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PARLIAMENTARY DEBATES
(HANSARD)

HOUSE OF LORDS

OFFICIAL REPORT

ORDER OF BUSINESS

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Abbreviation	Party/Group
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind LD	Independent Liberal Democrat
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
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

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House of Lords

Thursday 23 May 2019

11 am

Prayers—read by the Lord Bishop of Winchester.

Children: Gaming

Question

11.06 am

Asked by ***Lord Brooke of Alverthorpe***

To ask Her Majesty's Government what plans they have to sponsor research into the benefits of gaming for children's mental health and wellbeing.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Baroness Blackwood of North Oxford) (Con): My Lords, the department funds research through the National Institute for Health Research. The NIHR spend on mental health research for 2017-18 was £74.8 million, the highest ever. The NIHR welcomes funding applications for research into any aspect of human health. Existing research has shown some positive impacts of gaming—such as cognitive, emotional, motivational and social benefits—but has also shown that a small number of young people's gaming can become harmful.

Lord Brooke of Alverthorpe (Lab): My Lords, I am grateful for that reply. Yes, gaming can be harmful, and this Question is about gaming, not gambling. There is increasing evidence that gaming can help children in a whole variety of ways, particularly with mental health problems, yet little research is being done and the Minister did not really give a great list of what is happening with that. I wonder whether she could try to give more information about the scale of it and see whether we can try to persuade the internet companies to get more involved and to use their funding to start producing games of goodness and benefit to children rather than negative ones. She reported recently that there had been a summit at which the Secretary of State spoke to the internet companies. I wonder whether she will look into the possibility that, when the next meeting takes place with him or his colleagues, this item will be on the agenda and those companies will be encouraged to participate jointly in providing games of good to the country.

Baroness Blackwood of North Oxford: I thank the noble Lord for his question. He is absolutely right that gaming can have positive effects; there are some areas in which the UK Government are funding research into this. In partnership with industry, NHS England is funding work to develop and test how immersive gaming technology can be used to increase therapy adherence and tackle children's anxiety. He is absolutely right that, following the Secretary of State's social media summit, a partnership between industry and the Samaritans was formed. I shall certainly raise his proposal with the Secretary of State. The NIHR is also funding research to develop and evaluate therapy that uses virtual reality technology to treat patients with psychosis. The noble Lord is absolutely right that more can and should be done in this area, and I shall take that point away with me.

Lord Kirkhope of Harrogate (Con): Does my noble friend not agree with me, though, that we should deal with this extremely carefully? I am aware of a number of cases in which children have become obsessed with gaming. In desperation, parents have been in touch with their representatives and medical advisers to try to deal with the effect of the psychosis that results from the obsession with gaming among quite a lot of young people. Can she therefore make sure that, however she looks at the positive effects in certain cases, she also fully recognises the dangers of an open approach to this?

Baroness Blackwood of North Oxford: I thank my noble friend for his question. Hundreds of millions of people globally play videogames, and for the majority it is a positive recreational activity. He is right, however, that there is some evidence of a moderate correlation between gaming and depression and anxiety symptoms in young adults, and evidence that exposure to violent gaming can have an impact on sleep and mood. However, that is dependent on the nature and duration of gaming. We also support the WHO's classification, which identifies addiction within the classification of diseases. The CMO said in her evidence review, however, that there is insufficient evidence to support a specific evidence-based guideline on screen time. That is why we support more applications to the NIHR for research so that we can have a better understanding of the impact of gaming on young people. We would encourage anyone who is concerned to contact their GP.

Baroness Walmsley (LD): My Lords, as the noble Lord, Lord Brooke, said, this is about gaming, not gambling. Although some games can indeed be beneficial, some of them have covert elements of gambling in them such as loop boxes. Will the Minister assure the House that the PSHE curriculum in schools will cover elements of gambling, including those hidden in otherwise innocuous activities such as gaming? How do parents find out which are beneficial and which are the harmful ones?

Baroness Blackwood of North Oxford: My Lords, the noble Baroness is absolutely right, as ever, on this point. There is a challenge for parents and young people to be more educated and more critically engaged with online harms. The *Online Harms White Paper* is out for consultation until 1 July and I encourage all Members of this House to engage with that consultation. It is about setting clear responsibilities for tech companies to keep UK citizens safe but also about thinking about how teachers, parents and young people can get the best out of their engagement with the internet. To encourage the noble Baroness, our children and young people's mental health Green Paper addresses these issues and we shall make sure that we drive that agenda forward.

The Lord Bishop of Ely: My Lords, there has been much conversation already about research into gaming addiction among young people. My right reverend friend the Bishop of St Albans raised the issue of a mandatory pause function following calls from healthcare providers. As that was raised again in conversation and discussion around the *Online Harms White Paper*, will the Minister confirm that the Government are assessing the value of this function?

Baroness Blackwood of North Oxford: I thank the right reverend Prelate for his question. He is absolutely right that it is one of the issues that will be considered with the *Online Harms White Paper*. I encourage him and his colleagues to engage with the consultation. It is a very important part of that consultation and something we should consider very carefully.

Baroness Watkins of Tavistock (CB): My Lords, will the Government carefully consider encouraging NHS innovation to invest, with other independent companies, in developing games to promote healthy lifestyles in children? In particular, there could be a game that would attract children who are prone to obesity associated with mental health problems to get them engaged in health promotion programmes and associated healthy activities—innovative action research rather than pure research.

Baroness Blackwood of North Oxford: The noble Baroness is absolutely right on that point. Emerging augmented reality and VR markets should be encouraged to offer these opportunities. Interesting evidence emerged from the AR game "Pokémon Go", which encouraged many young people to go out walking and exploring, for example, and we have programmes that are investing in promoting exactly that kind of innovation. We also have the video games tax relief, which has benefited projects such as Eye Gaze Games, a series of games for children with mobility problems. We would like to continue investing in such programmes, which give the particular benefits that the Government would like encourage.

Suicide Act 1961: Prosecutions

Question

11.14 am

Asked by ***Baroness Meacher***

To ask Her Majesty's Government what assessment they have made of whether the threat of prosecutions under the Suicide Act 1961 is causing suffering to mentally competent, terminally ill people at the end of their lives.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, the Government recognise the challenges faced by those suffering from a terminal illness, and the desire of some to have choice over how to end their lives without fear of prosecution of themselves or those close to them. In a recent case, the High Court found that Parliament's decision not to change the current law strikes a fair balance between the interests of the wider community and those of people who are terminally ill and wish to be helped to die.

Baroness Meacher (CB): My Lords, the Minister will be aware that Ann Whaley recently took her husband, Geoff, to Dignitas for a peaceful death. Geoff suffered from motor neurone disease and faced the complete loss of any movement and the ability to speak, swallow, eat, drink or breathe without a ventilator. In answer to a question from Ann, Lord Sumption, our Reith lecturer, said that the assisted dying law—that is, the prohibition of assisted dying—should remain but that compassionate families should break the law. I find that remarkable. If a former Supreme Court judge is telling people to break the law, does that not indicate that the law itself is broken and should be reformed? What plans do the Government have to prepare for a change in this broken law so that terminally ill people who suffer unbearably—there are a number of them—and have only six months to live can have a peaceful death?

Lord Keen of Elie: My Lords, the Government do not plan to change the law at this time. Lord Sumption is a distinguished author and retired judge, of course. In his retirement and in delivering his Reith lecture a few days ago, he is entitled to express his personal opinions on morality and the law. I remind noble Lords that, while sitting as a Justice of the Supreme Court in the case of Nicklinson and Lamb in 2014, he said that,

"there is a diversity of opinion about the degree of risk involved in relaxing or qualifying the ban on assisted suicide, but not about its existence. The risk exists and no one appears to regard it as insignificant. There is a reputable body of experienced opinion which regards it as high".

Lord Dubs (Lab): My Lords, how much longer can we say to people that the only legal thing they can do is take the lonely journey to Switzerland? Surely we as a society can show more compassion to people than that. Can the Minister confirm that all surveys show that the majority of people in this country want a change in the law?

Lord Keen of Elie: My Lords, I am not in a position to comment on all surveys because that may embrace ones of which we are not aware. The Government have always taken the view that this is a matter of individual conscience and for Parliament to decide, rather than one of government policy.

Lord Mackay of Clashfern (Con): My Lords, noble Lords will remember that I chaired a committee of the House on this issue many years ago. Is it possible to take account of the suffering that may be experienced by vulnerable people, surrounded in their weakness by relatives whose interests may not be completely in the best interests of the vulnerable person? That is a serious risk to be taken into account. On the other hand, the Director of Public Prosecutions has issued very clear guidelines on these matters in accordance with a requirement from what was then the Supreme Court in his jurisdiction.

Lord Keen of Elie: The noble and learned Lord is entirely right. The Director of Public Prosecutions has issued very clear guidelines, which address not only the evidential test but the public interest test that arises in such a complex and difficult area. That is why we see the need for a careful and balanced approach to what is, at the end of the day, an issue of conscience.

Baroness Brinton (LD): My Lords, many families do not have access to Dignitas. Indeed, before it was available, a family friend of ours waited until his wife was away for two days before killing himself because he was very worried that the police might take action. The DPP guidance states:

"A prosecution is less likely if the person made a voluntary, informed decision to end their life, and if the assister was wholly motivated by compassion".

However, it then lists a string of reasons why a prosecution may be more likely. Despite the fact that Ann Whaley clearly fell into that first category, she was immediately interviewed under caution by police. The distress that caused was phenomenal. On Sunday, the Justice Secretary said in the *Sunday Express*:

"Personally I am in favour of reform in this area, and sympathise with calls to allow individuals choice".

When will the Ministry of Justice change the guidance?

Lord Keen of Elie: My Lords, my right honourable friend the Secretary of State for Justice expressed his personal views on this issue of conscience, but it is not a matter of government policy. With regard to the involvement of the police in cases where a matter is reported to them, that is not prompted simply by Section 2 of the Suicide Act, because if the police receive a report that someone's life is going to be terminated they would in any event investigate lest it be a case of murder or manslaughter.

The Lord Bishop of Winchester: My Lords, in a recent Royal College of Physicians survey just over 80% of palliative care doctors opposed the assisted suicide law reforms. The Secretary of State for Justice is committed to meeting organisations that support changes. Can the Minister assure this House that the views of those opposing such reforms, out of due concern for vulnerable patients placed at risk of abuse, have been and will be equally considered?

Lord Keen of Elie: I can give the right reverend Prelate that assurance. Indeed, we have had recent contact with some organisations representing the very parties to which he refers. They will be given an equal opportunity to express their views on this difficult matter.

Baroness Finlay of Llandaff (CB): My Lords, do the Government accept the evidence from jurisdictions that have changed the law? A recent paper from Holland shows that a majority of Dutch physicians feel pressure when dealing with requests for euthanasia or physician-assisted suicide, and their confidential survey shows a mismatch of many thousands more between euthanasias and assisted suicides and the reported figures. In Belgium there are estimates that up to 50% may not be reported. It is on the basis of the danger to those who can be pressurised that many people feel that a change in the law is too dangerous to contemplate.

Lord Keen of Elie: The noble Baroness makes a very clear point with reference to the findings in Holland and Belgium. The British Medical Association and the Royal College of Physicians have come out with diverse views on this issue, which raises challenges for the medical profession in general.

Museums and Galleries

Question

11.22 am

Asked by ***Baroness Rawlings***

To ask Her Majesty's Government what steps they are taking to ensure that museums and galleries remain accessible to the public.

Viscount Younger of Leckie (Con): My Lords, the Government are committed to ensuring access to museums and galleries because their world-class collections help people understand our culture and heritage, improve well-being and support learning. Museums are supported by public funding worth more than £800 million annually. The UK Government remain committed to free entry to the permanent collections of our 15 national museums. Through Arts Council England, DCMS aims to improve cultural participation for everyone regardless of their background.

Baroness Rawlings (Con): My Lords, I thank the Minister for his reply. It is important that museums and galleries should remain accessible to the public, but I hope that they will not be forced by today's fragile funding climate to close any part of them. Does the Minister agree that, whatever their circumstances, any policy decision on whether to make any changes or charges should be taken by their trustees, not by a central body? Perhaps they should even have more of a say because each gallery and museum has very different circumstances.

Viscount Younger of Leckie: I confirm that we are very strong supporters of the museum sector. The 2017 Mendoza review of museums found that some have faced challenging financial circumstances but that, alternatively, others have grown and thrived. My noble friend is right: where there are trustees, it is up to them or museum leaders to decide how to run their organisations. On the other hand, where there is public funding, appropriate mechanisms for accountability should be built in to protect the taxpayers' investment.

Lord Howarth of Newport (Lab): My Lords, I am sure that the Minister is not subject to the same curmudgeonly mood that sometimes overtakes me, but does it sometimes strike him that the more access there is for tourists, the less there is for others? If he thinks that there is any kind of problem here, does he have any thoughts about how to manage it?

Viscount Younger of Leckie: It is a dynamic sector. The noble Lord will know that there are over 3,000 museums in the UK, and there has been a net growth of 9%. That is very good news, although some museums have closed, so we constantly keep an eye on what goes on. It is very important to maintain access. The point should be made that 48% of visitors come from overseas. It is critical that we make sure that there is access for overseas visitors just as much as there is for domestic visitors, including from the education sector.

The Earl of Clancarty (CB): My Lords, the local authority museums urgently need better funding. A collection has been lost in Hertford, for example, and there has been a loss of curators at Leicester's important city museums. The next spending review must take these things into account.

Viscount Younger of Leckie: I have no doubt that the spending review will look closely at the museum sector. It usually does, but I cannot comment otherwise on that. It is also important for local authorities to feel that they are able to explore new funding and service

[Viscount Younger of Leckie]
delivery models. As I said earlier, the Government believe that funding decisions should be made at the local level. Local authorities are best placed to decide how to prioritise their spending, as each individual museum has its own particular issues.

Lord Foster of Bath (LD): My Lords, since 2012 the museums and schools programme has enabled nearly half a million schoolchildren from highly deprived areas to access museums and benefit from the collections and the skills of the museum staff. However, the former three-year funding regime has now been replaced by a year-on-year regime, which is bringing about uncertainty and difficulty in planning. Will the noble Viscount seek to work with relevant Ministers and the Chancellor to revert to the three-year funding cycle and ensure the continuity of this excellent scheme?

Viscount Younger of Leckie: To echo the words of the noble Lord, learning is at the heart of museums. It is very important that young people visit them and understand the background of the various exhibits. Fifty-eight per cent of children visited a museum or gallery in 2017-18. I take note of what the noble Lord says but in the 2018-22 funding period Arts Council England, through which much money is given by government for museums, is investing £160,000 annually in Kids in Museums. This, along with other initiatives, helps to encourage more young people to visit museums and galleries.

Lord Griffiths of Burry Port (Lab): My Lords, was it not a wonderful thing that a Labour Government made access to our museums free of charge?

Noble Lords: Hear, hear!

Lord Griffiths of Burry Port: That was of course a rhetorical question. Perhaps I may ask the one to which I know the answer but I want to hear it from the noble Viscount's own mouth. The Dutch and British Governments have had to negotiate very hard to make the van Gogh exhibition, currently showing here, available. The fear on the part of the Dutch is that the Brexit deus ex machina will take over all our considerations and make it impossible for them to repatriate their works once they have come here without there being a great tax implication. Is the noble Viscount able to reassure us that the current impasse in the Brexit discussions is not affecting our cultural heritage being made available to as many people as possible?

Viscount Younger of Leckie: I note that the noble Lord received a cheer for what he said at the beginning of his remarks, and I confirm again that for the 15 museums entry will remain free. On his point about Brexit, much planning has taken place to anticipate Brexit issues, including at the DCMS, which has been working with our world-leading national museums to evaluate the potential impacts of Brexit and provide support. Due to the ongoing uncertainty, national museums and galleries have drawn up detailed plans for Brexit, including the possibility of no deal, and I am sure that they will include the points that the noble Lord has made regarding the continent and Holland.

Electoral Commission: Referendums and Elections Spending

Question

11.29 am

Asked by ***Lord Foulkes of Cumnock***

To ask Her Majesty's Government what assessment they have made of the powers available to the Electoral Commission to deal with breaches of spending rules for referendums and elections.

Lord Young of Cookham (Con): My Lords, the Government are considering recommendations from the Electoral Commission on whether it should be granted more powers. Political parties vary considerably in size and professionalism, so regulation should be proportionate and not undermine local democracy or discourage engagement. We are also reviewing the commission's report *Digital Campaigning*, the Information Commissioner's recommendations on the use of data in politics and the DCMS Select Committee's inquiry on fake news.

Lord Foulkes of Cumnock (Lab Co-op): My Lords, I am grateful to the Minister for his helpful Answer as usual, but has he seen that the fines imposed on Vote Leave and Darren Grimes by the Electoral Commission have been upheld in the courts? Given that their misdemeanours have resulted in the paralysis of the Government for three years and our moving towards a disastrous no-deal Brexit, surely the Electoral Commission should have more powers to send people to jail and to declare such fraudulent referenda null and void.

Lord Young of Cookham: The Electoral Commission's annual report for 2017-18 shows that it issued £126,625 in fines and penalties. Penalties were imposed in 86 cases, £30,000 being the highest charged to any one party, with a further two of over £10,000. As the noble Lord will know, for more serious criminal offences the Electoral Commission can refer the matter to the police and to the National Crime Agency—which it has done—and if anyone is convicted, then the maximum fine is unlimited. So the potential exists to go above the Electoral Commission's powers. I do not accept his suggestion that we should rerun the referendum, which resulted in a 1.3 million majority of one side over the other. We should accept it; and I do not accept that it has led to the total paralysis of the Government.

Baroness O'Neill of Bengarve (CB): My Lords, this is the fourth Question that the Minister has answered in this general area during the past week. Although his Answers are detailed and useful, they do not seem to reflect the urgency of the issues. We cannot sit here saying, "Oh, there are consultations and consideration of these problems going on", because we may face a referendum or election before many of us would wish. We would not wish that election or referendum to be corrupted, as is possible with the range of regulatory powers that our Electoral Commission and our Advertising Standards Authority have.

