizens living in the UK, that we will work hard to ensure continuity of care for them in this uncertain time and that we are looking forward and thinking about providing care in other places, as a Government should.

To assist our consideration of these issues, I thought it might be helpful to set out the intention of some of the delegated powers as drafted, as we have not yet had a chance to do so in much detail. As I indicated previously, Clause 2(1)(a) is intended to be used to set out the detail of complex payment arrangements under reciprocal healthcare deals because payments can be made in a variety of ways. For example, the UK pays France the actual cost of treatment provided, meaning that a claim for the cost of each person's individual treatment is made to the UK, whereas in Spain, we pay an average cost per person of treatment provided. In Portugal, on the other hand, we offset payments. That is why that power has been drafted in that way.

Clause 2(1)(b) provides for regulations to be made in connection with the provision of healthcare abroad outside reciprocal arrangements, allowing us to put in place complex arrangements outside a bilateral agreement in an urgent situation. That is designed specifically for an EU exit situation that may be an emergency.

Clause 2(1)(c) is needed to give effect to comprehensive healthcare agreements entered into with another country or international organisation, such as the EU. This provides the power to implement agreements in domestic legislation. We believe that it would be unworkable to produce new primary legislation to implement each agreement on an individual basis; I am sure that the House would agree.

Clause 2(2) sets outs examples of the type of provision that might be included in regulations under Clause 2(1). As we have said before, it is an illustrative list of the kinds of provision that would already be included. I took note of the concern about conjunctives under this clause.

Clause 2(2)(a) highlights that complex healthcare agreements may include a mechanism for calculating payments and regulations but would need to specify how the cost of healthcare would be calculated between different countries.

Clause 2(2)(b) indicates that regulations may establish eligibility criteria that specify which people can access healthcare outside the UK. Establishing robust eligibility criteria is key to preventing the misuse and abuse of healthcare, as referred to already by my noble friend Lord Lansley in previous debates.

12.45 pm

Clause 2(2)(c) indicates that regulations made under this Bill may also be used to specify the types of healthcare covered in relation to healthcare arrangements abroad. For example, under the current EU reciprocal healthcare scheme, the EHIC scheme provides access to needs arising whereas the S2 route provides access to pre-planned treatment. That would be how we would enter that into domestic legislation, a point that the noble Lord, Lord Foulkes, was concerned about.

Clause 2(2)(d) indicates that the regulations may provide for set-off arrangements. This is when the amounts that both countries charge for reciprocal healthcare are offset, with only the difference being paid by the country owing the most money. This is the kind of arrangement that we have at the moment with Portugal.

Clause 2(2)(e) indicates that regulations may provide for determining reimbursement levels, including caps. For example, the Government may negotiate future agreements that will bear the cost of certain treatments abroad, but only up to the cost of the treatment on the NHS, which is the arrangement that we have with some of our reciprocal healthcare partners at the moment.

Noble Lords have rightly drawn attention separately to issues of dispute resolution and rights of appeal which we have debated in a previous group. Clause 2(2)(g) indicates that this is something that the Government recognise as important. Regulations made under Clause 2(1) can be used to make domestic provision about appeals and dispute resolution processes pertinent to an agreement.

Clause 2(2)(h) indicates that regulations may be used to confer functions on the Secretary of State or any other person, as we already discussed in the first group. Finally, Clause 2(2)(i) indicates that regulations may be used for delegating functions. Reciprocal healthcare agreements are implemented in partnership with a number of NHS bodies and organisations as well as with non-NHS organisations such as the Department for Work and Pensions, which obviously covers pensions and social security. They need to be identified and be given a clear legal responsibility and operating mandate to do so.

Baroness Thornton: My Lords, all these powers exist at the moment, as do all these arrangements. However, the powers being asked for in this Bill have not been needed for that. The point that was made on Tuesday is about why we look to have such huge powers when actually we have managed without them in the past.

Baroness Blackwood of North Oxford: For the implementation of international healthcare arrangements, these powers exist within EU legislation. At the moment we do not have the powers to implement international healthcare arrangements within domestic legislation. That is why they are being introduced.

The department believes that the negative procedure is appropriate for the use of the delegated powers to arrange the specific implementation purposes which I have laid out. That balances the appropriate level of scrutiny with the use of parliamentary time. However, I have listened closely to the discussions in the debate and I take seriously the concerns which have been raised by noble Lords, by the DPRRC and by the Constitution Committee. However, I hope that noble Lords will understand that we need to ensure that the Government have the legislative tools needed to implement the agreements we reach, especially the ones with

reciprocal healthcare at EU exit. I would like to work constructively with your Lordships to further consider these issues in detail as we progress the Bill to Report, and I will make myself and officials free to discuss the breadth of the regulation-making powers further at an open session next week. I hope that with this explanation and these reassurances, my noble friend will feel able to withdraw his amendment.

Lord Lansley: I am grateful to my noble friend and to all noble Lords who have taken part in this short debate. I thought it was very constructive and I am especially grateful to my noble friend Lord O'Shaughnessy for his support for my two amendments. I thank the Minister for her willingness to think about these issues positively and constructively. We will return to them on Report and I look forward to that. On the basis of her helpful assurance, I beg leave to withdraw the amendment.

Amendment 27 withdrawn.

Amendments 28 to 30 not moved.

Amendment 30A

Moved by ***Baroness Humphreys***

30A: Clause 5, page 3, line 42, at end insert—

"( ) Regulations under this Act may not however repeal or revoke primary legislation in the case of—

(a) an Act of the Scottish Parliament,

(b) a Measure or Act of the National Assembly for Wales, or

(c) Northern Ireland legislation,

without the consent of the relevant devolved legislature."

Baroness Humphreys (LD): My Lords, I apologise for not being able to take part on Second Reading.

This group contains two amendments in my name and that of my noble friend Lady Jolly and a further amendment in the names of the noble Baroness, Lady Thornton, and my noble and learned friend Lord Wallace of Tankerness, which I also support.

Amendment 30A seeks to ensure that the Government may not by regulation repeal or revoke primary legislation made by the devolved legislatures without their consent. Amendment 30B seeks to ensure that the Acts passed in this Parliament giving powers to the devolved legislatures may not be modified without their consent. It could be argued that this is what the Bill tries to do.

I am grateful to the Minister for her response to a question posed by the noble Baroness, Lady Finlay, in Committee on Thursday. However, I would like to use my two amendments to open further discussion around the issue of legislative consent by the devolved Administrations and how this is impacted by the Bill. In the light of the Minister's response on Tuesday, which was made after my amendments were tabled, I shall keep my contribution relatively short at this stage.

Many noble Lords have already spoken about the wide-ranging powers conferred on the Secretary of State by Clause 2(1)—powers which the Delegated Powers Committee described as "inappropriately wide" and as having "breath-taking scope". As that committee pointed out in its report of 14 February, its conclusions were supported by the Constitutional and Legislative Affairs Committee of the National Assembly of Wales on the Welsh Government's legislative consent memorandum on this Bill, where these inappropriately wide powers can be seen to have an impact on the devolved legislatures.

This House's Constitution Committee records the decision of the Scottish Parliament to agree to an LCM in these "exceptional circumstances". However, it also records that the Welsh Government have so far declined to give their legislative consent. It describes the Welsh Minister for Health and Social Services, Vaughan Gething AM, as expressing particular concern about Clause 2 because it,

"doesn't require consultation or consent from Ministers in devolved administrations".

The Welsh Government would expect to be consulted and their consent sought on this issue because powers over the health service have been devolved to Wales by this Parliament. However, Clause 2 is silent on this and, as such, it is an important omission from the Bill.

The Welsh Government acknowledge, of course, that an LCM will be required by the UK Government because provisions in the Bill modify or fall within the Assembly's legislative competence. However, they also note that,

"any healthcare agreement entered into on behalf of the UK will affect the NHS in Wales and this legislation will therefore have a significant impact on a devolved policy area"—

and, one might add, potentially a significant impact on their finances too if they are expected to implement a UK policy that they have not budgeted for.

Rightly, the Welsh Government seek assurances from the UK Government to ensure that the Welsh Government are involved in matters that affect devolved areas in Wales and that this is recognised in the Bill.

The Minister said on the first day in Committee that she is in advanced discussions with the Welsh Government and that she hoped to be able to report back on this in more detail on Report, so I will not detain the House any further today on this issue. I merely wished to outline my concerns and draw your Lordships' attention to them at this stage. I look forward to that further debate that she promised. I beg to move.

Lord Wallace of Tankerness (LD): My Lords, I apologise that I was not able to speak at Second Reading. I shall speak in support of Amendment 42, which was tabled by the noble Baroness, Lady Thornton, to which I have added my name. It is about a duty to consult the devolved Administrations before making regulations under this Act.