Lord Young of Cookham: I accept what the noble Baroness has just said. As I said earlier, were there to be another referendum, there would have to be primary

legislation as there was with the last referendum. Noble Lords would have the opportunity to change the law if they felt it was defective in the way that the noble Baroness has indicated. On the other matters, we are taking action. We issued a document earlier this month on the intimidation of voters and candidates, and we are taking action on digital imprints. We are making progress on a number of key issues to uphold the integrity of our electoral system.

Lord Cormack (Con): My Lords, my noble friend has said several times that there is a little bit of spare time to do things. This is such an important issue, and as we have his guarantee that the Government are not suffering total—though perhaps partial—paralysis, can we please have a debate when we come back on this general issue which affects us all?

Lord Young of Cookham: I notice the impassive face of my noble friend the Chief Whip, who of course has great influence on what issues we discuss. He will have heard my noble friend's suggestion, and I know that he will want to discuss it through the usual channels.

Lord Wallace of Saltaire (LD): My Lords, the Minister said that political parties "vary considerably". Their finances also vary considerably, and one of the structural problems in British politics is that the Conservative Party is now able centrally to raise so much more finance than any of the other parties. I recognise—as a member of a party which has activists under the age of 50 and is therefore able to deliver its own leaflets without having to pay others to do so—that it needs some of this. But is it not urgent that financing that comes into the centre of the Conservative Party should be carefully examined to eliminate those large donations that come from people who are not domiciled in the United Kingdom or are not British citizens? Is it not also urgent that the rules be tightened to allow central spending to be directed to particular constituencies and thus get round the limitations on constituency campaign funding?

Lord Young of Cookham: On the last point that the noble Lord raised, there was a court case relevant to this. The Electoral Commission is now in the process of issuing guidance which will give clarity to what scores against the local candidate's expenditure and what should score against the party's national expenditure. I hope the noble Lord welcomes that. I was relieved to hear that my party now finds it so much easier to raise money than any other party; this will come as welcome news to the party treasurer. So far as donations to the party are concerned, my party tries to stick rigorously to the rules—as I am sure all parties do. If an impermissible donation is presented, we are obliged to return it within 30 days.

Lord Kennedy of Southwark (Lab Co-op): My Lords, I thank the noble Lord for offering yesterday to speak to the Minister for the Constitution to seek another meeting to discuss these important matters further. Could the noble Lord also consider the need for a thorough review of the powers, functions and purpose of the Electoral Commission? Maybe that could be part of our future discussions.

Lord Young of Cookham: Following our exchange yesterday, I have been in touch with the Minister for the Constitution and he has agreed to the meeting that was discussed. It took me 24 hours to agree to that proposition; the noble Lord may think he is on a roll when it comes to the second one. So far as that is concerned, the Government have regular contact with the Electoral Commission on a range of issues, including its powers, and we keep those matters under review.

Lord Forsyth of Drumlean (Con): My Lords, in his contacts with the Electoral Commission, could my noble friend encourage it to consider the issue of collusion between trade unions and the Labour Party in campaigning in general elections? Expenditure made by trade unions in campaigning should be accounted for as part of the Labour Party's contribution.

Lord Young of Cookham: The Electoral Commission will have heard the suggestion from my noble friend, which aroused some excitement on the Benches opposite. I am sure that all political parties want to abide by the law, and declare donations as appropriate.

Business of the House

Timing of Debates

11.36 am

Tabled by ***Baroness Evans of Bowes Park***

That the debate on the motion in the name of Lord Brown of Eaton-under-Heywood set down for today shall be limited to two and three quarter hours and that in the name of Baroness McGregor-Smith to two and a quarter hours.

Lord Taylor of Holbeach (Con): My Lords, in the absence of my noble friend, I beg to move the Motion standing in her name on the Order Paper.

Motion agreed.

Parliament: Freedom of Speech and the Rule of Law

Motion to Take Note

11.37 am

Moved by ***Lord Brown of Eaton-under-Heywood***

That this House takes note of the potential conflict between the right of members to speak freely in Parliament and the obligation under the rule of law to obey court orders.

Baroness Barran (Con): My Lords, I respectfully remind your Lordships that the advisory speaking time in this debate is six minutes. When the clock shows six that means the six minutes are up.

Lord Brown of Eaton-under-Heywood (CB): My Lords, it will be obvious to all that the impetus for this debate, its essential backdrop, was the statement made by the noble Lord, Lord Hain, in the Chamber on 25 October last year, naming Philip Green under parliamentary privilege as the subject of an anonymity order issued by the court two days earlier.

[Lord Brown of Eaton-under-Heywood]

I should make plain at the outset that my central objective in this debate is not to criticise the noble Lord, Lord Hain—although inevitably I will need to persuade your Lordships that he acted wrongly before I can hope to ask the House to change its procedures. To that end, I will have to spell out why I regard his statement as a misuse—indeed, I would suggest, a clear abuse—of privilege.

Still less do I seek to have the noble Lord, Lord Hain, disciplined. Indeed, as to that, while several complaints were made against him by members of the public, as well as by Philip Green's solicitors, the Commissioner for Standards rightly recognised that the only complaint within her jurisdiction was an alleged breach of the noble Lord's obligation to declare his role as global and governmental adviser to the law firm Gordon Dadds, which was acting for the *Daily Telegraph* in the litigation. Against that complaint, the noble Lord had a complete defence: he had no idea that Gordon Dadds was involved in the litigation. He would have known had he looked at the court judgment, because the solicitors' name was prominently shown there—but he did not. Whether, overall, that is to his credit I leave to others. To set oneself up as a one-person or one-Peer court of final appeal over a fully considered Court of Appeal judgment without even reading the judgment might be thought a touch presumptuous. Indeed, the noble Lord in his evidence to the commissioner went further and said that he did not think it would have made any difference even if he had read the judgment—a judgment that had granted a short interim injunction pending a speedy trial of the issue so as not to pre-empt the final decision on the merits of anonymity.

Lord Foulkes of Cumnock (Lab Co-op): Would the noble and learned Lord give way?

Lord Brown of Eaton-under-Heywood: I am terribly sorry, I am not proposing to take interventions. This is a strictly time-limited debate and I need my 15 minutes.

The noble Lord, Lord Hain, does not suggest that the court's judgment was in any way wrong, but rather that, whatever the legal position, he thought it his moral duty to name Green. He said that he believed he was acting honourably in naming him and:

"The sovereignty of judges is vital but should never override the sovereignty of parliament".

Of course I accept that the noble Lord is an honourable man, but I reject utterly his suggestion that his own subjective view of what is right must always prevail over a court order.

My central concern is for the future. Indeed, the very fact that, as I understand it, the noble Lord, Lord Hain, does not accept that he was guilty even of a misjudgment in his use of the privilege increases that concern. Why would he and perhaps others of like mind, if there be such, not act similarly in the future unless the House now clarifies and, as I suggest, modifies the position? Doing what we now can to guard against any such egregious exercise of parliamentary privilege is essential to protect both the rule of law and the reputation of this House. Here I should declare an interest as a member of the House's Privileges and Conduct Committee and as the chair of its Sub-Committee on Lords' Conduct until these were recently restructured.

My essential concern is for the House's loss of reputation if its Members breach the rule of law. Of course I recognise the fundamental importance of a Member's right to speak freely in Parliament. Parliamentary privilege is enshrined in Article 9 of the Bill of Rights. It is of foundational significance in our constitution and I am certainly not proposing any legislative change to its scope. But I cannot accept that parliamentary privilege must always prevail over all competing interests. Are Members invariably to be free to breach court orders protecting, say, the identity of children, sometimes even the safety of children? Take the notorious Thompson and Venables case: could a Member have decided off his own bat to reveal their whereabouts and thus imperil their lives—or, say, trade secrets or intelligence material?

Essentially, the privilege is to prevent Members being vulnerable to claims of defamation, breach of privacy and so forth—indeed, to any other risks inhibiting the discharge of their duty to speak fearlessly on an issue in the House. But surely it is one thing to say that the privilege should not be whittled down, and quite another to claim for it so exorbitant a reach as is asserted here—namely the right, with total impunity, to breach any court order that the Member dislikes.

I advocate two distinct steps. First, the *Companion*, our guide to proceedings in the House, should be tightened up on this point. It is 250 pages long but there is not a word about disobeying court orders. All there is is our resolution some years back on the sub judice rule, which I can summarise simply: the privilege of freedom of speech in Parliament should be used responsibly. It requires both Houses to,

"abstain from discussing the merits of disputes about to be tried and decided in the courts of law".

Essentially the rule requires Members in most proceedings before the House not to refer to active court proceedings, except where the Lord Speaker, in his discretion, allows it, and the Lord Speaker must be given at least 24 hours' notice of any proposal to refer to a matter which is sub judice. Civil proceedings cease to be "active" on judgment.

I have three comments. First, the rule contemplates the issue arising in the context of,

"any motion, debate or question".

I suggest that it does not envisage doing what the noble Lord, Lord Hain, did here—rising unannounced before the House after the conclusion of one unrelated, busy debate, and before the start of the next, to make a "personal statement".

Secondly, in his evidence to the commissioner, the noble Lord asserted not only that he did not consult the Lord Speaker before making his statement but that he consulted no one. He merely notified the Deputy Speaker on the Woolsack at the time that he would say something once the ongoing debate had ended.

Thirdly, the noble Lord's statement was contrary to the sub judice rule, but only because the court's order was for an interim injunction. Had it been a final court order at the conclusion of proceedings, it would not have been covered by the rule. I suggest that the very

least the House should do now is revise the *Companion* to make plain that in addition to the sub judice rule—indeed, more important than the sub judice rule—there is an obligation on Members to respect the independence of the courts and the rule of law, as the Lord Speaker said in his brief, well-judged Statement four days after the noble Lord's statement, so that,

"we do not set ourselves in conflict with the courts or seek to supplant them".

The sub judice rule is, after all, intended merely to discourage Members without good reason from discussing the merits of a case, so that their views will not risk prejudicing the court in deciding it. Intentionally flouting an actual court order after it has decided the case is surely altogether more extreme, and clashes directly with the rule of law.

I might add that the action of the noble Lord, Lord Hain, in the Green case had the effect of preventing the court ever deciding the important final question that the interim injunction was intended to leave for decision—namely, the correct approach to non-disclosure agreements in this context. The court's open judgment, a full and measured judgment, expressly recognised the conflicting interests and arguments in play. The Court of Appeal took account of a recent House of Commons report by its Women and Equalities Committee on sexual harassment in the workplace, which recognised a legitimate role for NDAs, not least—as in the Green case—in settling employment tribunal claims. Two of the five employees supported Green's application for an injunction. All five had been separately and independently legally advised, and each agreement expressly allowed disclosure to people such as the police and any regulatory and statutory bodies.

Unsurprisingly, Green discontinued his action after the statement of the noble Lord, Lord Hain, had pre-empted the result. Anonymity, of course, was lost for ever—but surely even unpopular people such as Philip Green are entitled to the protection of the courts. Shortly after the statement the noble Lord, Lord Pannick, described it in his *Times* column as,

"a clear abuse of parliamentary privilege",

and suggested that the House should,

"amend its procedures to deter such conduct in future cases".

He advocated Standing Orders in both Houses forbidding disclosure of information,

"without first seeking and then complying with a ruling by the Speaker"—

a failure to comply with that being a breach of the Code of Conduct. Whether that approach would put too heavy a responsibility on the Speaker is for consideration, but it is difficult to think of many cases where the Speaker would support the proposed breach of a considered court order.

Moreover, there is another important factor to have in mind here, which is the European Convention on Human Rights. In 2002 Strasbourg, in A v UK, accepted by a majority that the rule of absolute parliamentary immunity was justified even when it operates to defeat convention rights. The court's reasoning, however, included that:

"General control is exercised over debates by the Speaker of each House of Parliament",

and that,

"the immunity attaches only to statements made in the course of parliamentary debates on the floor of the House".

The privilege there had been used to prevent a defamation claim—not, as in the case of the noble Lord, Lord Hain, a statement wholly outwith the control of the Speaker and unrelated to any debate on the Floor of the House, simply oversetting a court order. As Erskine May tells us on pages 222 and 301, even in A's case,

"the judges were not uncritical of the exercise of privilege without recognition of … human rights".

They expressed the view that a national Parliament should incorporate into its procedures,

"some system of redress for citizens".

For my part, I seriously doubt whether the case of the noble Lord, Lord Hain, would survive a Strasbourg challenge today.

As the admirable Library note makes plain, there have been a number of relevant committee reports down the years. In the context of super-injunctions, a 2012 Joint Committee on Privacy and Injunctions concluded that the use of privilege to defeat them, as in the Ryan Giggs and Fred Goodwin cases, had not yet reached the point where Parliament needed to act; a high threshold for taking action had not yet been crossed. I suggest that it now has been and that we should not kick this can further down the road.

We all of course enjoy our privileges and it is understandable that we should cherish them and wish to guard them jealously. But it is my contention that the time has come when we should recognise an abuse for what it is and try to limit its recurrence in future. I greatly look forward to hearing what the noble Lord, Lord Hain, and all others have to say in this debate—the non-lawyers at least as much as the lawyers. I beg to move.

11.53 am

Lord Mackay of Clashfern (Con): My Lords, I put my name down to speak in this debate when it was a two-and-a-half hour debate and I had intended to go by plane to Inverness later today, at a time that would have allowed me to be here until the very end of the debate and after. Unfortunately, for some reason a strike has taken place at Inverness Airport and my flight was cancelled. I have therefore had to make alternative arrangements to fly to Edinburgh and get the train, which as your Lordships can imagine is a slightly longer procedure. I may therefore have to leave before the end of this debate. I am extremely sorry about that and I shall attend as long as I possibly can—but I gather that the Jubilee line is not perfect today, which is another difficulty.

I want to look at this issue in a general way, and do not propose to deal with a particular case. The right of free speech in Parliament is well-established and has been ever since the present arrangements of Parliament came into being. There are two difficulties with that. One is that Parliament might seek to affect a judgment in a case before the courts—the so-called rule of sub judice. On the other hand, Parliament has free speech when there is no current case and, as mentioned by the noble and learned Lord, Lord Brown, when there is a decided case about a matter. My understanding of the law on this is that that right to speak freely is to be exercised responsibly by Members of Parliament.

[Lord Mackay of Clashfern]

That is the general rule. The rule for sub judice is different because here, there is a perceived conflict on the final decision between the court—which has been set up to decide these matters as part of our constitution—and Parliament, if it has stepped in to alter the judgment or make it instead of the court. That is a special problem that, over the years, Parliament has thought needs to be dealt with. Parliament has no desire, as a corporate body, to replace the courts of law, which are independent and set up for that purpose, with severe oaths affecting the judges and so on.

That issue has been thoroughly discussed in this House. A committee, under the distinguished chairmanship of Lord Nicholls of Birkenhead, came up with a resolution that Parliament adopted, at page 60 of the volume of the *Companion to the Standing Orders* that we all have. That sets out what a sub judice case is and the attitude that Members of Parliament should have to it. A Member of Parliament who seeks to make a statement that may, in some way, affect a judgment or resolution still to be made, should give notice to the Lord Speaker in our House. In the House of Commons, a similar resolution was passed to give notice to the Speaker. The Lord Speaker here has the discretion to see whether the statement proposed by the Member is likely to interfere with the course of the judgment. Even if it refers to it, as long as it does not seek to interfere with the course of the judgment, it might be allowed at the Lord Speaker's discretion. That seems an entirely satisfactory arrangement and I have no reason to seek to change it.

This is fundamental to the more general aspect referred to by the noble and learned Lord, Lord Brown. Strictly speaking, if you analyse it properly, the courts have no jurisdiction to restrict the speech of a Member in Parliament. It is not part of their jurisdiction. Therefore, if somebody in Parliament makes a statement that conflicts with a decision of the court, because the court's jurisdiction does not extend to Parliament, it is not a breach of the order. On the other hand, it could give rise to confusion. The rule, therefore, which seems general and appropriate, is to exercise these rights responsibly, as for every other right we have. That includes consideration of the effect of what you are doing on the general position in the country for which we are responsible.

11.59 am

Lord Hain (Lab): My Lords, I have great respect for the judicial expertise and eminent career of the noble and learned Lord, Lord Brown of Eaton-under-Heywood. I remind your Lordships that the Commissioner for Standards completely exonerated me in dismissing complaints from Sir Philip Green after I had named him on 25 October 2018. I explained to her that I acted for moral reasons and was not second-guessing or criticising the judiciary, nor have I done so since. To explain why, I am revealing for the first time in public exactly what one of Sir Philip Green's victims told me while pleading with me to name him under parliamentary privilege.

I quote: "He was touching and repeatedly slapping women staff's bottoms, grabbing thighs and touching legs. Hundreds of grievance cases were raised with HR. The company lawyer who interviewed me then lied. Sir Philip screamed and shouted at staff 'to go to psychologists'. Victims went to an employment tribunal but were told it would not get anywhere so settled with an NDA. Some were worn down with spiralling legal costs costing them a fortune. He broke some in the end. It was horrible. He is still doing exactly the same thing. It is rife, it happened all the time. I saw him grab the breasts of others. This has gone on for a long time".

After I named Sir Philip, numerous former employees and executives of his made similar allegations in various newspapers. My motive was to stand up for ordinary employees against a very powerful and wealthy boss who, as described to me, seemed to think he was above the rules of decent respectful behaviour. Part of the injustice I acted against is the misuse of non-disclosure agreements—NDAs—which Sir Philip Green deployed to suppress victims from obtaining redress, as did Harvey Weinstein to silence his sexual harassment victims, as did organisers of the Presidents Club dinner in January last year, when 130 women were required to sign NDAs in a bid to stop any details of harassment, groping and propositioning going public.