My noble friend Lady Humphreys has already given a flavour of the important constitutional and devolution issues which arise as a result of these provisions. As she indicated, unlike the Welsh Assembly, the Scottish Parliament has passed a legislative consent Motion in respect of the Bill—quite exceptionally, because the position of the Scottish Government is generally to withhold consent to legislation in respect of EU withdrawal, but they took the view that they would give consent if there were exceptional circumstances. In this case they believe there are exceptional

[Lord Wallace of Tankerness]
circumstances. That view was supported by the relevant parliamentary committee in the Scottish Parliament, and last month by the Scottish Parliament as a whole.

This is a relatively modest amendment requiring consultation. The Explanatory Memorandum that accompanies this Bill makes clear in annexe A that there are areas, specifically in Clauses 1, 2 and 4, where a legislative consent Motion is required. It is very obvious, because here we have a situation where international agreements are made by a member state, in this case the United Kingdom, with other countries in respect of a subject matter that is devolved.

I am sure the Minister will be very familiar with Section 2CB of the National Health Service (Scotland) Act 1978, which refers to the functions of health boards outside Scotland. It states:

"Where it is the function of a Health Board to provide or to secure the provision of a service, the Health Board may secure the provision of that service outside Scotland … For the purposes of securing the provision of any service referred to in subsection (1), a Health Board may make such arrangements for the provision of the service as they think fit (and may in particular make contractual arrangements with any person) … Anything done by a Health Board in pursuance of subsection (1) or (2) is to be regarded as done in exercise of functions of the Scottish Ministers conferred on the Health Board by an order under section 2(1)(a)".

The annotations on the very helpful legislative website indicate that these sections originate in EEA treatment costs regulations. Clearly this impinges on responsibilities devolved to Scottish Ministers. As I said, the legislative consent Motion was passed by the Scottish Parliament.

My noble friend Lady Humphreys mentioned the Constitution Committee. Paragraph 13 of its report on the Bill states:

"We recommend that the Government sets out how it intends to manage overlapping competences in relation to this Bill and other policy areas".

When the Minister replies, it would be very useful if she could give us some indication of how the UK Government intend to do that. Obviously there are areas—for example, a regulation specifying or describing evidential or administrative requirements or processes—that could have an impact on administrative processes within the responsibility of the Scottish Government or health boards in Scotland.

It is instructive that, when the Health and Sports Committee of the Scottish Parliament took evidence in relation to the legislative consent Motion from Mr Paul Gray, who was the director-general for health and social care and chief executive of NHS Scotland until he stood down this month, he said:

"The Scottish ministers and the UK Government agree that the bill impacts on the devolved function of health. As a result, it requires the consent of the Scottish Parliament. UK Government officials have indicated that the bill will be amended to recognise the responsibility of the devolved Administrations. The proposal is to introduce a requirement to consult the devolved Administrations and to agree a memorandum of understanding with them before regulations can be introduced that impact on devolved matters".

Subsequently, in answer to questions, Mr Gray went on to say:

"As I said in my opening statement, UK Government officials have indicated that the bill will be amended to recognise the responsibility of the devolved Administrations. The particular point to which I would draw the committee's attention is the requirement to consult devolved Administrations and agree a memorandum of understanding before regulations can be introduced that impact on devolved matters. The distance that I can go, based on what we have—and bearing in mind that these are proposals—is to say that the current proposal is that there is a requirement to consult the devolved Administrations before regulations can be introduced".

That was evidence given by the then chief executive of the health service in Scotland to a Scottish parliamentary committee, undoubtedly based on good faith from discussions he had had with officials at UK government level. This amendment seeks to give some substance to what would appear to have been agreed at official level, and I hope that the Minister feels able to accept it.

1 pm

Lord Hain (Lab): My Lords, in following the noble and learned Lord, Lord Wallace, I strongly support Amendment 42 and the amendment moved by the noble Baroness, Lady Humphreys. She made the very important point that the Welsh Government have not given their legislative consent. I know that there is considerable concern in the Welsh Government, and I say that as a former Secretary of State for Wales.

By the way, I welcome the Minister to her place as a refugee from the House of Commons—as I am, except that I was not defeated.

Noble Lords: Oh!

Lord Hain: I resigned. However, she is very welcome and I wish her all the best.