Maria Miller MP, chair of the Women and Equalities Committee, said the Philip Green case had,

"thrown a spotlight on the way NDAs can be used repeatedly to cover up alleged wrongdoing … If an NDA hadn't been used in this case then maybe the managers and the board of the company involved could have taken action to avoid this repeated behaviour, and that is what is so concerning about the way NDAs are being misused".

She added that she personally would like to see NDAs outlawed in employment severance agreements. Jess Phillips also said that:

"It seems that our laws allow rich and powerful men to … do whatever they want, as long as they can pay to keep it quiet".—[*Official Report*, Commons, 24/10/18; col. 274.]

Parliamentary privilege is a fundamental part of our constitution and is the only absolute free speech right entrenched in the law. It is a part of the rule of law itself, and the prospect that it may be used should surely be a deterrent to anyone minded to seek a secrecy order from the courts to cover up allegations of misconduct, as in the Philip Green case. Despite similar outrage from the legal establishment, it was used to name the notorious spy Kim Philby. It was vindicated again in 1977 when MPs used it to expose the bogus secrecy of "Colonel B", who was wrongly—as the judges later found—given anonymity by the court to bolster an oppressive official secrecy case against journalists. When the DPP immediately threatened the press with prosecution, newspapers, led by the *Times*, defied him. That said, it should be used responsibly, sparingly and only when absolutely necessary. In my 30-year parliamentary career I have used it just twice before: in 2000 when I named traffickers selling arms for "blood diamonds" fuelling wars in Africa; and then in 2017-18 to name, in this House, British corporations complicit in former President Zuma's corrupt activities in South Africa. These, like my Sir Philip Green intervention, exposed gross injustice in the public interest when the law was clearly failing to do so, and are living proof of parliamentary sovereignty, irrespective of the

wishes of the Executive, the powerful and the wealthy, and even rulings by the legal establishment when it covers up allegations of misconduct.

Some noble Lords would make parliamentary sovereignty subject to the power of judges, who perhaps have granted secrecy orders—as, notoriously, in the Colonel B case—at the behest of an oppressive Executive. In such cases, a parliamentarian's right to exercise privilege conscientiously and responsibly is an important safeguard for the liberty of the subject. It should not be whittled away by turning the Speaker or the Lord Speaker into pre-vetting police officers with a censorship role. Nor should the sovereignty of judges override the sovereignty of Parliament—the path down which, I fear, the noble and learned Lord, Lord Brown, and others might be leading us.

12.05 pm

Lord Thomas of Gresford (LD): My Lords, naturally the disclosure of material contrary to a court order offends against the training of all lawyers. We are brought up to respect the rule of law, to keep our mouths shut when it is appropriate, to respect the courts and their judgments and not to criticise them. I am wary that this approach may not have the same cataclysmic effect upon those who are not lawyers.

This issue came to a head in 2011 with John Hemming, the Liberal Democrat Member of Parliament for Birmingham, Yardley from 2005 to 2015. I have been a guest in his house and I know him very well. John Hemming was a scholar in theoretical, atomic and nuclear physics at Magdalen College, Oxford, and he became a millionaire with a software business by the age of 27, at which point he took up Liberal politics. He really was a good, old-fashioned Liberal campaigner. He passionately opposed super-injunctions, orders forbidding the revelation not just of the parties but even of the existence of the injunction itself. He considered that their use was the preserve of the rich, because only the rich could go to court and obtain them. I was very interested to hear from the noble Lord, Lord Hain, that Jess Phillips, who succeeded him in Birmingham, Yardley, made precisely the same point—that this is the preserve of the rich. In 2011 John Hemming revealed a number of well-known figures under parliamentary privilege: the chairman of Barclays Bank, Mr Goodwin and a well-known Welsh footballer. The result of that seems to be that the use of super-injunctions has declined—you can spend a lot of money and find that, if it is mentioned in Parliament, you have wasted it all.

Similarly, another friend of mine, Paul Farrelly, Member of Parliament for Newcastle-under-Lyme in Staffordshire, disclosed the existence of a super-injunction in the Trafigura scandal by means of a Parliamentary Question. Trafigura was dumping toxic waste products in Côte d'Ivoire, causing injury in the nature of burns to skin and lungs to 30,000 people. These are exceptional cases involving very considerable public interest. I oppose altering our disciplinary procedures so as to make such disclosures a breach of the Code of Conduct. It seems to me that, in exceptional circumstances, it may be justified to do what the noble Lord, Lord Hain, did—although I must say that, as a lawyer, I was shocked at the time, I can tell him that, and I do not think it quite comes into the category of some of the other disclosures that have been made. However, I think it is highly unwise to make such disclosures.

First, I think that a Member of Parliament who does so must examine his own motives. It may be a vehicle for a lowly Member of Parliament to indulge in publicity he would not otherwise get, as a result of the dramatic disclosure he makes and all the press that follows.

Secondly, it is obviously wide open to abuse. I do not suggest that abuse has taken place in any of the cases I have mentioned, but it would be possible for parties to proceedings and the press to approach a particular Member and induce him in one way or another to ask a Parliamentary Question under the cloak of privilege. We should be very concerned about that.

Thirdly, the Member in question is not a caped crusader, going around the world to seek justice and end injustice wherever it may be; someone must put him up to the particular issue, as we have heard from the noble Lord, Lord Hain. Whether it could amount to a criminal conspiracy to perform an unlawful act is doubtful, but it is inappropriate for a representative of the people to engage in an unlawful act, and it is unlawful to breach a court injunction. The fact that you are an MP and will not be punished for mentioning it in Parliament is an exercise of the privilege of Parliament, not the privilege of the Member. The Member is not cloaked and protected by the armour of this principle. It rests with Parliament itself.

I do not criticise the noble Lord, Lord Hain, for doing what he did. I am sure that he had very good reasons and was moved to do so. However, it is unwise, and anyone who seeks to do it should examine their conscience very carefully.

12.11 pm

Lord Craig of Radley (CB): My Lords, I congratulate the noble and learned Lord, Lord Brown of Eaton-under-Heywood, on arranging this important and topical debate. While aware in general terms of the concept and protection provided by parliamentary privilege, I was grateful for the additional information in the helpful Library briefing note provided by Nicola Newson.

Rather than dwell on any specific instances of reliance on the privilege, I will add a couple of general points to this debate. I was struck by the explanation that parliamentary privilege is the privilege of each House as a whole, not just of an individual Member. In effect, all Members of a House—not just a spokesperson—are sheltered by privilege, even if they endorse or otherwise support the contribution of the spokesperson. They are sheltered even if they inadvertently say something deemed defamatory.

If all thus benefit, so too should they collectively be responsible for upholding the principles of comity. I further believe that Members of the other place have a greater need of privilege protection than Members here in your Lordships' House. MPs face re-election to retain their place in Parliament; Members of this largely appointed House do not. This in turn seems to place a greater obligation on this House to abide very closely by the carefully structured rules of sub judice and the essential principles of comity.

[Lord Craig of Radley]

Noble Lords should be careful never to use parliamentary privilege which might not be prayed in use in the other place. Although this House no longer includes the Appellate Committee, I like to feel that there remains a deep commitment to upholding the rule of law coursing through the veins of this House.

I fully endorse the description of the 1999 Joint Committee on Parliamentary Privilege that the legislature and the judiciary are, in their respective spheres, estates of the realm of—I stress this—equal status. As the Joint Committee on Privacy and Injunctions concluded in 2012, there should be a presumption that,

"court orders are respected in Parliament".

Should a Member of either House decide not to comply, he or she should,

"demonstrate that it is in the public interest".

But there is more than one "public interest" at stake here. Undoubtedly the upholding of the rule of law—not least injunctions—is a clear public interest. What seems to be missing is what else may be honourably brigaded together under the heading "public interest".

I do not think it upholds the unique importance of the rule of law to claim, for example, that totally different, additional, even contrary "public interests" coexist in any equivalent way: say, some issue, or some persons, that have been the subject of a media onslaught of hearsay and innuendo and which must be further highlighted and enlarged upon by means of parliamentary privilege. That seems to besmirch the importance and value of this unique privilege. Public interest is widely defined in common law, but in relation to parliamentary privilege, should it not be seen as more for matters of national importance and not just some partisan or parochial interest, let alone a personal or private one?

I will make one final point. A truth, from time immemorial, is that one should not blame the messenger if the message is not to one's liking. However, in these Brexit-charged days, this dictum seems to be more and more overlooked—regrettably only last week over the selection of the chair of Wilton Park, when the individual as the messenger, rather than her message, was traduced in a way that did no credit to your Lordships' House.

I have long believed, and tried to practise, that by extolling the strength of the case that one espouses, rather than only seeking to rubbish that of the opposition, one may be more likely to succeed. To the outside observer, negative attacks on the opposition suggest, subliminally, that one's own case is weak and lacks the support and commitment to it that one might expect one to have and to express. Reliance on parliamentary privilege gives protection for defaming a person or issue at stake. But it is also fair to ask, when observing on a use of this privilege: has it been about a matter of national and positive value rather than a vehicle for negativism and spite?

To make use of parliamentary privilege—such a unique, omnipotent privilege—requires the House of the user to seek to ensure that its use is never abused. Not to do so in this media-savvy world might ultimately even call into question the medieval provenance of this privilege itself.

12.17 pm

Lord Norton of Louth (Con): My Lords, I too congratulate the noble and learned Lord, Lord Brown of Eaton-under-Heywood, on raising this important issue. I will focus on the sub judice rule. Like my noble and learned friend Lord Mackay of Clashfern, who is still with us, I do not propose to comment on any particular case.

As the 2012 Green Paper and 2013 report of the Joint Committee on Parliamentary Privilege noted, references to privilege may appear archaic and misleading. They mask the importance of Article 9 of the Bill of Rights; it is fundamental to Parliament being able to discharge its functions.

As so often, rights need to be matched by responsibilities. The sub judice rule, as the noble and learned Lord, Lord Nicholls of Birkenhead, stressed some years ago in evidence to the House of Commons Procedure Committee, is a self-imposed rule. Its embodiment in the rules of both Houses has developed over time, with some uniformity now between the two. The first edition of *Erskine May* made no reference to it. As Eve Samson points out in her study of privilege, it first appeared unambiguously in the 10th edition in 1893, which stated:

"A matter, whilst under adjudication by a court of law, should not be brought before the house by a motion or otherwise".

The rule has been developed and reported on by Joint Committees and the Commons Procedure Committee. There is a recognition of its importance, not just for comity between the legislature and the courts; as Lord Nicholls said, it,

"goes much deeper than that, because it is inherent in the proper discharge by the courts and Parliament of their separate constitutional roles".

It is vital that both Houses retain freedom of speech to carry out their functions, but it is essential to the courts in fulfilling theirs that the rule is observed. The courts must operate free of parliamentary interference and must be seen to do so. Judges may well be able to ignore or resist MPs or Peers making comments about live cases, but they need to be seen to be free of such interference.

For reasons of time, I shall make just a few core points. The Motion refers to the right of Members to speak freely in Parliament but, as has already been touched on, the essential constitutional point is that the right exists for the benefit of the House. Members in exercising their freedom of speech need to have regard not only to protecting the rule of law, but also to protecting the reputation and role of the House of which they are Members. There have been various problems with breaches in the past, not least in this House in respect of coroners' courts. Both Houses have since agreed changes to the Standing Orders. If there is a problem, is it with the rule as embodied in the Standing Orders, is it with Members not knowing the rule and its importance, or is it both? I see no reason why Members should not be reminded regularly of the rule. It should form part of the induction process for new Members. It need not be in the form of repeating the Standing Orders, but rather simply in the

form of, "If a matter is before a court—any court—it is best not to raise it". I would add, "If you do plan to raise it, take advice first".

There is also a case for considering how we deal with the rule. The difference between the two Chambers is in the position of the Speakers. The Speaker in the House of Commons can intervene in a way that the Lord Speaker cannot. The briefing note for the debate reminds us that it is open to any Peer to move,

"that the noble Lord be no longer heard".

That is a blunt weapon and depends on a Member of the House recognising that the rule is being broken, that it is being broken inappropriately, and being quick-witted enough to get to their feet to move the Motion, which itself is debatable. I think we need a more robust way of dealing with transgressions along the lines indicated by the noble and learned Lord, Lord Brown of Eaton-under-Heywood. For that reason, I would favour the matter being referred to the Procedure Committee. Rather than coming up with any particular solutions today, that is the route to take, and the very fact of the committee considering the matter and inviting comments will itself raise awareness of the rule. My question to my noble and learned friend Lord Keen and the noble Lord, Lord McFall, is this: do you not agree?

12.22 pm

Baroness Whitaker (Lab): My Lords, it is with great trepidation that I venture, as a non-lawyer, into this debate with so many distinguished experts, but I congratulate the noble and learned Lord, Lord Brown of Eaton-under-Heywood, on calling it as it concerns a fundamental aspect of our democracy. I have three short points for consideration.

I may be convicted of simplism, but my starting point is that law is not only for lawyers, and perhaps it is not even primarily for lawyers, any more than water is for water engineers. It is one of the essential protections of the citizen. It is for the people. Of course that does not mean that citizens are necessarily able to interpret or advise on the import of the law, but it is for them.

Secondly, the law as it stands is never quite coterminous with justice. It is our best shot at justice at one time and in one context. I think this must be so or the law would not be amended and reinterpreted as culture and values change. Non-disclosure agreements may be a case in point. What I look for in the law as a citizen, before redress, is first the correct attribution of responsibility for harmful acts. Among other things, that seems to me to be about establishing accountability.

My third point concerns the role of the rule of law—which of course I wholly support, on the basis above—in its crucial underpinning of democracy. My understanding is that it protects the citizen against exploitation or oppression by more powerful agents. It protects minorities against majoritarian bias, for instance. Thus it upholds the dignity of our fellow human beings, in particular through human rights law.

Looking at the conflict between a legal injunction and the conduct that is our subject, I am driven to think that the vulnerable citizen is not Sir Philip Green. Allegations of acts for which, I think, we would all agree that responsibility should be attributed were prevented from being disclosed. Accountability was not possible. The wrong conduct was protected.

We think, of course rightly, of the rule of law as essential to democracy. In so doing, we have put democracy as the primary objective. We do not say that democracy is essential to the rule of law. I am not sure that it is, unfortunately. So when a legal decision does not serve democracy, it is in a different place from those laws and judicial procedures that preserve rights.

I would not presume to question a court order, but there is a balance to be struck between juridical decisions and constitutional freedom to expose injustice. I submit that that balance lies in the exercise of parliamentary privilege, including in this case, and that it should not be undermined.

12.26 pm

Lord Thomas of Cwmgiedd (CB): I too welcome the pleasure of having this debate on such an important topic and congratulate my noble and learned friend Lord Brown of Eaton-under-Heywood on obtaining it. I do not wish to speak at all about the particular matter that has given rise to this, nor about the sub judice rule as that has already been explained. I wish to deal with two much broader issues.

The first is the interdependent relationship between the three arms of the state—Parliament, the executive Government and the judiciary. It is clear that the state can function properly only if there is a clear understanding of that principle. Although each branch is independent of the others, they are interdependent. Interdependence requires: that there must be a clear understanding by each branch of the state of the constitutional functions and responsibilities of the other branches; that each branch must support the others when they are carrying out the functions and responsibilities that the constitution has assigned to them; and that no branch should interfere in the proper working and functions of the other branches, which have been assigned those responsibilities by the constitution. Each must show a proper and mutual respect. It seems to me that these requirements are applicable to all circumstances where issues arise, not merely to the subject of today's debate.

I fear, however, that there is much less understanding of the roles of the respective branches of the constitution. I fear that people do not properly understand the role of the judiciary; nor do judges always understand the role of Parliament. This is an unfortunate state of affairs and today is not the time to debate it, but it seems evident to me that there has been a diminution in the discourse necessary to ensure the relationships work. Where there is room for concern that one branch of the state may have overstepped its position or not properly carried out its functions in the views of those in another branch of the state, there should be dialogue before action is taken that interferes with the proper functioning of the other branch of the state. I cannot overemphasise the importance of such dialogue.

That takes me to the second point I wanted to deal with, which is the upholding of the rule of law. Each branch of the state has a duty to uphold the rule of law. The constitution has assigned to the judiciary the primary function of upholding the rule of law, particularly where there are disputes between two individuals or between an individual and the state. I hope that for the future it will be generally understood that, although of course the fundamental right of freedom of speech in

[Lord Thomas of Cwmgiedd]
Parliament is in no way undermined, the principles of interdependence to which I have referred should lead to the clear recognition that, when a decision of the courts relates to a particular case, the issues are matters for the judicial branch of the state and have been assigned by our constitution to that branch. The decision of the judicial branch should be respected as an essential prerequisite of upholding the rule of law and the effect of the decision should not be nullified by another branch of the state.

It seems to me of vital importance that we set out the principles much more clearly, and I hope that we can find a means of doing that. I particularly welcome the suggestions that have been made. We must be sure that each branch of the state understands and respects the principles of interdependence. We must do all that we can to minimise the risk—for we can do no more than minimise the risk—of one branch of the state failing to respect the position of the other branches of the state in relation to a particular matter. We need principles and, above all, we need dialogue. I hope in that way that each part of the state can contribute to the upholding of the rule of law.

12.31 pm

Lord Empey (UUP): My Lords, the noble Baroness, Lady Whitaker, commented on the difficulty of non-lawyers speaking against a background of so many noble and learned colleagues, and I certainly come into the same category as her. But I do not think that this matter is for lawyers only; it affects everybody.

For more than 20 years I have had access to this particular privilege. I have never personally exercised it. However, it is clear that it is there for a purpose. At the end of the day, I suppose that one could say that it has the potential for the exercise of arbitrary power, which is a very serious thing. My anxiety is that, if you particularise this issue, as some noble Lords have in the case the noble Lord, Lord Hain, it misses the point. Where a particular privilege is granted, whether to a Member of Parliament or somebody else, there is always the potential for a mistake to be made. There is always the potential for somebody wrongly to make an accusation or misuse the privilege.

In recent years, people at the other end of the Corridor have joined in campaigns against what they believed to be inappropriate behaviour by a number of senior political figures of the past and made allegations against them that subsequently appeared to be untrue. Nevertheless, my anxiety about the conflict—and the noble and learned Lord, Lord Brown, is correct that this is not just the potential for conflict; there is conflict in many respects—is that once you start to put an envelope around the privilege, you are then in a position of having to decide where to draw the lines, and you are then subject to arbitration about whether you have crossed a particular line or not.

For instance, we could seek the guidance of the Speaker or the Lord Speaker. But if we take our present-day circumstances, one can imagine that one of the two current Speakers might be prepared to take a different view from the other—and I do not specify which one. Therefore, you start down a road at the thin end of the wedge where, ultimately, the privilege will become controlled. On balance, looking at the arguments between observing the rule of law on one hand and maintaining parliamentary privilege on the other, once you introduce a process where somebody or some institution has to judge whether the Member is right or wrong, that power will ultimately be reduced.

The noble Lord, Lord Norton, made a very good point when he talked about Members being advised on privilege at their induction. Although I was aware of it because I had been in an institution for some time, it was not part of my induction. The House could without any difficulty make it a normal part of the induction process. It does not require any additional committees or further reports; it just needs to be done. That would be a very positive contribution.

There is power in the ability to say something, I know that the noble Lord, Lord Thomas, made the point that when it is your training, your life and your career, you naturally give a precedence to something a court will decide that perhaps the general public does not. It is also the case that wealthy and powerful people can get greater access to and understand the potential of the courts more than most ordinary people. They have used and abused this—so the privilege requires protection.

I am nervous about committing to starting reports and going through the whole thing again, and then asking particular individuals, who will vary in judgment from time to time, to decide whether you can exercise the power. It must be done responsibly—I fully accept that—but I do not believe that the situation is so out of control that any radical steps need to be taken. The privilege is used sparingly. One can argue about each individual case, but I do not think that we have a huge constitutional problem on our hands. However, we may do if we start to diminish that privilege. The more people who are engaged in some kind of arbitration on whether you exercise your privilege, the greater the risk that the privilege will ultimately be lost. As a final protection in our constitution, Parliament must uphold that privilege, which should be left alone. Providing Members with guidance should be more than adequate, rather than setting up any further committees or inquiries.

12.37 pm

Baroness Deech (CB): The Motion moved by my noble and learned friend Lord Brown goes to the heart of our constitution—that is, the separation of powers, the respective and distinct roles played by the judiciary, the legislature and the Executive, and the balance between them. Recent events seem to have put the rule of law and the independence of the judiciary at risk. The legislative branch overreaches itself if it intrudes into the Executive, as we are witnessing almost daily in the struggle over European withdrawal; the legislature also overreaches itself if it intrudes into the judicial function. Intrusion into judges' independence comes if parliamentary privilege is misused to undermine their judgment, without recourse for either the judges or the subject of the disclosure. In the extraordinary circumstances we are told we are living through, it is all the more important not to abandon the rules; that way lies lawlessness.

The privilege is to enable us to hold the Executive to account, to debate and inquire, to criticise bad conduct and so on without fear. It is not there just to satisfy public curiosity, feed the media or even encourage other victims to come forward. It is meant to help parliamentarians to use their position to uphold and act in the public interest in, for example, the case of a national emergency or corruption on the part of public officials and Ministers that needs exposure. It is especially regrettable when parliamentary privilege is used to expose matters that should be kept confidential but are about sexual impropriety, where the motive for the breach appears to be prurience and satisfying media curiosity. The Philip Green issue, for example, was not urgent, was not of national importance to the economy or security, and the propriety of non-disclosure agreements was already a live issue. We were deprived of the court judgment on that very issue. Moreover, a Peer who takes it upon him or herself to flout a court order will not have heard all the evidence about why the court ordered anonymity. The breach of anonymity will serve only to inhibit future claimants, whose confidentiality will be seen to be at risk from the outset. It will tempt those involved in such litigation to feed injuncted material to parliamentarians to secure revelation in Parliament, to the detriment of the parties involved. The individual who suffers has no remedy and the courts can do nothing about the damage.

The question has arisen of whether a Member should consult the Lord Speaker if he or she proposes to breach court anonymity. The problems with this solution are, first, that a Member may none the less precipitately reveal that which should have been kept secret without prior notice. Secondly, the Lord Speaker, even with the assistance of other Members as advisers, ought not be put in the position where he or she has to pit his or her judgment against that of the court and without the information that led the court to decide that there should be anonymity. It would not be advisable to attempt to lay down statutory rules about privilege, for that would amount to a situation whereby judges would rule on parliamentary matters in contravention of the separation of powers.

I am driven to conclude that there is no more that can be done, save to remember how important it is for the legislature to respect the scope of the judiciary and the judiciary the scope of the legislature, as explained by Stanley Burnton J in the 2008 case of the Office of Government Commerce. Members have to exercise self-discipline and remind themselves of the important historical and constitutional role played by judicial independence and parliamentary privilege side by side. If they fail to respect the rules, the punishment is not contempt of court, but forfeiting the trust of their colleagues and exposure to the sanctions that might exist under rules of parliamentary conduct. We have to act on our personal honour and place the public interest ahead of private interest. An irresponsible breach of court-ordered anonymity or a breach with the wrong motive loses the respect of the House.

12.42 pm

Lord Garnier (Con): My Lords, I thank the noble and learned Lord, Lord Brown of Eaton-under-Heywood, for initiating this debate. He has calmly set out his arguments with authority and care, which comes as no surprise, despite his obvious disappointment at the conduct of the noble Lord, Lord Hain, in deliberately breaking a court order last October not to identify a party to a legal dispute. I agree with the noble and learned Lord's arguments and his conclusions, subject to the tempering of those conclusions in the speeches of the noble Lord, Lord Empey, the noble Baroness, Lady Deech, and my noble friend Lord Norton.

I have known the noble Lord, Lord Hain, as a political opponent and as an acquaintance for the past 25 or 30 years. I sincerely admire much of what he has done in public life, and I desperately wanted him to convince me today that what he did last October was right, but I am afraid he failed. I draw the House's attention to my interests set out in the register and, in particular, to the fact that for more than 40 years I have practised as a barrister specialising in media law, the law of privacy, confidence and contempt. When I was Solicitor-General, I frequently had to prosecute cases as contempt, dealing with respondents who had in one way or another interfered with the course of justice in particular cases.

That said, I am entirely familiar with the vital importance in our democracy of free speech in and out of Parliament, the importance of having free media and fearless journalists, and the importance of having laws that protect our right to freedom of expression. Any curtailment of that right must be necessary and proportionate and, if our freedom of expression is to be guaranteed or its curtailment is to be legitimate and acceptable, we can in the final analysis rely only on the law and our justice system to protect our interests,

If we are to rely on our justice system and the law to provide that protection, we need to accept that sometimes, for the greater good of society, decisions or laws may not always suit us personally. For example, I may prefer to keep some information about me private because it is personally or politically embarrassing, whereas someone else may feel that that that information ought, in the public interest, to be made known. I may find somebody else's comments about me or my conduct offensive and unwarranted, while that person may hold the view that his opinion of me or my conduct is warranted and entirely fair.

Over the centuries, there has been a healthy but often heated debate about where as a general rule, and where in a particular case, the line lies between on the one hand an individual's right to privacy and the protection of their reputation, which I distinguish from self-esteem, and on the other the right to freedom of speech. Of course, there will be occasions when people confuse what is interesting to the public and what is in the public interest but, absent an agreement on the matter between the individual concerned and the person wanting to publicise it, in a civilised society we ask a dispassionate, disinterested judge to assess the facts of the matter and apply the law, be it our own domestic statute and common law or imported law in international treaties or conventions, such as the European Convention on Human Rights.

I venture to think that judges trying defamation cases in the High Court or dealing with a contempt matter before the implementation of the Human Rights

[Lord Garnier]

Act would have taken the same liberal view of the law relating to freedom of speech as they do now, as well as recognising that some things are matters for Parliament and some are matters for the courts. Sir Stephen Sedley, a former Lord Justice of Appeal, had it exactly right when he said, in explaining the real significance of freedom of expression in a case involving the unlawful arrest of a street preacher:

"Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having".

However, he also said on another occasion:

"If Parliament does not like what the courts do, it changes the law. The sovereignty of Parliament as the final source of law and the sovereignty of the courts in interpreting and enforcing the law are the twin pillars on which democracy and the rule of law in the UK rest".

"Exclusive cognisance" is an old-fashioned term but I think we know what it means.

We all have rights and obligations that need to be respected if we are to live in a tolerant society. Call it a rules-based society, call it respect for the rule of law, call it a world in which we accept that there is no reason not to have a bit of give and take—an understanding that sometimes we have to meet half way and that we cannot always have things our own way—but, however we describe it, we need to live our public and private lives in a way that respects the opinions and customs of others. That does not mean that we are not allowed opinions, that we cannot criticise judges for the decisions they make or that we all have to think and do the same. One of the central purposes of this very Parliament is to provide a forum for argument.

Through the Bill of Rights, the law of the land protects us from arrest or litigation for what we say in this House and in the other place, but we cannot, without damaging our way of life, take unto ourselves the power to make decisions which are entirely or largely selfish. The Bill of Rights enshrined in law what has come confusingly to be called "parliamentary privilege". Privilege is a legal term with several different meanings depending upon its context.

We know now that our privileges not to be arrested and sued for what we say here are not our own but are held on trust from the public so that we can the better carry out our public duties. That relationship between the public, our uncodified constitutional arrangements and us as trustees is very delicate, and much of it is based on convention, mutual respect and understanding for and between the different elements of our mutual system of law and governance. So it is all the more important for the proper working of our Parliament, courts and Government that none of those constitutional bodies behaves in a way that damages that respect or mutual understanding. In this I entirely agree with the noble and learned Lord, Lord Thomas.

Time prevents me from developing these arguments further, but I urge my noble friend the Minister and all noble Lords that, if we are to run this place in a civilised and sensible way, we must have mutual respect for the various institutions of government and not trample all over them for personal gain.

12.50 pm

Lord Armstrong of Ilminster (CB): My Lords, I should like to join other noble Lords in congratulating and thanking the noble and learned Lord, Lord Brown of Eaton-under-Heywood, on bringing this Motion forward for debate. The incident to which the noble and learned Lord referred—that involving the noble Lord, Lord Hain—raises an important issue which ought not to be left unaired.

The time-honoured privilege of being able to speak in this House without fear of being pursued for libel or some other breach of the law was established by the Bill of Rights to allow noble Lords to speak their mind freely when contributing to debates and other proceedings in this House. It is a necessary and valuable privilege which is generally understood and accepted, but it must not be—I was going to say "abused", but perhaps I should say "misused".

There are matters and cases where it should not be exercised; if it is misused, that will call into question whether the privilege should be regulated, further controlled, or even abolished. Everyone would accept that it should not be used to expose official secrets or matters that demand a high degree of confidentiality for other reasons. As a general rule, the sub judice rule is important; we should not use the privilege to frustrate a judicial decision in a court of law.

It would be difficult to define a range of issues on which the exercise of this privilege should be banned or limited by legislation or Standing Order. Misuse of the privilege is recognisable when it happens, just as Dr Johnson knew a stone when he kicked it. So what is needed is some sanction which will cause a noble Lord to think twice, or even more often, before deciding to exercise the privilege.

My suggestion is that, if a noble Lord has exercised the privilege in a sense that might be regarded as misuse—against the advice of the Lord Speaker, or without taking the Lord Speaker's advice—a House committee such as the Committee for Privileges and Conduct should have the right and duty to examine and investigate the matter, and to report to the House of Lords on whether the use of the privilege was justified in that instance. I believe that that—without the need for a ban by definition—would oblige those minded to exercise the privilege in a manner that might be seen as a form of misuse to consider not twice but even more often whether to go ahead.

12.54 pm

Lord Parekh (Lab): My Lords, I begin by thanking the noble and learned Lord, Lord Brown, for securing this debate and introducing it so well. I think we would all agree that Parliament is at the heart of our democracy. It is the place where discussion and debate takes place and where misuse of power is exposed. It has to be a protected space; a space where people can talk freely without fear of the consequences. That notion of a protected space implies the absolute right that we have been talking about: the right to question things done outside Parliament, including an injunction that the courts might have issued.

That particular right—to question an injunction from the courts—is challenged on three grounds. First, the judge has already considered the public interest,

so what is a parliamentarian doing in trying to supersede the judge? It has been suggested that he is unfairly acting as a kind of super-judge. Secondly, it has been noted that the judge has acted in a certain way in his judicial capacity, while the Member of Parliament acts in a legislative capacity. The two are supposed to be separate under the system of executive functions and the division of powers. Thirdly, it has been suggested that in allowing a parliamentarian to question an injunction, you are giving him greater freedom of speech and therefore violating the rule of law and the principle of equal citizenship.

All three objections can be answered, some more conclusively than others. The first point about the Member of Parliament acting as a super-judge is just not correct, because what he is doing is bringing a different perspective to the judgment. The judge has issued an injunction based on his consideration of the public interest, defined from a judicial point of view. A Member of Parliament looks at it from a holistic, national, political perspective and might be able to show that the judgment can be disregarded. On whether the Member of Parliament enjoys greater freedom of speech, it is certainly true that Parliament is at the heart of democracy and therefore that the Member should be able to enjoy certain rights and privileges that are not enjoyed by others.

For these reasons, I would have thought that the objections made to the absolute right to question things can be disregarded. The right of a parliamentarian to question or ignore the injunction issued by the judge can be respected. As it is a right under which the individual cannot be sued, and one of great importance, it should be exercised responsibly. But what does this mean? What seems responsible from one person's point of view might not seem responsible from another's. Here one has to think in terms of certain objective criteria.

As your Lordships have suggested, this right should be exercised in consultation with the Lord Speaker, or should have to be defended afterwards in front of a committee of the House. In other words, there must be some sanction on the parliamentarian. Otherwise, it is a free for all, especially when we are entering a situation in which there will be an enormous amount of populist pressure on parliamentarians to placate public opinion. It is important that we are protected against those kinds of pressures and the need to placate public opinion. Therefore, a requirement to consult the Lord Speaker, or another mechanism of that kind, is absolutely vital.

In the case of my noble friend Lord Hain, I almost totally disagree with the noble and learned Lord, Lord Brown. I think my noble friend was acting honourably. More importantly, he was acting in a way that can be fully justified. If there is a danger of the normal democratic process of debate and discussion being shut down because of the enormous power of an important individual, or pressure from him or her, obviously that process of discussion and debate, which is at the heart of democracy, has to be unblocked and activated. If a statement by a parliamentarian activates that process, that action, to my mind, is fully justified.

12.59 pm

Lord Trevethin and Oaksey (CB): My Lords, it is a pleasure to follow the noble Lord, although I have the misfortune to disagree with his conclusion. My view, with respect to the noble Lord, Lord Hain, who obviously acted in what he considered was the proper way, is that this was not a proper use of parliamentary privilege. It might be instructive for me to say a little more than some other speakers have about the course of the relevant litigation with which the noble Lord's comments were concerned because it might indicate, when one understands what happened in that litigation, just why it was inappropriate to use parliamentary privilege in effect to determine the outcome of that litigation when it was heading towards a speedy trial in the Court of Appeal, at which detailed arguments would be advanced to both sides by leading counsel who are eminent in the relevant field.

If the noble Lord had read the Court of Appeal's judgment before saying what he said in this Chamber—we know that he did not because he said so to the commissioner—he would have learned the following things, among others, about the litigation. Five complainants were directly involved. At the court's instigation they had been contacted. Two out of the five had said that they supported Sir Philip Green's application, or his company's, for an injunction. That is a striking fact that reminds one that NDAs can be regarded as beneficial by both parties to a settlement agreement, not merely by the party who is the subject of allegations of inappropriate behaviour.

Secondly, the judgment informs the reader that these NDAs permit legitimate disclosures, including any report that any complainant might wish to make to the police or other appropriate authority of criminal misconduct. That seems a relevant fact. The reader will also find that the Court of Appeal gives careful consideration to the statutory context and to the reasons given by the judge of first instance for permitting disclosure of relevant matters pending trial.

The reader will also find that the Court of Appeal, having lucidly and carefully explained why it doubted the correctness of the judge's handling of the matter, ultimately decided that the disclosure should be prohibited pending speedy trial because:

> "The Judge has ... left entirely out of account the important and legitimate role played by non-disclosure agreements in the consensual settlement of disputes".

In coming to that conclusion, the Court of Appeal expressly made detailed reference to an instructive report by the House of Commons Women and Equalities Select Committee, which recognised the beneficial part NDAs can play in facilitating consensual settlement. Everyone, not only lawyers, knows that in general terms settlements are to be encouraged. They save money and time, and they avoid a great deal of harassment and distress. Of course, settlements and NDAs within them can be abused, but generally speaking they are to be encouraged.

The Court of Appeal made an interim order restricting or prohibiting disclosure, but also directed that the matter should move at speed towards a trial. At that trial detailed arguments would have been put by both sides of the case concerning the function of NDAs

[Lord Trevethin and Oaksey]
and whether, in the long term, it is desirable for there to be a general recognition that NDAs are worthless because they can be ignored with impunity. There would quite swiftly have been an authoritative judgment of great assistance not only to lawyers but to anyone concerned with this area. What in fact happened, of course, was that the noble Lord's intervention, which was I think in breach of the sub judice rule, did not merely influence the outcome of the litigation, but in effect determined it.

Some further steps were then taken in the litigation that I will mention briefly, because time restricts me. There was a hearing before Mr Justice Warby at which Sir Philip Green's lawyers made it clear that they were going to pursue the question of who disclosed his name and other matters to the noble Lord, Lord Hain. The judge did not dismiss that suggestion immediately. Instead, he took steps to bring it to the attention of the Lord Speaker so that he could, if he so chose, make representations on behalf of Parliament. The prospect came into view of a court having to consider an application for an order compelling the noble Lord, Lord Hain, to disclose his source on pain of being found in contempt of court. I suspect that that would not have happened, for all sorts of reasons, but the fact that that prospect came into view might indicate just how unfortunate it is for litigation to be derailed in this way.