What worries me about this—and I hope that the Minister can give us concrete assurances—is that, on the Brexit agenda, it seems to be in the DNA of Whitehall not to have regard for the devolved Governments. The only reference I can find in the Bill to the Welsh, Scottish and Northern Ireland devolved legislative bodies comes right at the end, when it says that it applies to them. At the very least it is essential that a requirement to seek legislative consent and to consult is written into the Bill, because of course health policy is devolved to Scotland, Wales and Northern Ireland.

The Government have form on this issue in the way that they approached the Brexit legislation earlier in the process. As your Lordships will recall, there was a crisis and a real confrontation with the Scottish Parliament and the Welsh Government—and there might well have been with the Northern Ireland Assembly if it had been up and running. It must be in the DNA of Whitehall, because it has simply done it again. That really worries me. I hope the Minister can give reassurances which mean that we do not have to vote at Report on something very similar to these amendments. If a major concession is not made, we will need to do that and seek to defeat the Government.

I endorse what the noble and learned Lord, Lord Wallace, and the noble Baroness, Lady Humphreys, said. I ask the Minister to give very specific assurances, spelling out that, if she does amend the Bill—and I hope she will assure us that she will—she will do so only having agreed those amendments in precise terms

with the Welsh Government and the Scottish Parliament, and having consulted officials in the Northern Ireland departments.

Lord O'Shaughnessy: My Lords, it may be useful if I reassure the Committee in response to the comments of the noble Lord, Lord Hain. There was extensive engagement with the devolved Administrations in advance of the Bill, not just by officials but by me as a Minister. I spoke to my counterparts in Scotland and Wales, although of course it was not appropriate to do it in quite that way in Northern Ireland, for obvious reasons—there not being an Executive. That happened before, and subsequent to, the publication of the Bill, so this has been going on for several months. It is one reason why we were very pleased to get the legislative consent Motion in advance from the Scottish Government. Clearly, everyone had recognised the benefits that flow from this for the inhabitants of all parts of the United Kingdom.

It is useful for the Committee to know that this is not an activity that has simply been undertaken as a bolt-on in response to concerns raised during the passage of the Bill; it was baked in from the beginning and it has been our intention to move in the appropriate way with no procedural or constitutional novelty of the kind that the noble Lord fears.

Lord Hain: I am grateful to the noble Lord for giving way. Why, then, are the Welsh Health Minister and the Welsh Government still so concerned about this Bill? I am encouraged that these consultations took place, but why is there this evident concern?

Lord O'Shaughnessy: The different Governments have clearly taken different approaches. The noble Lord will know that it does not automatically follow, even if you know where you all want to get to, that you can agree it overnight. I am sure that my noble friend the Minister will be able to update us.

Lord Foulkes of Cumnock: My Lords, I want to endorse everything that my noble and learned friend Lord Wallace of Tankerness has said. He has the great distinction of having been for some time Deputy First Minister of Scotland and, for a short period, acting First Minister. Very few people can claim that distinction. Again, I agree with every word he said. I describe him as my noble and learned friend in every sense of the term—I hope that is not misunderstood. I also agree with everything said by the noble Baroness, Lady Humphreys.

What I find difficult to understand is why this Bill has received the legislative consent of the Scottish Parliament—which is usually more reluctant to give consent—and not that of the Welsh Parliament. I can only assume that it is because the noble Lord, Lord O'Shaughnessy, kissed the Blarney Stone before he went to Edinburgh again, and was able to persuade them. I am interested to know why and will try to find out from my contacts in Scotland before Report.

I suspect that a lot of the points made about the omissions in this Bill have arisen because this legislation, like much of the legislation we are considering at present, is being rushed because of Brexit, without proper consideration being given. I do not blame the officials, who have so much work to do. I went to a briefing they held right at the start of this process and I know that they work very hard. However, I would rather see them doing more constructive work than some of what they are being required to do on Brexit.

I agree with the noble Lord, Lord Hain—and I find this not only in health but in a lot of other areas—that some officials, particularly at the higher level in Whitehall, still have not come to terms with devolution; they do not quite understand what it means, or that the health service in Scotland is run completely by the Scottish Parliament. It is difficult for those officials who have been involved since before devolution to understand that fully. I hope that we will do more to get the message across as we move forward. I hope that the next Government, of whatever shade—a non-Conservative Government; I will put it that way—take more care of the devolved settlements.