Almost inevitably, there was then a discontinuance of the proceedings in circumstances in which there had been no adjudication. That left the judge with the very difficult task of having to sort out issues of costs without knowing who had won. All in all, if noble Lords read that sequence of three judgments, they will see that the litigation was derailed in a way that I think is fairly characterised as the course of justice being perverted.

There are clearly cases in which it would be appropriate for a parliamentarian to disclose matters that are subject to an injunction. Such cases would normally involve the parliamentarian giving careful and conscientious consideration to the course of the litigation and deciding that the course of justice had been perverted. I respectfully suggest that this was not one of those cases.

1.06 pm

Lord Bethell (Con): My Lords, I thank the noble and learned Lord, Lord Brown, for bringing forward this remarkable debate, which has showcased the huge legal depth on the Benches here, and I thank the Library for the excellent briefing paper. I have an emotional response to this debate, as a former journalist who has himself been injuncted, which is to sympathise with the description from the noble Lord, Lord Hain, of his feelings when he decided to commit this breach. In my life as a new parliamentarian, I feel very excited about having this privilege. I feel defensive of it. But I think that the noble and learned Lord put really powerfully the case for there being a problem that needs to be resolved. From listening to the debate my sense is that doing nothing is not an option.

I will make two recommendations based on the principle that something needs to be done. First, we need to resolve this bitter battle between the courts and Parliament. Hearing in the debate how parliamentarians and the courts are at odds over this has made me feel very uneasy. Some very sensible-sounding reforms have been recommended—some of which have been articulated by the Bingham Centre, which has written a very good note on this matter—such as strengthening the existing provisions in the *Companion to the Standing Orders*. The noble Lord, Lord Parekh, made some very detailed recommendations along these lines, which I support.

My second recommendation is to protect not the courts, but citizens. Privilege can be used for good, as a number of noble Lords have explained. I remember, as a boy, when the then Prime Minister, Lady Thatcher, used privilege to expose Anthony Blunt, which not only was a pivotal moment in the Cold War but cleared the name of an innocent man who had been associated with spying. But in recent times some mistakes have been made, the consequences of which can be extremely damaging and long-lasting for the individuals concerned. The lurid and fantastical claims made against Lord Brittan—once my boss at the European Parliament—Lord Bramall and Harvey Proctor have been exposed as false. Surely some sort of redress is appropriate for them. The hurt and suffering felt by innocent people and their families when great privileges are not used responsibly should stop us in our tracks and make us reflect on our behaviour.

This is different from the point I have focused on, but I will make not a legal, but a political point. As my noble and learned friend Lord Garnier said, the danger is that such incidents reinforce a deepening impression among ordinary people that somehow parliamentarians might think that they are above the law in some way. It contributes to the sort of anger that is often remarked upon on the Floor of this House, and which I fear we will see meted out at the ballot box today.

Something should be done to tilt the balance of power between unaccountable parliamentarians and ordinary people, in a way that preserves the principle of privilege—which is such an important part of our constitution—and does not create confusing definitions, but gives people a form of redress. Some kind of citizen's right of reply should be considered. This would provide aggrieved citizens with the opportunity to have published on the record a brief response to accusations made in Parliament that they feel are inaccurate, unfair or defamatory. It would also help redress some of the tensions between the absolute nature of parliamentary privilege and fundamental human rights, tensions which a number of noble Lords have mentioned and the European Court of Human Rights has recognised.

Similar democracies in Australia, New Zealand and Ireland have adopted their own versions of a citizen's right of reply, putting power back into the hands of ordinary citizens and allowing them to set the record straight and defend their reputations, while preserving the important principle of privilege in Parliament. This House has debated a citizen's right of reply several times over the last 20 years. Given the public's justifiable concerns and growing cynicism about government, I wonder whether now is the time to demonstrate respect and honour for our fellow citizens

by enabling them to clear their names when they feel unjustly targeted by members of Parliament and abused under the cover of privilege.

I wonder whether it is time to seize this opportunity to consider these two proportionate measures in order to modernise a precious but fraying custom and to protect its fundamental value from being undermined or discredited in the future, while at the same time safeguarding the rights of citizens.

1.11 pm

Lord Anderson of Ipswich (CB): My Lords, we all have our prejudices. Mine, in common perhaps with the noble Lord, Lord Hain, include unease about the use of non-disclosure agreements in the employment context—particularly where bullying and harassment are concerned—and a strong belief that in corporate, as in public, life, sunlight is the best disinfectant. Hence the importance of dispassionate and disciplined legal analysis, exemplified by the case to which the noble and learned Lord, Lord Brown, referred in opening, and in which I declare a remote interest, having been instructed in the past on unrelated matters on behalf of one of Sir Philip Green's companies, and on behalf of the owners of the Telegraph group.

The High Court favoured the public interest in publication. The Court of Appeal, having carefully weighed what it referred to as,

"important and difficult policy considerations",

gave precedence to the public benefit in the enforcement of settlement agreements freely entered into by the parties. Legal principles developed over many years were argued out and applied in a way that held the ring, pending a speedy trial by judges with the experience and aptitude to do so.

Of course, the development of the law should be robustly debated and criticised in Parliament. We are in the law-making business. If the judges take a wrong turn, it is open to us to reverse it. One thinks of the long history of the admissibility of complainants' sexual history in rape trials. No legal topic could, or should, possibly be considered off-limits in this House. However, to ignore a court order and so prejudge the result of a trial is an entirely different matter. What would we think of a Supreme Court that overrode the Court of Appeal on the basis of an interview with a single witness, and without troubling to read the judgments of the courts below? Yet if the noble Lord, Lord Hain, is right, then not just he but any Member of either House would be entitled to do exactly that, because his or her personal morality suggested that it was a good idea.

The noble Lord told the Commissioner that he was motivated by human rights, and on human rights his record is well-known and highly respected, not least by me. But this is an area where rights conflict. There is the right of the public to be informed, certainly, and the countervailing privacy rights of the two complainants mentioned by the noble Lord, Lord Trevethin and Oaksey, who had signed non-disclosure agreements and supported the application for an injunction. Crucially, there is also the right of Sir Philp Green and his companies to a judicial determination of their legal rights, guaranteed by Article 6 of the European convention.

The noble Lord, Lord Hain, told the commissioner that he was not seeking to challenge the decisions of the judges, and that he totally respected their authority. However, whatever his intentions may have been, the foreseeable result of his actions was to pre-empt their jurisdiction and prejudge the outcome of the case. Were this matter to be considered in Strasbourg, our system would be scrutinised as a whole. At the very least, as we know from the A v UK case, the European Court of Human Rights would need to be satisfied that there are strong mechanisms in place to prevent privilege from being abused. That case would be a hard one to make, given the absence of a Speaker who controls our proceedings, the limited jurisdiction of the Parliamentary Commissioner for Standards and the lack of mechanisms for redress.

In his recent lecture to the Commonwealth Law Conference, the Lord Chief Justice observed that for almost 300 years it did not appear to occur to any Member of either House that it was appropriate to use the freedom of speech in Parliament to undermine an order of a court. The practice seems to have emerged in the 1970s—ironically, not long after the sub judice rules were formalised. Since then, the pace has picked up. In his lecture, the Lord Chief Justice identified five cases in the past 10 years, only one of which he discounted as inadvertent.

What is the solution? I freely defer to the experience of those who have been in this place much longer than I have, though I respectfully doubt whether the Lord Speaker's Written Statement of 29 October, welcome though it was, is enough. I have not heard anyone say that we should subject parliamentary sovereignty to the power of the judges, as the noble Lord, Lord Hain, characterised the argument. However, can we not at least consider the ways in which our code of conduct could be beefed up to give the commissioner jurisdiction over the central issue in these cases, and not just questions of conflict of interest? That would avoid the need for these matters to be ventilated in this Chamber in the context of individual cases, which currently seems to be all we can do to register our disappointment or dismay.

I suspect that we also need to achieve clarity about the application of the sub judice rule, or some broader rule, to matters pending before tribunals; to private proceedings in this House, such as Select Committee meetings in closed session; and to cases in which final orders have been made, such as injunctions or orders for anonymity in criminal or family cases. It is seductive to be placed above the law, and it may be tempting to do nothing in the hope that the problem will not get worse. However, the threat to justice is real. We need to get our own House in order, and I hope we will.

1.17 pm

Baroness Warwick of Undercliffe (Lab): My Lords, I thank the noble and learned Lord, Lord Brown of Eaton-under-Heywood, for giving us this opportunity to consider the potential complexities of this issue. I have no legal expertise, but as a member of the Procedure Committee, I had an opportunity to consider this issue.

[Baroness Warwick of Undercliffe]

I want to speak about parliamentary privilege—to reflect on what it was introduced for and its continuing relevance today. I should say up front that what has been characterised for the purposes of this debate as a potential conflict I see rather as a question of balance—between respect for legal judgments on the one hand and exercising Parliament's profoundly important right to free speech on the other. I believe that the House already has sufficient mechanisms with which to maintain that balance. The noble and learned Lord, Lord Mackay of Clashfern, set them out very clearly. Seeking to change these mechanisms by introducing new restrictions or disciplines could have a profound effect on the ability of parliamentarians to carry out our public duties without fear or favour.

A consequence of Parliament's exclusive jurisdiction over proceedings in Parliament is that participants are not legally liable for things said or done in the course of those proceedings; nor are those adversely affected by things said or done in Parliament able to seek redress through the courts. Therefore, in certain circumstances, it overrides other generally accepted legal rights.

Parliamentary privilege is, by its very name and definition, an exception to the general principle of the rule of law. The tension between parliamentary privilege and the rule of law can be uncomfortable, but the rule of law as reflected in judicial decisions must be balanced against the competing claims of Parliament to be free to speak on matters of importance without fear of prosecution. To seek a general assumption that judicial decisions must trump the freedoms of speech afforded through parliamentary privilege is to introduce the risk that the judiciary or the Executive interfere with the proper operation of Parliament. Parliamentary privilege is a fundamental constitutional principle, itself part of the law. It would be a big step to tamper with that principle by deploying the argument that parliamentary privilege, as currently operating, is no longer proportionate.

The last major review of parliamentary privilege was in 1999, the year I entered this House, and it still usefully reminds us that parliamentary privilege exists to protect the independence of Parliament. Parliament and its Members and officers have certain rights and immunities under the banner of parliamentary privilege, which are rooted in this country's constitutional history. They allow each House to work effectively, giving them the exclusive right to oversee their own affairs and, above all, to enable Members to speak freely. While the courts have a legal and constitutional duty to protect freedom of speech and Parliament's recognised rights and immunities, they do not have the power to regulate or control how Parliament conducts its business. Parliament in turn is careful not to interfere in how judges discharge their judicial responsibilities. In taking responsibility for our own affairs, we must still respect the rule of law.

The way that we ensure privilege is not abused, and the rule of law is not undermined, is for each House to enforce its rules on conduct and to ensure that our Standing Orders set out the importance of respecting judicial process, the separation of powers and the rule of law. The sub judice rule, set out in the Standing Orders of the House, makes it clear that the privilege of freedom of speech in Parliament places a corresponding duty on members to use the freedom responsibly. Respect for this rule is important in securing a balance between Parliament and the courts. Perhaps, as the noble and learned Lord, Lord Brown, suggested, stronger wording in the *Companion* could highlight the need to respect the sub judice rule and use parliamentary privilege responsibly. But I would also want to ensure that any enhanced wording in the *Companion* would still provide for the possibility of a Member breaching a court order if he or she believed there was a strong public interest argument in favour of doing so.

For me, free speech in Parliament remains the touchstone in any debate of this issue because of its constitutional importance to our functioning democracy. In my 20 years in this House, I have heard parliamentary privilege called on only a handful of times. It is clearly not used lightly, nor do I believe that its recent use by the noble Lord, Lord Hain, in October last year represents an escalation that now needs to be addressed. I would counsel against introducing new or draconian measures that would regulate what Members can or cannot say during parliamentary proceedings. That would mean curtailing the freedom of speech essential to parliamentary privilege, guaranteed by Article IX of the 1698 Bill of Rights, and reaffirmed regularly thereafter.

1.22 pm

The Earl of Kinnoull (CB): My Lords, it is a pleasure to follow the noble Baroness, Lady Warwick, and I add my congratulations to the noble and learned Lord, Lord Brown of Eaton-under-Heywood, on securing a debate on such an important topic. I am legally qualified; however, I have spent my career in international business, which has included spells in New York, Zurich and Bermuda, as well as 20 years or so in the City itself. Underpinning all international business are written agreements, which all have provisions to determine the governing law and jurisdiction arrangements concerned in whatever that agreement is. The winner by choice in so many of these things—I do not mean just with UK entities as parties, but generally—is English law and English jurisdictional methods, which may include arbitration or mediation as well. This leadership positioning of English law is a key component, I submit, of the great success of the City of London and the huge legal businesses there now: the magic circle firms are world leading and exceptionally large.

In preparing for this debate, I rang up an Austrian lawyer who I knew used English law in some of his arrangements. I asked him why he did that and he said, "It is the prestige". When I tried to analyse with him what he meant, he said, "The first thing is that you have a structure—a structure which is presidential, predictable and fair. The second thing you have is the people, in that the quality of the judiciary is exceptionally high and they understand what you're talking about, because they have the knowledge and experience of arcane financial services instruments or other things as well". He also pointed out, and I agree, that those things are comprehensively intertwined. I therefore feel strongly that any damage to this happy leadership position is greatly against the national interest.

A business principle that I have always abided by is "Everything communicates". If your brand is trying to be a premium brand, you cannot send out a letter to all your clients full of spelling mistakes. If you were Gerald Ratner, you would understand this point as well because he criticised his own brand and his business simply disappeared. We have our own principles of comity, which are incredibly important as the boundaries between Parliament and the court. They were clearly laid out in principle—or relaid—by our Lord Speaker in his Written Statement of October last year. Although I agree with the noble and learned Lord, Lord Brown, that they could do with some strengthening, they are clearly laid out procedurally as well in our *Companion to the Standing Orders*. If we ignore those things, we therefore communicate something negative about our precious legal system.

I am not suggesting that this is a death-by-one-cut thing at all, as in the point made by the noble Lord, Lord Empey. But if we serially ignore our courts—ignore the hard work of the Court of Appeal, which heard for several days on this matter—we will find other jurisdictions snapping at our heels. Other governing law matters will come and people will choose them, which would be damaging to us. We will find it damaging to our efforts, which have already been damaged recently by such things as pension arrangements, to recruit really good judges. So "Everything communicates" is why this debate is important, because I hope we are communicating that we thoroughly support our judges and that we have a method of comity, set out in the Statement of our Lord Speaker and in our *Companion*. We should stick to that method.

1.26 pm

Lord Lisvane (CB): My Lords, I start from the premise that there should be a comity between the courts and Parliament and that both should be, in the words of Lord Browne-Wilkinson in Prebble v Television New Zealand,

"astute to recognise their respective constitutional roles".

There are two means of, as it were, keeping the tanks off each other's lawns. One is article IX of the Bill of Rights, which says that parliamentary proceedings,

"ought not to be impeached or questioned in any Court or Place",

outside Parliament. Over the years, the judiciary has generally been very careful to ensure that this is observed. The mirror image is the sub judice rule, enshrined in resolutions of the two Houses, which prohibits reference to active proceedings in the courts, subject to the right of Parliament to legislate on any matter and with the possibility of a waiver if, in the judgment of either presiding officer, this is justified.

I should note in passing, as this was something that much occupied me in my former life, that the sub judice resolutions in their present form date from 2001 and are sorely in need of updating. For example, following the Armed Forces Act 2006, there is now no mandatory post-trial review in court-martial proceedings. Moreover setting down a case for trial, one of the trigger points for the rule's operation, is phraseology no longer used in the Civil Procedure Rules. The application of the rule to tribunals needs to be clarified, and I have long thought that its application to inquests—in effect, treating them as quasi- criminal proceedings—is simply not sustainable.

However, in the issue we are considering today, the sub judice rule is a bit of a red herring. It may apply to injuncted material but only if proceedings are still active; it will not apply to a final injunction unless an appeal is outstanding. The question before us is, I suggest, whether there should be a parallel rule to protect the rights conferred on an individual by the judicial process, and incidentally of respect for that individual's private life under Article 8 of the European Convention on Human Rights.

Two particular cases were considered by Commons committees. In 1978, the Committee of Privileges considered the Colonel B case, which has already been referred to, and, in 1996, the Procedure Committee considered the Baby Z case. A more wide-ranging inquiry was undertaken by the Joint Committee on Privacy and Injunctions, which reported in March 2012. Part of the Joint Committee's consideration was of parliamentary breaches of court injunctions. To what extent they were justified is neither here nor there. They related to people engaged in the popular sports of football and banking, and particularly to sportsmen who, in their private lives, had been a little too sporting.

My noble and learned friend Lord Brown of Eaton-under-Heywood referred to the suggestion made by my noble friend Lord Pannick in the *Times* a while ago. I hope I may be acquitted of vaingloriousness when I say that I was a few years ahead of my noble friend. In my memorandum, as Clerk of the House of Commons, to the 2012 Joint Committee, at pages 191 to 211 of the committee's written evidence, I set out how the two Houses could deal with the problem. They could pass in effect a self-denying ordinance, on the pattern of the sub judice resolutions, stating the determination of each House to preserve Parliament's freedom of speech, uphold the rule of law and respect the rulings of the courts, save either for the purpose of changing the law or if the chair had given prior—note, prior—authority for the rule to be set aside if the circumstances warranted it. This would be a high bar to clear. Such a resolution would also have an important declaratory function, which we should not underestimate. The Joint Committee was clearly attracted by this option but, in the end, concluded that there were not enough cases to constitute a real problem that needed to be dealt with in this way.