The noble Lord, Lord O'Shaughnessy, said that he has had discussions with the Cabinet Secretary for Health and Sport in Scotland, Jeane Freeman. The Minister has taken over very recently and will not yet have had time to do this, but can she assure us that she will have an opportunity to meet with Jeane Freeman to discuss this issue between now and Report? I hope she will be able to report back to us in more detail on the attitudes of the Scottish Parliament and let us know whether it is satisfied on some of the points that have been raised by the noble Baroness, Lady Humphreys, and my noble and learned friend Lord Wallace of Tankerness.

Baroness Wheeler (Lab): My Lords, I am moving Amendment 42 in the name of my noble friend Lady Thornton and the noble and learned Lord, Lord Wallace. The noble and learned Lord has already spoken to the amendment and covered many of the points that we need to raise. The amendment focuses on ensuring that the commitment to involve, consult and have regard to the views of the devolved Administrations, before regulations on new health agreements are drawn up, is in the Bill and set out as a clear duty on the Secretary of State. The amendment ensures that:

> "Before making any regulations under this Act, the Secretary of State must consult the Scottish Government, the Welsh Government and … if there is no Executive on the day on which this Act is passed the relevant Northern Ireland Department".

The Minister told the House at Second Reading that the Government have been working with the devolved Administrations and fully understand the need for legislation on reciprocal healthcare agreements to fully respect the devolution settlements. The amendment would reassure the Committee on this matter—that reassurance has to be given, as speakers have illustrated. We also support the principle of the safeguard set out in Amendment 30A, moved by the noble Baroness, Lady Humphreys, and Amendment 30B.

As we have heard, given the significant impact on devolved authorities, it is crucial that their interests are appropriately considered in the development of reciprocal health arrangements and that mechanisms are in place to ensure that each Administration contributes to the making of decisions that affect Scotland, Wales

[Baroness Wheeler]
and Northern Ireland. I look forward to the Minister's update in respect of the Scottish Government. The noble and learned Lord, Lord Wallace, provided us with some of the detail of the ongoing discussions, despite the Scottish Government having carried the legislative consent memorandum. I look forward to the Minister's updated response to the issues the noble and learned Lord raised.

As we heard from the noble Baroness, Lady Humphreys, and my noble friend Lord Hain, the Welsh Government have so far declined to recommend that the Welsh Assembly give its legislative consent to the Bill. The Welsh Minister for Health and Social Services expressed particular concern about Clause 2 because it does not require consultation with or consent from Ministers in devolved Administrations. However, the Minister of State's offer to amend the Bill to place a statutory duty on the UK Government to consult the devolved Administrations where regulations under Clause 2 would be within their legislative competence is welcome. This would be underpinned by an accompanying memorandum of understanding, stating that all parties will seek to proceed on the basis of consensus. Draft agreements would be discussed with the devolved Administrations before they are shared with third countries and Ministers would be consulted on the content and drafting of regulations made under Clause 2 where they relate to devolved matters. Could the Minister confirm this?

This approach would be a welcome step that would help to create a positive framework in which the future of reciprocal healthcare arrangements can be discussed on a collaborative and constructive basis. Consulting before making regulations would also smooth the process for making regulations, given that any statutory instrument which amends Welsh, Scottish or Northern Irish primary legislation would of course be subject to a statutory instrument consent memorandum in each legislature, which would decide whether to recommend that consent be given in the circumstances.

As noble Lords underlined, the importance of reciprocal health arrangements to the people of Northern Ireland—and of Ireland—has been raised by noble Lords at Second Reading and in our separate amendment dealt with earlier. A statutory commitment to consult and seek the views of either the Northern Ireland Executive or the relevant NI department on regulations enacting new healthcare agreements would provide reassurances about the continued funding arrangements.

Finally, I hope the Minister will be able to respond to the recommendation from the Constitution Committee's report, which underlined the need for the Government to set out how they intend to manage those overlapping competences relating to the Bill. As the committee points out, while the making of international agreements is a reserved matter for the UK Government, healthcare is a devolved matter and the potential for overlapping competences increases as all powers are repatriated from the EU, as does the scope for disagreement about such issues. This will need to be managed.

Our amendment places the Minister's commitments to consultation and involvement with the devolved Administrations in the Bill—no more, no less.

Baroness Blackwood of North Oxford: My Lords, I am grateful to the noble Baronesses, Lady Jolly and Lady Humphreys, for Amendments 30A and 30B, and to the noble Baroness, Lady Wheeler, for speaking to Amendment 42 on behalf of the noble Baroness, Lady Thornton, and for the opportunity to address this important issue of engaging and working with the devolved Administrations. As we take the Bill forward at pace, we endeavour to do so in a way that is collaborative and respects the devolution settlement and the conventions for working together.

To that effect, the contribution from the noble Lord, Lord Hain, was rather disappointing in implying that the Government have anything but the highest regard for the role of the devolved Administrations in this matter. Indeed, as the noble and learned Lord, Lord Wallace, described, the department has had, and continues to have, constructive discussions both at ministerial and official levels with all the devolved Administrations, on the Bill and on the underlying policy.

As your Lordships have already noted, the regulation-making powers in this Bill provide us with a legal mechanism to implement international agreements into domestic law for the benefit of UK nationals; this is a UK competence, but we recognise that in some parts of the Bill, powers may be used in ways which relate to devolved matters; namely, the domestic healthcare elements. With that in mind, as my noble friend Lord O'Shaughnessy has said, we are delighted that the Scottish Parliament has granted the legislative consent Motion to the Bill. We have had positive and constructive engagement with colleagues in Northern Ireland's Department of Health and in the Northern Ireland Office, and we are grateful for their support and their agreement to ensure that the Bill applies and extends to Northern Ireland.

We are working very closely with colleagues in the Welsh Government to secure their support for a legislative consent Motion, and to that end, as the noble and learned Lord, Lord Wallace, will I hope be pleased to hear, we will be introducing a government amendment on Report which places a statutory duty to consult with the devolved Administrations, where regulations under Clause 2 would make provision that would be within the legislative competence of the devolved Administrations.

Furthermore, I confirm that we have now agreed a memorandum of understanding with the Welsh Government to accompany the amendment. This MoU sets out how we intend to work with each other, and how the UK Government intend to work with all the devolved Administrations in respect of this policy area. In response, we expect the Welsh Government to lodge and support a consent Motion in the Welsh Assembly very shortly.

We have also been working to secure the support of colleagues in both Northern Ireland and Scotland to the terms of that memorandum of understanding. We hope that colleagues in both of those Administrations will agree to the measures provided for in the MoU, following some very recent final discussions and changes with the Welsh Government. The MoU sets out a pragmatic and mutually beneficial working relationship to ensure that the devolved Administrations will continue to have a vital role to play in delivering reciprocal

healthcare for the benefit of all UK citizens. In addition, it will enable devolved Ministers to set out their views at an early stage of reciprocal healthcare policy formation. Where they relate to devolved matters, we will share the draft regulations we intend to make under Clause 2 with the devolved Administrations before they are laid.

This agreement is both pragmatic and practical, allowing us to move forward in a collaborative way. I thank my colleague, Stephen Hammond, the Minister of State, who has taken the lead on this engagement, and acknowledge the positive relationships that he has sought to build with his counterparts in the devolved Administrations. He has been speaking to them this very week. We consider that amendments to the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998 would be outside the scope of regulations made under this Bill, and it would therefore be unnecessary to place a consent requirement in the Bill in this regard, but the UK Government are committed to working closely with the devolved Administrations, now and in the future, to deliver an approach that works for the whole of the United Kingdom.

I hope that now that I have reported these positive developments, the noble Baroness will be moved to withdraw her amendment—

Lord Hain: I am grateful to the Minister, and reassured by what she has said. Perhaps I will withdraw the tone of some of my earlier remarks, which were made without knowing what she was going to say.

I ask the Minister to bear in mind, in terms of advice to Whitehall officials working on Brexit legislation of this kind, that it is not an accident that these extra consultative arrangements she is now describing were not in the original Bill. This has been true all the way through the Brexit process, and I am afraid that when I said that it seems to be in the DNA of Whitehall, it is as though the default position is that these consultative rights are not put on the statute book. I ask the Minister to use what influence she has with the rest of the ministerial team to say that this must not happen again, in any other legislation.

Baroness Blackwood of North Oxford: Part of the reason that this amendment has come at this stage is because it has been part of a negotiation, and we wanted to have agreement with the devolved Administrations to ensure that it was in a manner which suited them. That is why it has been part of the process: because it was in agreement and in consultation, rather than us putting it in at the beginning and then consulting afterwards. I hope that as the result of that discussion and agreement, I have reassured—

Lord Wallace of Tankerness: I acknowledge that the Minister said that an amendment will be brought forward. That is very welcome. Is there anything technically defective with Amendment 42 and is she going to accept it?