That was also the conclusion of the Commons Committee of Privileges in 1978, the Procedure Committee in 1996 and the Joint Committee on Parliamentary Privilege in 1999, which was endorsed by the Joint Committee on Parliamentary Privilege in 2013. It also wisely recommended against the codification of privilege in statute.

There we have it: it is a matter of proportionality. If, in your Lordships' judgment, and that of the other House—and it would be sensible for the two to keep in step—these are events whose frequency and nature give rise to sufficient continuing concern, the means of addressing the issue are to hand.

1.32 pm

Baroness Hayter of Kentish Town (Lab): My Lords, I particularly thank the noble and learned Lord, Lord Brown of Eaton-under-Heywood, for enabling me to witness a near-private tutorial, given by some of our nation's top experts—not just from the law, but from Parliament, academia and elsewhere—on the interrelation of aspects of the rule of law with that vital issue of parliamentary freedom of speech. If my noble friend Lord Hain had done nothing else in his career than create the opportunity for today's debate, I would have much to thank him for. Incidentally, I wonder whether today's *Hansard* together with the helpful Library briefing we had, bound into a book, would not only be a great bestseller, with no issue of copyright and royalties, but may provide that extra guidance that some speakers have called for today.

I turn to the issue, whose coverage I will not try either to summarise or assess, and will say three brief things. The first nicely follows the noble Lord, Lord Lisvane, who talked about there not being enough cases. I always think that amending or making rules in response to an isolated incident, whether that incident is right or wrong, rarely makes for good law. We often refer to the Dangerous Dogs Act but, within other organisations, in business and elsewhere, the normal advice is to wait for a pattern before contemplating a response. Whatever the merits that brought the noble and learned Lord, Lord Brown, to table this debate today, there is clearly not a trend in behaviour to which we need to attract our attention.

Secondly, in any arena where two long-held and vital principles might collide—although the idea of balance referred to is better—hard and fast rules will rarely provide the solution. Careful judgment is needed, particularly when the public interest has to be defined and weighed. This is where skill may need to mix with sense, even political understanding, for a judgment to be made. As the noble Lord, Lord Empey, said, if lines are drawn, someone will have to arbitrate on where the boundary was crossed. Few of us want to rise to that challenge.

Thirdly, we have a Procedure Committee. As one of its members, my noble friend Lady Warwick, said, it has already looked at this issue and has not come to us with recommendations for change. We should heed its membership, which reflects the expertise we have in the House, from whom we have heard today. As they have the confidence that we did not need to bring anything today, we should follow their lead. It has been a fascinating two hours or so, and I now look forward to some added experience from the noble and learned Lord the Minister.

1.36 pm

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I am grateful to the noble and learned Lord, Lord Brown of Eaton-under-Heywood, for his careful and well-considered contribution to this debate. I am also grateful for the contributions of other noble and learned Lords, and noble Lords, on this issue.

Parliamentary privilege is a critical part of our democratic process, and is essential if Parliament is to function fully and freely. Noble Lords, and in particular the noble Lords, Lord Norton and Lord Lisvane, referred expressly to Article 9 of the Bill of Rights of 1689, which protects debates and proceedings in Parliament from interference from the courts. But let us be clear: the protection of absolute privilege belongs to the Houses of Parliament, not to its individual Members. This protection does not mean that Members are above the law, nor that they can ignore it. Indeed, parliamentarians have a duty to exercise the privilege of the House in a responsible manner that reflects the public interest. That includes being mindful of the sub judice principle and respectful of the jurisdiction of the courts.

It is a matter for Parliament, in the administration of its internal affairs, to regulate the conduct of its Members in the exercise of Parliament's privilege. More particularly, it may be for the Committee for Privileges and Conduct of the House of Lords to consider the use of parliamentary privilege by Members of this House. The noble Lords, Lord Armstrong, Lord Parekh and, I believe, Lord Anderson of Ipswich, alluded to the apparent absence of procedures and perhaps sanctions to address that issue.

It is clear that the privilege of Parliament should not be relied upon in such a way as to undermine the independence of the judiciary and, consequently, the rule of law. Where the judiciary has seen fit to make a court order, that ruling should be respected. That is the case no matter what stage legal proceedings may have reached. There may, of course, be a tension, but the relationship between parliamentary privilege and the independence of the courts—and, indeed, the rule of law—should not be one of conflict but of mutual respect. Each individual parliamentarian has to be mindful of the tension between releasing information where he subjectively considers it to be in the public interest and, on the other hand, the absolute necessity of maintaining comity between Parliament and the courts.

As it happens, we already have in place appropriate guidance on how that can be achieved. The *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* has already been referred to. It is quite clear, at least with reference to the issue of sub judice. Indeed, it is recorded that the House of Lords adopted a resolution on sub judice on 11 May 2000. That resolution, as amended, states inter alia:

> "Cases in which proceedings are active in United Kingdom courts shall not be referred to in any motion, debate or question".

That is subject to qualification, as is necessary, because the *Companion* goes on to say:

> "But where a ministerial decision is in question, or"—

I emphasise this—

> "in the opinion of the Lord Speaker a case concerns issues of national importance such as the economy, public order or the essential services, reference to the issues or the case may be made in motions, debates or questions".

That, of course, is subject to a safeguard. The Lord Speaker must be given at least 24 hours' notice of any proposal to refer to a matter which is sub judice. That, in turn, will prompt the Lord Speaker to consult with the clerks and the usual channels when he receives intimation of such an intention.

The Lord Speaker cannot, of course, intervene in our proceedings in this House, but it is open to any Member to move that a noble Lord should no longer be heard on a particular matter. We do, therefore, have in place safeguards that can be properly employed. Regrettably, where those safeguards and recommendations are circumvented, there is a danger that the House will bring itself into disrepute, and that the comity that it is necessary to maintain between Parliament and the courts may be undermined. In those circumstances, noble Lords may wish to look further at the issue raised by a number of noble Lords concerning the present terms of the guidance given on this matter and the potential need for sanctions where such guidance is overlooked.

Clearly it must remain central to our proceedings that we maintain the privilege of Parliament. I emphasise again that it is the privilege of Parliament, not a privilege of individual Members. I am obliged to noble Lords.

1.42 pm

The Senior Deputy Speaker (Lord McFall of Alcluith): My Lords, I thank the noble and learned Lord, Lord Brown, for initiating such an interesting debate and the Minister, the noble and learned Lord, Lord Keen of Elie, for agreeing to share the task of winding up today. It is unusual for two Members to respond to a debate—but this is an unusual subject area, where both the Government and the House have responsibility. As chairman of the Procedure Committee, I will set out the deliberations of our recent meeting where this matter was discussed in response to a written request from the noble and learned Lord, Lord Brown. I invited the noble and learned Lord to give an oral representation to the committee, and he asked us to consider four options.

The first was that the *Companion to the Standing Orders* should stress the importance of Members complying with court orders and injunctions—final and interim—rather than deliberately disobeying them under parliamentary privilege. The second was that consideration should be given to extending the sub judice resolution to encompass all, or almost all, proceedings in the House. At present, Members are exempted from the resolution during legislative proceedings where a ministerial decision is in question, or where the Lord Speaker believes that the court case in question concerns,

"issues of national importance such as the economy, public order or the essential services".

The third was that thought should be given to whether "egregious abuse of privilege" should in future become sanctionable in some way. The noble and learned Lord, Lord Brown, suggested that such behaviour might be deemed a contempt of the House, sanctionable by a requirement to apologise publicly and/or to pay a fine, or perhaps an explicit breach of the Code of Conduct. Finally, it was suggested that consideration should be given to whether the Lord Speaker might be empowered to require a Member who breaches, or is about to breach, the sub judice rule, and presumably any rule on injunctions, to desist.

In considering these options the committee was mindful that in 2011-12 the Joint Committee on Privacy and Injunctions was established to inquire into this issue in depth. That Joint Committee considered some of the suggestions now being made by the noble and learned Lord: namely, whether it would be desirable for the Houses to pass a new resolution on injunctions or to adapt the sub judice resolution. While the Joint Committee saw some advantages in this course of action, it also saw significant practical difficulties with enforcing it, particularly in the Lords. It concluded, in paragraph 231 of its report:

"If the revelation of injuncted information becomes more commonplace … we recommend that the Procedure Committees in each House should examine the proposals made to us for new restrictions with a view to implementing them".

The comments of the noble Lord, Lord Lisvane, on proportionality come into focus here.

The revelation of injuncted information has not become more commonplace in this House since the Joint Committee reported. In fact, we are aware of only one such revelation in this House since then—the case of the noble Lord, Lord Hain, which has been discussed today. At our meeting earlier this month, the Procedure Committee noted that there is no evidence that this is a growing problem. Further, members of the committee expressed strong support for the Joint Committee's conclusion that freedom of speech in Parliament is "a fundamental constitutional principle" and that:

"The threshold for restricting what members can say during parliamentary proceedings should be high".

Like the Joint Committee, the Procedure Committee decided that that threshold had not yet been crossed.

Having said that, we are mindful of the need for Members to use their freedoms responsibly, as the Lord Speaker set out in his Written Statement a few days after the noble Lord, Lord Hain, named Sir Philip Green. To this end, the committee agreed with the first proposal of the noble and learned Lord, Lord Brown, that the *Companion to the Standing Orders* should include some new text exhorting Members to respect court orders and to use parliamentary privilege responsibly. The committee agreed to look at a revised text for the *Companion* at our next meeting.

The suggestion by the noble Lord, Lord Norton of Louth, echoed by the noble Lord, Lord Empey, that Members should be reminded of the importance of using parliamentary privilege as part of the new Member induction programme, is a good one. The committee will shortly be publishing a new edition of the short guide to procedure, which will be given to all Members, current and new, as part of the induction package, and this paragraph will be included in that.

I hope that today's debate will help raise the profile of this issue among Members of the House. I hope that each of us will reflect on how we use our freedoms responsibly. I give a commitment to the House to convey the comments made by Members here to the next meeting of the Procedure Committee—so it will be on the agenda. I thank all noble Lords for their contributions, especially the noble and learned Lord, Lord Brown.

1.47 pm

Lord Brown of Eaton-under-Heywood: My Lords, I have three very brief comments; I am conscious of the fact that there are aeroplanes and trains to be caught. First, I give huge thanks to all noble Lords who have spoken in this high-quality debate. Not least, I am

[Lord Brown of Eaton-under-Heywood]
grateful to the non-lawyers who have spoken. This is partly because their view on the conflicting interests in play is particularly valuable and partly because I suspect that they have had to do even more homework to prepare their contributions than the lawyers who have spoken.

Secondly, the noble Lord, Lord Hain, and one or two other noble Lords suggested that what he did here was justifiable. This heightens my concern that there is a real risk of this being repeated unless we now do something worthwhile to discourage such statements in future.

Thirdly, I respectfully suggest that there is more than sufficient support from the speeches today for taking some real action to deter future misuses or abuses, whatever you call them, of this privilege. So I respectfully urge the House authorities—no doubt predominantly the Procedure Committee—to give full consideration to this matter.

The Senior Deputy Speaker has just said, rightly, that the matter was looked at, comparatively briefly, by the Procedure Committee recently, and he undertook to look at it afresh. I urge him and the members of any committee that now looks into this to do so fully informed by this debate, in all its aspects. I hope that giving full consideration to the speeches today might very well temper what is otherwise a very limited proposed response to the problem, simply by way of adapting the *Companion*. I repeat that I am very grateful to all noble Lords who made such valuable contributions today and I beg to move.

Motion agreed.

Public Procurement and the Civil Society Strategy

Motion to Take Note

1.51 pm

Moved by ***Baroness McGregor-Smith***

That this House takes note of the case for increasing the social value of public procurement by aligning it with Her Majesty's Government's Civil Society Strategy.

Baroness McGregor-Smith (Con): My Lords, I am delighted to open today's debate and refer to my interests in the register. I have been really interested and very passionate about public services and public service procurement for the last 27 years, having spent most of my career working in outsourcing, where my clients were from the public and private sectors. I am delighted that the Government have launched a consultation into social value in government procurement; this will enable the public and private sectors to feed back on what does and does not work in public procurement.

Government procurement accounts for around one-third of all public expenditure. However, the way procurement decisions are made has been criticised for either not delivering value for money or not encouraging enough innovation in how services are delivered. Regardless of everyone's views on outsourced goods and services, ranging from "Should we outsource everything?" to "Should we consider only in-house delivery?", we know that the public sector will always need goods and services it cannot make or deliver itself. Therefore, an outsourced market for goods and services will continue to exist, as will public procurement.

Successive Governments have looked to change the way government procurement operates. I was delighted when the Public Services (Social Value) Act 2012 was introduced, requiring central and local government officials to consider social value when making procurement decisions around services, and the extension by the Government in 2018 of the existing requirements to consider social value in public procurement, making it apply to central government departments, which would include procurement of goods and works. I was also pleased to see the Government's Civil Service strategy, which looks at engaging charities, social enterprises and other bodies in the delivery of services. The Government have also sought to increase awareness of social value among civil servants and those bidding for procurement services. So all the principles of what we need to do are in place. However, we now need a clear delivery framework for this ambition. This is where the challenges really begin.

In 2018 the Institute for Government stated that the Government spend £284 billion on buying goods and services from external suppliers, which amounts to one-third of public expenditure. As Gary Sturgess said in his 2017 paper *Just Another Paperclip? Rethinking the Market for Complex Public Services*:

> "The UK public service market is the most sophisticated in the world … the UK has undoubtedly been the world leader in opening the delivery of public services to delivery by external providers".

However, the House of Commons Public Accounts Committee has argued that the marketplace for procurement in the UK is not diverse enough. It states that the Government are too reliant on a small number of large companies when they look to outsource services. It and so many others point to the collapse of Carillion and the crisis of confidence now felt about public service providers. We should also note that only one of the large public service providers before the collapse of Carillion made a commercial return between 2012 and 2017.

I understand all the views that are out there, but today I want to talk about the diversity of the marketplace and what I believe the Government need to do to ensure diversity of choice in the marketplace. All this starts with the procurement practices we have in place across central and local government and all public sector bodies. The plethora of practices that exists is still far too wide and we still do not have enough skills to run major procurements that we often talk about. We know that procurement rules come from a variety of sources: we have EU treaty obligations, WTO rules, the Treasury, the Public Contracts Regulations 2015 and the Public Services (Social Value) Act and other guidance, including the recently published Cabinet Office outsourcing rulebook. However, we do not have enough commercial teams to really drive anything except lowest cost.

This is not a problem confined to the UK. The European Commission has said that European public authorities spend approximately €1.8 trillion on goods and services, with lowest cost remaining the sole criterion for awarding contracts in 55% of all procurements. Social value in public procurement today is simply not considered enough, with many saying that it is simply an afterthought. I have some recommendations for the Government, and I shall be making these recommendations to the Cabinet Office in response to its consultation on social value in government procurement, which asks how the Government should take account of social value in the awarding of central government contracts. This uses some excellent criteria in its proposed evaluation model. First, the consultation currently in place should apply to all public sector procurement, not just that of central government: it needs to apply to all goods and services as well.

Secondly, social value should not be optional but at the heart of every procurement decision in the public sector. Although the Government have said that there should be a 10% minimum weighting of social value, they have also said that departments should include it only where it is relevant. My experience in business tells me that there is not a single procurement situation that could not be leveraged to make the world a better place.

Thirdly, we are not being ambitious enough. The Government's approach to social value is still too narrow. The consultation shows that they see social value as a series of parallel issues, such as the environment or digital resilience. Instead, they should recognise that all these areas are absolutely connected. Procurement processes should recognise companies that have a responsible business strategy. I urge the Government to look at Business in the Community's responsible business tracker, launched in April 2019. This would be an effective way to test whether an applicant is serious about social value. There is also no explicit link to the public sector equality duty. This was highlighted to me by the Equality and Human Rights Commission. It would be good to see an explicit link. I note that Scottish public bodies are already required to consider building equality considerations into the awarding criteria for contracts, and that really makes a difference. It has encouraged action on employment pay gaps experienced by underrepresented groups in Scotland.

A minimum 10% weighting is suggested by the Government's March consultation. This is really not ambitious enough; the ambition should be up to 50% and this should be a mandatory calculation across all procurements. We should explain to the marketplace what would really drive high scores. There are many examples of this, which could include organisations that give equity or part ownership to employees. Mutuals and social enterprises must be considered here—those who really believe in people on the front line who deliver goods and services, not just in rewarding a small number of people in the organisation. Having managed many different types of business, with different ownership structures, I have always found that the most motivated employees—those I have also seen delivering the highest level of service—are those who feel they really have a great stake or personal investment.

Next are the organisations that support local skills, jobs and apprenticeships; those that want to eliminate single-use plastics; those that want to tackle climate change; those that take safety, cyber-risks and protection of data, including employee data, really seriously; those that put the most disadvantaged into work and help them to develop careers; those that take diversity seriously and have board and senior teams that reflect the communities where they work; and those that have proper plans in place to eliminate the gender pay gap and what I hope will soon become the ethnicity pay gap. The list goes on and on. When I was a chief executive, my team set up a charitable foundation through which we worked with different charities across the UK to support the most disadvantaged into work. Today, all large companies should have charitable foundations that do the same and encourage their employees to work with them.

The Government's consultation is also silent on the potential of procurement to reduce deprivation. That must also be included. We should absolutely expect the owners of all companies and organisations that work for the public sector to respect and invest in social value. Hedge funds are simply not interested, and most institutional investors need to understand more about what is needed. We need more socially responsible investors, and the Government need to do more with investor groups as they can tell boards and management teams what is expected of them. It is no longer enough for investors to focus only on long-term financial returns. They all need to be socially responsible and hold companies to account.

Fourthly, we must strengthen the Public Services (Social Value) Act 2012 to make social value mandatory, and state that all organisations subject to it should produce a social value policy. I would like to see that on the front page of every website. Enterprise UK has excellent examples that could be used to develop a standard methodology for this.

Fifthly, there should be a mandatory calculation of shared value for all goods and services procured. This needs to be considered not just at the pre-procurement stage but at all stages of the procurement cycle. Different stages of procurement and changes in specification mean that you have to keep considering social value all the way through a procurement. Companies should publish a social value score, and someday soon this language should be as commonplace as "gender pay gap".

As an example of what could change, I note the recent criticism of Crossrail, which has been significantly delayed. I have to say, I am quite impressed by what those working on it have done on sustainability. They have talked about sustainable consumption and production; they have talked about how they will address climate change and energy challenges; they have talked around how they will protect natural resources; and they have looked at promoting opportunity and social inclusion. They have created over 4,000 jobs for local and previously unemployed people, and have over 1,000 apprenticeships. They have reduced construction-related CO_2 by 18.6%. None of that hits the media today.

Sixthly, we should make sure that we have a body overseeing this, sitting in government, to bring together all interested parties. For example, we can expand the role of the Crown Commercial Service to cover this

[Baroness McGregor-Smith]
and share best practice, making all this available to commissioning teams. We need more commercial expertise across government departments and local authorities, and we need to share some of the amazing best practice that so many already use. The Government should produce an annual report on how social value is embedded in public procurement to celebrate the excellent work that exists.

Seventhly, we should look at the tax system and at what the Treasury can do, because more benefits can be created for society through using different incentive schemes. An example of one already implemented tax is the apprenticeship levy; despite having been criticised, it is leading more organisations, public and private, to think about how they can support apprenticeships differently today. We also need to look globally at best practice. The Canadian Government sponsor Grand Challenges Canada, a venture capital undertaking that funds early-stage companies with shared innovations. We must focus on shared innovations for government, society and companies. Innovate UK is doing some excellent work here; its funding could also be used to support companies that believe more in and deliver on social value. We should embed all of this in our industrial strategy.

In conclusion, there is a real opportunity to create a wave of positive action by embedding social value in public procurement and moving the debate away from lowest price, which, after nearly 30 years of outsourcing for many contracts, simply no longer works. We need to explain to the marketplace what we want to support the Government's ambition for society and use every pound of public money to support the ambition of the civil society strategy. I certainly think this is exciting; some of the innovations we could see come forward would excite us all. We still struggle when we talk about innovation. If the UK gets this right, we could continue to innovate and lead on change and transformation in public procurement. This is a really exciting opportunity to do more, and I call on all of us in this House and the other place to support it. I beg to move.

2.03 pm

Lord Haskel (Lab): My Lords, few of us would argue with the objectives of the Government's civil society strategy. We all want to strengthen and unify the institutions and organisations which make up our civil society. The noble Baroness is quite right; public procurement has an important role to play in this and I congratulate her on moving this debate.

As the noble Baroness told us, the UK public sector spends over £250 billion, about one-third of public expenditure, on the procurement of goods and services from the private sector. This large amount of money means that directing public procurement can make a real difference. Deliberately choosing providers from the local area can make a difference to local communities. This keeps money in the local economy. Managed well, it can lead to more investment in poorer parts of the country and help revitalise local economies.

By deliberately favouring smaller firms, the Government can promote competition and discourage dependency on large monopolistic providers. Public procurement can favour firms which meet certain ethical standards, as the noble Baroness said—for example, living wage employers or sourcing fair trade products. Public procurement can also favour providers with strong community links. For example, a local authority may prefer to fund a homeless shelter provided by a church which has strong local links and is grounded in the community, rather than a large national organisation. As I said, few of us would argue with these social objectives. Indeed, most of us would welcome them.

So what stands in the way? In short: the law, value for money, public sector bureaucracy and standards. By the law I mean our EU membership and free trade agreements. The EU is relatively relaxed about restrictions on public procurement. On the other hand, far less relaxed are the existing free trade agreements and the proposed free trade in services. The agreement aims to provide equal treatment to foreign service providers as well as promoting competition. Indeed, Liam Fox has repeatedly stated that this will be a priority for UK trade policy after Brexit.

These trade deals include heavy restrictions on local and ethical procurement. Put simply, the Government's prioritisation of these agreements is at odds with their civil society strategy to use public procurement to strengthen civil society. The free trade ambitions of one government department are at odds with the domestic policy objectives of another. It may be above the Minister's pay grade to sort this out, but somebody will have to do it.

I can be a lot more helpful to the Minister on value for money, bureaucracy and standards. For some time there has been growing concern about failures in procurement. The care homes fiasco is but one recent example; the noble Baroness mentioned Carillion. These failures have undermined the public's trust in outsourcing. It is estimated that the recent failure of the privatisation of the probation service will cost the taxpayer some £450 million. Yet the Government aim to achieve value for money. Most believe that, with the exception of IT, this is simply a matter of price, as the noble Baroness said. This seems to have led to the evolution of large monopolies delivering public services, and it is difficult to find an alternative when they fail. Measures of market concentration in this and other sectors have risen sharply in recent years. As a result, there is broad concern about the ethics, quality, transparency and value for money in the procurement process.

It was with these concerns in mind that, many months ago, Tomorrow's Company—here I declare an interest—approached the British Standards Institution to see whether a well-defined set of criteria could be established to define what "good" looks like and what works in the field of public procurement. To some of us, the British Standards Institution means a kitemark—a mark which tells us that a piece of steel is strong enough to do the job. But the world of standards has moved on a long way. Standards are now a tool that enables firms to set and meet best practice. For example, the British Standards Institution now has the task of laying down the standards strategy for connected and autonomous vehicles. A British standard for public procurement would level the playing field so that UK businesses of all sizes can be included in the public sector supply chain. By meeting the standard, an organisation can demonstrate that it meets the generic requirements for

an organisation providing products and services to the public. All of this is this in keeping with the Government's civil society strategy and the requirements listed by the noble Baroness.

Meeting the standard allows small and start-up organisations to prove themselves suitable and capable. This takes the burden off public sector administrators to perform due diligence, as there will be third-party conformity assessment. It reduces bureaucracy because it simplifies the complex process of tendering for government contracts—a process which deters many small firms from tendering. Indeed, standards can be a form of self or lighter-touch regulation, so that the Government are not obliged to enact legislation establishing best-practice benchmarks.

For this purpose, British Standard 95009 will come into effect on 31 May. The Minister may already know about this, because his department has been consulted. This standard was written with input from a broad range of stakeholders, including government departments, large and small firms, industry organisations—reflecting infrastructure and technology—and charities and welfare organisations; everybody was consulted. This standard also sets out good practice in the supply chain. This is the second time I have raised this issue in your Lordships' House, and I make no apology. We seem to have lost our way on public procurement and services, and this British standard will point us back in the right direction.

My question to the Minister is: will the Government insist that all public procurement bodies and suppliers to the public sector will have to satisfy British Standard 95009? After all, the British Standards Institution is appointed by the Government as the National Standards Body. This will not only help to restore public trust and confidence in public suppliers and contractors and in the Government's handling of the supply of these goods and services; by adopting this standard, public procurement will be much more aligned with the Government's civil society strategy—the purpose of this debate—and it will incorporate many of the points made by the noble Baroness.

2.13 pm

Lord Maude of Horsham (Con): My Lords, I draw attention to my entry in the register of interests, and I congratulate my noble friend on securing this important debate. Public procurement is rarely a subject that sets the pulse racing but it is important, accounting for, as we have heard, just about a third of public spending, and the way in which it is done and the success of how it is done make a huge difference to what the public get from the money that we in government spend on their behalf. If the value for money, the quality or the timeliness of delivery are wrong, people in real life suffer as a result.

My noble friend Lord Young knows a great deal about public procurement from the supplier or vendor side; I know quite a bit about it from the client side. I had responsibility in the coalition Government for public procurement and spent a lot of time dealing with the issues around it. I pay tribute to the noble Lord, Lord Wallace of Saltaire, who for virtually all that time was the House of Lords Whip assisting us in the Cabinet Office on these subjects, and who gave enormous support to the reforms that we were seeking to push through.

We found at the outset that public procurement was working in a rather bizarre way. Practices had been put in place, often attributed to the requirements of EU procurement rules but which in fact were being massively gold-plated, both through our regulations but much more through established practices, which almost deliberately seemed to exclude smaller businesses, social enterprises and civil society organisations from bidding for and winning public contracts. We therefore wanted to change that. We found that public procurement, especially in central government but much more widely in the public sector, was driven by a group of people I came to know as "procurocrats"—people for whom process was king and who had far too little commercial awareness. There are three parts of any procurement process: pre-tender market engagement, a formal tender process, and contract management. Overwhelmingly, the time and energy were spent on the middle part of that, which should really be the shortest and kept to a minimum. Typically, public procurement processes in this country took twice as long as they did in Germany, for example, which was quite unnecessary. Procurocrats used to say to me, "But, Minister, we're not allowed to exercise judgment", which puzzled me a little, because I thought that was what all of us in the public service were paid to do.

In the way public procurement operated, the sense was that the only thing that mattered was an arithmetic comparison of bids against a hugely detailed specification, which was drawn up to the most intensely detailed and quite unnecessary level of specification, really to replicate what was already being done and then to see whether it could be done more cheaply. That is not a good way to operate. The right way to do it commercially is to spend quality time before you draw up the specification talking to the market to see what is available, and then draw up the specification in response to what the possibilities are. That is how you harvest the gains from innovation and dynamism in the marketplace. We came to know that as injecting commercial DNA into the procurement process. Very few procurement services around the world are good at this, and we needed to make a lot of progress in the UK. We therefore crunched down the formal tender process as much as we could, managing to get it from being twice as long as it typically took in Germany to half that time, and we found that there were ways of doing it much more quickly. We then recruited people into the government service who could bring commercial nous and capability to the pre-tender process and strengthen the contract management. That was typically rather weak and delegated to junior people as a kind of boring process, but it was incredibly important.

We therefore removed the hurdles which had typically excluded smaller and more socially driven entities—civil society organisations—from bidding. There had been immensely complicated prequalification questionnaires. I once discovered one which was 70 pages long for a contract which was worth £80,000. That was ludicrous and meant that only big organisations could bid because they were set up to process prequalification questionnaires. There were performance bonds where bidders were required to put up money in advance before they were allowed to bid. There was a requirement to present three years of audited accounts, which meant that any

[Lord Maude of Horsham]
new business coming on to the market with a new product, service or approach was almost automatically excluded from taking part. There was a requirement to show that you had insurance in place to cover the cost of the delivery of the service at the time when the company was bidding, which again excluded smaller organisations even from getting through the starting gate let alone having a chance of winning the race. I mention also turnover thresholds.

All this created a huge bias in favour of the big outsource vendors because they looked like they were safe and reliable. I specifically exclude the one that was led by my noble friend at the time, but what actually happened was that their core competence became winning contracts—doing public procurement, not doing the work. Too many of them lost their ability to provide innovative solutions to public needs but they became excellent at winning contracts. If they were public companies, too often they were telling the financial markets that the key thing was top-line growth, so winning more and more contracts was essential to their stock market ratings. It became clear, as time went on, that too often they were tending to bid rather low in effect to buy the contract, but then they expected to make their money through changes to the specification. Those were all too common and we were hearing reports from some vendors that they expected an internal rate of return of 40% on changes to the contract. That is insane but it was because the pre-tender market engagement process had not been done in a sufficiently commercial manner.

These companies would then rely on weak contract management on the procurement side, and that is where the problems have since emerged. It is notable that some of the worst problems have been with what looked like some of the biggest and safest of the established outsource vendors. It did not need to be like that and we changed the way in which this worked to some effect.

A lot of social value was being lost because, certainly in central government, public procurement was not being run in a cross-government way. Things like facilities management—the running of buildings—would tend to be dealt with by a particular ministry on its own which would look to cover all its buildings across the whole country in one contract. Of course, that again would bias heavily in favour of the big national providers, whereas social value can be provided, particularly for activities like building management, where local suppliers are able to operate. It is much better to operate across government in the way we started to do, although we did not get anywhere near as far as we wanted. By doing so you can take a particular locality, look at all of the Government's property within it, and then by multiplying up you get economies of scale without losing the local focus. Much more can be done.

We discovered that there was simply not enough capability within government so we set up the Commissioning Academy. It would be good to hear from my noble friend when he replies to the debate what progress has been made in developing the academy, which was available to the whole of the public sector. However, a lot of people tended to confuse procurement with commissioning. Commissioning is much wider and is particularly crucial in pre-tender market engagement. It was the noble Lord, Lord Adebowale, who opened my eyes most vividly to the whole essence of this activity and he deserves huge credit for the progress that has been made.

In the rest of my remarks I would like to talk about one programme which would have a huge effect if it were to be revived, regenerated and strongly driven again because some of the momentum has gone out of it in recent years. It is the programme for creating public service mutuals. Between 2010 and 2015 we promoted and supported the creation of more than 100 of them. I should say that it was very much about picking up an idea which had started to be developed by the previous Labour Government, but in their case it was limited to the National Health Service along with some restrictions that made it hard to give it scale and allow it to get traction. However, as I say, more than 100 public service mutuals were created, with tens of thousands of staff choosing to move out of the public sector to form themselves into entities that would continue to deliver the same service on a contractual rather than an in-house basis. We would negotiate contracts with the vendor, whether it was a government department, a council or part of the National Health Service. The largest number of mutuals were in the health and social care sectors. All those chose to be not-for-profit social enterprises, although they did not have to be. In some other cases they became mutual joint ventures while others opted to be simple commercial for-profit entities.

What they all had in common was that they generally reduced the cost and improved the quality of their services through massively increased workforce leadership and engagement. I found visiting these mutuals a most uplifting and inspiring experience. I always asked people whether they would go back and work for the council, the NHS or the ministry that they had spun out of. I never heard anyone reply by saying anything other than an immediate no. When I asked them why, the answer was always a variant on, "Because now we can do things. We can see what needs to be done. We do not have to submit a business case to some committee, which is like dropping a stone down into a deep well. We can see what needs to be done and we can just get on and do it".

We concluded that a public service mutual brings together four very powerful elements: first, entrepreneurial leadership, of which there is much more in the public sector than we ever realised because such skills inside the sector tend to be used for circumnavigating bureaucratic obstructions; secondly, a liberated and empowered workforce; thirdly, commercial discipline and financial rigour because even the mutuals that became not-for-profit social enterprises would always talk about how they needed to be successful in business terms; and of course the fourth element was the public service ethos. Bringing those four elements together created a kind of alchemy that was very powerful indeed. I hope that the Government will put a much greater emphasis on this programme and revive it for the future. Particularly in the National Health Service, where there is such a need to drive improvements in productivity, there is no better way of doing that than

through the promotion of public service mutuals. A great deal of social value is generated, particularly when they become able to operate in a more holistic way. Inclusion Healthcare started as a GP practice serving homeless people in Leicester. It spun itself out and became a very successful mutual and has grown through winning contracts to provide other services to the same group of people. The benefits both financially and in terms of the care that is being given to a demanding and very vulnerable group of people have been huge because the service can be configured around the needs of the individual rather than being delivered through numerous different agencies, which is far too often the case when we deliver public services.

I urge my noble friend on the Front Bench and the Government more generally to look at increasing the social value delivered through procurement, and to pay particular attention to the part that has been played and can be played again through an acceleration of the development of the public service mutual movement.

2.38 pm

Lord Shipley (LD): My Lords, I should remind the House that I am a vice-president of the Local Government Association. I thank the noble Baroness, Lady McGregor-Smith, for enabling us to have this debate. She made a large number of important points in her speech. I was struck by her observation that the government consultation is too narrow and that far more could be achieved, and particularly by her view that up to 50% of a contract could be related to social value. I was going to say one-third, but if we can reach 50% I would be very happy with that figure.

I also thank the noble Lord, Lord Maude of Horsham, for reminding us about public service mutuals, which seem very important, and the three stages of the procurement process: the pre-tender process; the actual procurement assessment; and then contract management. As he rightly said, all the effort—certainly from Whitehall—seems to go into the middle of those three. In response, I observe that it is very difficult to do the first and the third from Whitehall.

In the debate yesterday on 20 years of devolution to Scotland and Wales in particular—but also to Northern Ireland, of course—I was struck that it has enabled a piloting of ideas in those nations. On procurement policy, the noble Baroness, Lady McGregor-Smith, reminded us that they have much greater pre-market engagement, which means that tenders can be talked about, can be more detailed and can avoid confusion between contractor and provider, with an agreed understanding of the specific outcomes that must be delivered.

It is important that we pause for a moment to consider the context of this debate. The context is that a lot of people in many parts of the country feel left behind. They have low pay and insecure contracts, and many have few opportunities to improve their lives—not least in housing and discretionary spending. Applying the principles of social value should help to reduce inequalities for those people, and for that reason the Government's current consultation is welcome. It will help to encourage charities—particularly smaller ones—and social enterprises in the delivery of services and will reduce the Government's dependence on a small number of large companies such as Carillion, with its 420 contracts from central government. It is clearly not in the public interest for such a concentration of contracting to occur.

The Government need to include goods and other works, as well as services, in their procurement policies. Social value should cover all public spending, not just central government spending; I will come back to that in a moment. Also, the consultation that is being undertaken is poor on the potential for procurement to reduce deprivation in specific localities. It is about not just consulting with deprived communities but finding ways of working with them to reduce disadvantage.

I wonder if the Minister will look closely at the 10% minimum weighting the Government propose for assessing the social value component of a contract. That low level could mean that contracts are let with poor social value outcomes. I am not clear why the financial value is set at 30%, when the social value is set at 10%. There are three factors in commissioning: the cost; the quality of what happens as a consequence of that commissioning; and the social value generated. I would like to think the proportions would be a third each, but I guess we could look further than that.

There is a problem of centralised decision-making in England. I mentioned a moment ago the 420 contracts awarded to Carillion basically following a value-for-money exercise. The Government's procurement decisions have been too dominated by narrow value-for-money policies that seek simply to reduce costs. I remind your Lordships that one Whitehall department's concentration only on value for money can be another Whitehall department's extra cost, such as through the benefit system. Too often the silo management of Whitehall does not serve the public interest as well as it might.