Baroness Blackwood of North Oxford: We need to bring forward the clause which we have agreed with the devolved Administrations. It is appropriate to do that but I thank the noble and learned Lord for his intervention and, on that basis, I hope that the noble Baroness will feel free to withdraw her amendment.

Baroness Humphreys: I thank the Minister for her clarification and the excellent news that the memorandum of understanding has been signed. I seek assurance from her that this matter will be reported on, or an amendment put forward on Report, so that we can hear exactly whether the Welsh Government have completed the LCM process. I thank her very much and I beg to withdraw the amendment.

Amendment 30A withdrawn.

Amendments 30B and 31 not moved.

Amendment 32

Moved by ***Lord Marks of Henley-on-Thames***

32: Clause 5, page 3, line 43, at end insert—

"( ) Not less than 28 days before laying any regulations pursuant to subsection (1) the Secretary of State must publish a draft of the proposed regulations, and not less than 14 days before such regulations are laid, Her Majesty's Government must give both Houses of Parliament the opportunity to consider and debate the draft."

Lord Marks of Henley-on-Thames: My Lords, for years many of us have believed that the procedures for considering statutory instruments have been unsatisfactory. Whether any statutory instrument is to be passed by the affirmative resolution procedure or the negative resolution procedure—a question we have discussed today—is not the fundamental point. That distinction merely determines the way in which the instrument comes before Parliament to be debated—if it does so.

The more fundamental problem, which we all recognise, is that SIs are unamendable. They are "take it or leave it"—every paragraph or none. We were reminded on Tuesday by the noble and learned Lord, Lord Judge, that it is exactly 40 years since the House of Commons rejected a statutory instrument. In this House, we too have the power to reject statutory instruments by fatal Motions. The last time we did so—at least, it was said by some that we did—was over tax credits in 2015. Indeed, it was on the Motion of the noble Baroness, Lady Manzoor, when she was on this side of the House.

On that occasion, the right-wing press railed against us for exceeding what it thought our powers ought to be and advocated our abolition. Anyway, the Government set the noble Lord, Lord Strathclyde, on us, after which the fuss rather died down. However that may be, fatal Motions are very rarely passed by this House. I think that is partly because they are seen as disrespectful of the primacy of the House of Commons and partly, perhaps, as was pointed out by the noble Lord, Lord Foulkes, because the Whips discourage fatal Motions in case they, too, will face such Motions when it comes to their party's turn in government.

I suggest that the power to reject delegated legislation is an important power and ought to continue. However, it is a residual power to be used very sparingly and when the objection to an SI is very substantial indeed. The noble Lord, Lord Butler of Brockwell, said in debate on the first group that we should use the power to reject SIs more often to achieve amendment by

[Lord Marks of Henley-on-Thames]
sending them back for review and reintroduction. That is a way of doing it, but it runs into the difficulty that it may be too cumbersome and, for the reasons I have mentioned, I doubt that it would be a politically workable approach. Regret Motions, which we often use, are useful, but they come too late in the process and the Government do not have to take any notice of them.

However, under my amendment, the Government would have to publish a draft 28 days before laying the regulations and give both Houses a chance to debate the draft, and to do so before it is actually laid. That would give us an opportunity in a relatively informal way to identify defects in instruments or particular provisions that ought to be removed. Amendment 32 would avoid the need to go through the super-affirmative procedure, which many would advocate for some of the provisions in this Bill, but it would improve scrutiny.

Under our existing arrangements, the power to scrutinise secondary legislation is weakened by the lack of any provision for Parliament to point to particular provisions in an SI and ask the Government to think again. Mine is of course a probing amendment. I suggest that it is particularly relevant to the provisions of the Bill because the regulation power, as we have all considered—many have made this point—is so general, so unrestricted and so unpredictable in its likely or possible exercise.

This amendment may be of more general relevance—I do not suggest otherwise. It is intended to offer a way for Parliament to have an early opportunity of considering proposed delegated legislation in draft before it is laid; to give MPs and Peers an opportunity to consider and express concerns about a proposed statutory instrument, or particular provisions within it; and to give the Government an opportunity to respond to issues raised in such exploratory debates. The amendment is expressed in the terms of a requirement on the Government to make those debates possible, because it is intended to emphasise that statutory instruments, though made by Ministers, are made under powers vested in Ministers by Parliament and are subject to parliamentary scrutiny.

I do not suggest that this amendment, or this type of procedure, ought to apply to every piece of delegated legislation, but I do suggest that it is worth considering. Many of us believe that scrutiny has become too weak and the power of Ministers too strong. This amendment is intended to explore a way of tilting the balance back in favour of parliamentary scrutiny and would, I suggest, offer us one path to better and more carefully considered secondary legislation. I beg to move.

Baroness Wheeler: My Lords, I listened carefully to the strong arguments put forward by the noble Lord, Lord Marks, on this issue, and I await the Minister's response. We have every sympathy with the intention behind the amendment, and the noble Lord's frustration that the House can either accept or reject a statutory instrument but cannot amend it, while parliamentarians can and often do take note of or reject Motions. However, Parliament is ultimately at the mercy of the Government to withdraw regulations and bring forward a revised draft, which may or may not adequately address the concerns that have been expressed. Fatal Motions are quite rightly used rarely, in exceptional circumstances.

The noble Lord, Lord Marks, says this is a probing amendment. However, I fear that, in this circumstance, it would be counterintuitive to the Bill's primary objective of implementing reciprocal health agreements after Brexit. As my noble friend Lady Thornton said on Amendment 33 in an earlier group, time is not on our side, and I fear that the approach contained in this amendment would lead to delays in implementing reciprocal health agreements. In the event of no deal, when millions of British citizens will lose their current access to healthcare treatment overnight, any delay while Parliament debates and considers draft regulations would be catastrophic. Obviously the delay that would occur from the proposals that the noble Lord, Lord Marks, suggests would have to be taken into consideration in any future changes, and would certainly need to be discussed.

Baroness Blackwood of North Oxford: My Lords, I thank the noble Lord, Lord Marks, for suggesting in Amendment 32 an approach to the important issue of appropriate levels of parliamentary scrutiny, and for clarifying that this is a probing amendment. The Government clearly recognise the importance of appropriate levels of scrutiny in this Bill and the secondary legislation made under it. Obviously, the hallmark of an effective and responsible parliamentary system is the process by which we draft, consider and test legislation.

During this debate, I have listened very carefully to your Lordships and the views expressed on the affirmative resolution procedure. This is an interesting proposal by which we could consider draft legislation. While the Government support the spirit of the amendment and agree that appropriate scrutiny is important, we have questions about this approach.

It is vital that we can make regulations that allow us to respond appropriately to a variety of possible scenarios arising from not just the UK's exit from the EU but any situation where we would need to implement regulations, where this Bill might be needed quickly and where it is required for a comprehensive international agreement. Such an approach for scrutiny would, we believe, increase the time taken to develop and lay regulations, and this may have quite a significant negative impact on our ability to bring forth timely regulations to provide healthcare arrangements to support hundreds of thousands of individuals who rely on these provisions—perhaps in a case which may be considered an emergency.

1.30 pm

We are also conscious of the Constitution Committee's report on delegated powers, which indicated that the use of different scrutiny procedures for statutory instruments can add unnecessary complexity. Where possible, the Government have agreed to use the existing model of the enhanced affirmative procedure rather than creating a new variation.

However, I recognise the experience and intentions of the noble Lord, and the concern of the House, and so I would like to make an offer to discuss, in advance of Report, the issue of scrutiny of the regulation-making powers in the Bill—on the general point, not relating

to this particular amendment. I thank the noble Lord, Lord Marks, for raising this vital issue, but I hope that, after reflection, he will feel that he is able to withdraw the amendment.

Lord Marks of Henley-on-Thames: My Lords, I do not need to reflect very hard to withdraw what was plainly a probing amendment. I raised an idea and I accept the point that, in the context of many of the regulations, particularly those to replicate the European agreements that we have, my amendment might not be appropriate. In the context of the wider issue of any other new healthcare agreements, if they are persisted with, it may be appropriate, and it is something that we would consider.

I would like to say how grateful I am for the offer from the noble Baroness to consider the question of scrutiny. I would like to accept that offer now, and, in so saying, I beg leave to withdraw the amendment.

Amendment 32 withdrawn.

Amendments 33 to 41 not moved.

Clause 5 agreed.

Amendment 42 not moved.

Clause 6: Extent, commencement and short title

Amendments 43 to 45 not moved.

Clause 6 agreed.

In the Title

Amendments 46 and 47 not moved.

Title agreed.

House resumed.

Bill reported without amendment.

House adjourned at 1.33 pm.