There is research showing that up to 20% added value can be obtained from maximising social value in a procurement process. I think that the abolition of government offices in the English regions was a major mistake; those government offices could have led the development of social value in procurement policies at a local and regional level and kept a watching eye on them to ensure that commitments on social value were actually delivered. At present that is difficult to do, because contracting is run from Whitehall—often many hundreds of miles from where the contracts are implemented.

I emphasise that what matters with social value procurement is achieving social outcomes. It is not just about cutting costs, dressed up as value for money. Government at all levels should procure outcomes, not just services for services' sake. This is a fundamental issue that the Government will need to get to grips with. It is vital that those who commission contracts should have the skills and knowledge to do it properly.

I shall ask the Minister a specific question, which I hope he will be able to reply to. Is local government part of this? The Government have said they want local government to support the use of social value criteria, but it is not clear whether it will be compulsory. I think it should, so I hope the Minister may be able to respond to that.

[LORD SHIPLEY]

The Government's civil society strategy is most certainly a start, not least in defining some key principles. The strategy requires government departments to account for, rather than to consider, social value. So far, so good—but it needs to be a local as well as national strategy. It should enable smaller charities to deliver at a very local level. I submit that only local government can achieve that; Whitehall simply cannot.

Why has statutory guidance not been published for the 2012 Act? There is some guidance but, as I understand it, no statutory guidance. I wonder whether that is wise, because there would be benefits from statutory guidance. I hope that once the consultation is complete, the Government might be willing to produce a guide for voluntary organisations and charities on how to bid effectively for contracts. Many lack the required expertise to pitch a bid at the right level. Of course, if we had government offices, they would be able to help here.

Might the Minister also explain why large construction contracts are out of the scope of the current consultation? There is huge potential here, not least for local apprenticeships, because building takes place in most areas. Creating a trained local labour force can be done all over the country, but it needs to be done in part through improving the social value element of contracting. Otherwise, labour forces can be brought in and do not derive from that local area.

In conclusion, I want to see the scope and strength of the social value Act expanded. I would like to see it applied to all goods, works and services and to oblige all public bodies to account for social value when negotiating contracts. The Minister might want to look at whether the Government can do more to audit social value outcomes. I have read in briefings about the possibility of social value budgeting and about local social value champions. I have also read about social value auditing locally. These ideas merit further consideration by the Government.

It may well be that the Government should produce an annual report to Parliament on what they have achieved in terms of the 2012 Act. It is one thing to have independent reports, as we had in 2015 on the functioning of the Act, but maybe there should be an annual report to Parliament. I hope that the Minister might be willing to give some thought to that, because there is a huge opportunity for social value to be expanded across the country and to make a difference to the lives of many people.

2.40 pm

Lord Pickles (Con): My Lords, I draw the attention of the House to my declaration of interests, particularly relating to Holocaust remembrance and the various bodies that may occasionally bid for contracts from the Government.

I congratulate my noble friend Lady McGregor-Smith. This has been an interesting debate. I particularly commend to the House, at a time when Crossrail is receiving the disapprobation of many people, the technical skills that Crossrail has managed to achieve, which she rightly pointed out; the number of apprentices, including female apprentices; and the college of engineering set up in the East End of London. The problems that have occurred have been mainly with software. That does not in any way diminish these great achievements.

The noble Lord, Lord Haskel, made some telling points, as always, on tendering standards. But it was when the noble Lord, Lord Shipley, spoke that I felt my ears burning and a greater sense of despair. It is time to confess: I am the guy who abolished the Government Offices for the Regions, and I regret their demise not for a moment. They were essentially a procedure; a passing of messages between government and the centre. I passionately believe in devolution. This country has too many levels of government that intercede between themselves and access. I could never imagine those great giants of municipal power, the Chamberlains, wanting to look over their shoulders to see what success looks like—the words that bring despair to any ministerial office when somebody wanders in and asks that most asinine of all questions.

I pay particular tribute to my noble friend Lord Maude. It was a joy to work closely with him in government and to work together at Central Office. Both of us know what pain actually feels like. He remains an enormously creative force in this area. He is absolutely right to say that process is king as far as the Government are concerned. I remember watching in my youth a "Monty Python's Flying Circus" sketch in which a group of men discuss how to get from Kent to Addis Ababa. To cut a long story short, there is an elaborate description of how to negotiate the various roads of Kent, taking in various roundabouts and bypasses—and then, when you get to Dover, "you turn right towards Africa". There is always something missing in procedure.

The Public Services (Social Value) Act 2012 was cautious in its approach—I remember the discussions. That is understandable, as it was a new thing. It brought out many of the fears of officials and politicians about those who are accountable to the public purse. Risk-taking does not come easily to those involved in government. Something out of the ordinary is always seen as risky. Far better to stick with the herd and be wrong than to try to do something unusual and be right. The unorthodox unfairly lack reward.

My noble friend Lady McGregor-Smith talked about the European tendering rules. I have some experience of those. I would frequently write to local government to point out the de minimis rule, the threshold at which the European Union did not require a detailed tendering process. It was interesting that very few local authorities took advantage of the de minimis rule. The safest thing for the officials was to go through the whole panoply.

Some would perhaps suggest that what we really need to do is to expel, remove and abolish this herd instinct mentality. That is a great idea until you find yourself in the second hour of being grilled by the Public Accounts Committee, when your boldness might not seem quite so exciting. But we should use that disadvantage and weakness of the herd mentality, turn it into a strength and make social benefit the norm.

I hope that my noble friend the Minister will note that I share the concern that some fear and timidity is still reflected in the strategy. As the NCVO points out,

with regard to services, goods and works, the strategy commits all central government departments to account for rather than consider social values for new procurement. It has always advocated widening the remit of social value in all public sector contracts and this commitment is seen to be in the right direction, but we must move forward and offer more reassurance. Guidance is an important point of comfort for making social benefits more mainstream, particularly statutory guidance—an important point made by the noble Lord, Lord Shipley.

Training is also important, and I too join the NCVO in welcoming that the strategy commits all central government commercial buyers to undertake training on how to take account of social value in commissioning and procurement. I hope that this commitment is devolved and understood at a local level. This cannot be a fringe thing—the kind of thing for my old department, now renamed the Ministry of Housing, Communities and Local Government, or for DCMS. It has to be absolutely mainstream to the Government and all departments should account for it.

The question that has been implicit throughout the contributions today is, is this compatible with value for money? We understand that procurement comes out of a murky world developed to ensure value for money, fairness and accountability—blind bidding. There is the great ceremony of opening the tenders, as a councillor. It is a great day. You arrive in the chief executive's office and lots of people are looking round. It comes out of that murky world best described in David Peace's *Red Riding Quartet.*

There is also a problem in the world of political perception and prejudice. Some feel that only the state can legitimately provide or shun outsourcing. The Institute of Directors found that at least £15 billion could have been saved had the last Labour Government taken the decision to do that. But there is another side of the divide. I am an ex-Conservative Party chairman and ex-Secretary of State and often, when I talked to council leaders, they wanted to impress this visiting swivel-eyed Thatcherite, so they would brag about how much they had outsourced, almost as if that were an end in itself. I always asked two questions: how can you improve the service, and what have you been able to do that you have not been able to do before? I must say, seven out of 10 times, I was disappointed by the reply.

As the noble Lord, Lord Haskel, said, outcome is everything. We should use the tendering process to bring about social change. We have all had the benefit of the Equality and Human Rights Commission briefing, which said that experience has shown that pre-market engagement is important and that experience from Scotland suggests that the more specific the tender is in its desired outcomes—for example, setting out the social outcomes for the contract in the pre-market engagement—the more likely it is to achieve its aims.

My noble friend Lord Maude spoke about how such pre-market engagement is important; I cannot match his eloquence. When I was a very new Member of Parliament, I was on the Environment Committee. We audited some contracts. A chap who knew all the words came up in front of us, talking about step change and stakeholder consent. He made me think of a PG Wodehouse character talking about Shakespeare: it all sounded very well but was actually quite meaningless. He was accompanied by a straightforward engineer. Eventually, the chairman asked, "Well, what do you think about sticking to the contract and ensuring that value is provided"? He said that sticking to specifications was a bit like walking on water: it is better if it is frozen. He said that it is better if the specifications are fixed and known and if the outcomes are delineated.

It is the function of government to drive social change. Equality is a key consideration. For example, it is encouraging that we can improve on the high-level outcomes suggested in the consultation: on employability and skills, as talked about by the noble Baroness, Lady McGregor-Smith; on the gender pay gap; and on the increased representation of disabled people, ethnic minorities and people with mental health conditions. A printing firm in my former constituency employs people who have had mental health concerns; it is a very valuable asset to the town. These contracts should be about community cohesion. In looking for value for money, the Government should think about making that difference and increasing the skill set and prosperity of a locality.

2.52 pm

Baroness Finn (Con): My Lords, I begin by drawing attention to my entry in the register of interests and by congratulating my noble friend Lady McGregor-Smith on securing a debate on this important topic, on which she spoke with such authority. It is an honour to follow her and other esteemed colleagues. I pay particular tribute to my noble friend Lord Maude for his tireless devotion to procurement reform during the coalition Government.

Every year, the Government spend a staggering amount of taxpayers' money—more than £44 billion—buying goods and services. While our priority must always be to get the very best value for money, in both quality and price, it is important to look at the social value of these contracts too; otherwise, we risk missing half the picture. The coalition Government's Public Services (Social Value) Act was all about ensuring that the Government use their buying power to effect lasting social good. That is the other side of my noble friend Lord Maude's procurement reforms, which were about opening up the public procurement market to SMEs and new digital providers, growing the supplier market by encouraging more mutuals and co-operatives, and improving commercial skills within government. Despite much progress, this remains unfinished business.

For too long, we have been operating under the false assumption that only government can create social value. Businesses pursue profit and generate externalities that either the Government have to mitigate with tax and regulation, or the company itself effectively apologises for with a corporate and social responsibility programme, but businesses can and should have social value at their core—not as an afterthought but in their DNA and not as an offset but through day-to-day activity. Businesses that get ahead of the curve in their social and environmental responsibilities tend also to be the most successful in building long-term shareholder value. The Government can do more than tax and spend to create social value: they can enable businesses to do it themselves and hold them to account for doing so.

[Baroness Finn]

In 2013, the Government implemented the social value Act. By 2017, around £25 billion of annual public sector procurement spend was shaped by that Act. That is a significant achievement but still represents less than 10% of the total public sector outlay. The truth is that, since the Act was passed, insufficient progress has been made. Businesses are enabled but not yet accountable. We need better to hold businesses to account on social value and continue to drive improvement in contract management and procurement in government, where skills and capacity remain lacking. Crucially, my noble friend Lord Young's 2015 review of the Act concluded that there is a lack of consideration of social value as part of procurement. In fact, social value for both buyer and seller was positioned as an afterthought, not as part of the procurement itself. This will always reduce the potential to create genuine and lasting social value.

The Government can enable but businesses, especially large ones, must take more responsibility and procurement teams must hold them to account. We have been talking about late payments to SMEs for too long, yet the problem is still endemic. We now have 30-day payment terms right down the supply chain, but are they being honoured? We can mandate the inclusion of SMEs and break up large contracts into smaller ones, but if SMEs are not paid on time, they will likely be dissuaded from bidding in the first place. Large companies, which often win large contracts on price, might well agree to tack on some apprentices or BAME targets, but unless they have fully considered the cost and training at the outset to enable the full benefit of those they take on, an opportunity is missed.

How can we go further and improve the Act's effectiveness? We need to move beyond social value as a mere consideration for buyers. I therefore applaud the Cabinet Office Minister, the right honourable Member for Aylesbury, whose amendment assigns a strong 10% of public procurement buying power to social value. More needs to be done. We need to engage earlier in the buying process, at a more fundamental and strategic level. Social value needs to be part of pre-market engagement wherein buyers engage with the entire supply chain.

Following this, social value needs to be written into the tender. If contracts were awarded with social value properly weighted, it would be priced into the contract itself and the chance of delivery would be maximised. When apprentices are taken on, they must be given meaningful work with the strongest focus on real training and supervision. If they are recruited as an afterthought, as a retrofit to a contract, it is unlikely that genuine social value will be created.

There remains an overall lack of transparency about how companies will act, when they will pay and where they will embed social value in delivery, but good practice is out there. In 2012, London Underground launched its station stabilisation programme using its Stake delivery model, which was designed to create greater efficiency by engaging directly with SMEs to employ the craftspeople to work on-site. Craft academies were established to provide skills training and front-line leadership for those delivering the programme. The benefits of the approach were that those who undertook the work were those who planned it. The early involvement developed clear accountabilities, increased planning and programme ownership, and gave a long-term commitment to suppliers, thus ensuring competent and capable resources. The Stake programme was designed in collaboration with Infrastructure UK and takes its origins from a 2011 keynote speech by the then Cabinet Office Minister, now my noble friend Lord Maude, who said:

> "We are looking for more innovative ways to structure services. We know that employees who have a stake in their business, or take ownership of it completely, have much more power and motivation to improve the service they run".

He eloquently made that case again today.

Cross-cutting all of this, however, means improving the commercial capability of public sector buyers. We need to combine value for money training with social value training so that the one is not seen as being in conflict with the other. Only if we improve the commercial skills in Whitehall will it be able to cut through this lack of transparency and hold businesses to account, as well as driving value for money for the taxpayer. As the noble Lord, Lord Young, found in his review, evaluation criteria are vital to align social value with value for money and offer greater clarity to providers on how it would like to see it measured.

We have long discussed how to improve procurement to bring in more SMEs, get value for money and drive efficiencies across government, but now we are talking about something far more profound: the scope for government not to punish business for doing harm, but to enable it to create social value. That is surely the ultimate public-private partnership and one we should aim to improve by properly implementing not only the letter but the spirit of the Public Services (Social Value) Act.

3 pm

Lord Wallace of Saltaire (LD): My Lords, if I may return the compliment to the noble Lord, Lord Maude, I learned a lot while working with him. One thing I particularly learned was how difficult it is to work across Whitehall. The entrenched traditions of departments—not only Permanent Secretaries but also Secretaries of State—make it very difficult to innovate or provide new means of dealing with digital, waste disposal or whatever it may be. I regret that some of the initiatives which we—the noble Lord, Lord Maude, in particular—took in government were not entirely successful because they ran into these structural difficulties.

I want to focus my speech on three things. First, unless we have a much stronger emphasis on local commissioning and much less on central commissioning, we will not achieve the sort of social value we are talking about. Secondly, part of our problem is that the focus on value for money makes it very difficult to bring social value back in. Thirdly—I pick up the theme of the noble Lord, Lord Maude—we have to rediscover the importance of the public service ethos as a motivation in outsourcing and in dealing with, in particular, the non-profit sector. That is part of the reason why we need to strengthen the non-profit sector.

The final chapter of the *Civil Society Strategy* recognises the structural problems of the model of outsourcing which successive Governments—Labour, coalition and now Conservative—have developed over the last 20 to 30 years:

"The reforms have led to a greater focus on outcomes and costs. However, they have also spurred the development of a transactional model of service delivery, with an often rigid focus on quantifiable costs, volumes, and timescales rather than on the relationships, flexibility, and patience which the reality of life for many people and communities demands".

I spoke to a number of officials while preparing this speech, and many of them said that it is all very well to try to put in social value, but when you are arguing with the Treasury, value for money, which you can quantify, wins the day. The problems with quantifying social value are very considerable. There is an important distinction between public value—social value is part of that—and private value and between public motivation and private motivation. We all recognise that timescales of public investment are longer than the usual timescales for private investment.

I disagree with the noble Baroness, Lady Finn, that externalities are a matter for the private sector. The externalities that the DWP imposes on the National Health Service by some of the ways it treats universal credit benefit recipients are very clear. The externalities that the for-profit care sector imposes on the NHS by the way in which it does not provide sufficient health support for its members are also extremely clear. There is a range of ways in which the interconnectedness of particular contracts is not recognised in our current outsourcing, as we have seen with probation and in the extent to which cuts to youth services lead to more school exclusions and higher youth crime. The motivation for workers in the public sector are clearly not accepted as relevant in the economics of public choice theory which drives much of the value-for-money analysis which we still have. This is an issue I began to argue about with economists at the LSE when I was a teacher there. I used to be quite critical of the sort of economics taught in the next-door department when teaching my students.

The Young review of the social value Act in 2015—by a Lord Young with no particular connection with Cookham, so far as I am aware—said:

"the incorporation of social value in actual procurements appears to be relatively low",

after three years of operation. It also said:

"the current state of social value measurement can make it difficult for public bodies to differentiate the additional social value offered by one bidder over another".

Many commissioners used it as another way of defining value for money or negotiating down the cost of contracts.

The opening statement of the *Social Value in Government Procurement* consultation paper promises that:

"Central government will, in future, take better account of social benefits in the award of its contracts".

That was several years after the 2012 Act had come in. The paper quotes David Lidington, who has said:

"We want to see public services delivered with values at their heart".

That was what the Act six years earlier was beginning to talk about.

What we all should be concerned with is how to strike the right balance between traditional Labour municipalism, which assumed that only trained and paid professionals employed by the state could be trusted to work at the interface between the state and civil society, and libertarian Conservatives who want to shrink the state and leave most social welfare to volunteers and charities. A fundamental part of my party's priorities is that far too much public spending in England is controlled by central government rather than by local government and that attempts at devolution in England have so far been limited, hesitant and undermined by continuing cuts in financial resources for local authorities.

I waded through the *Civil Society Strategy* White Paper. My strongest criticism is that there is no recognition of the negative impact of continuing cuts in local authority budgets or of the importance of accountable local government in linking citizens, civil society and government. In 120 pages there are two paragraphs on democratic government. One admits:

"Many people feel disenfranchised and disempowered, and the government is keen to find new ways to give people back a sense of control over their communities' future".

There is no mention of greater financial autonomy and revenue-raising powers. We are offered only citizen's juries and "trusted local messengers" who will not, I assume, be locally elected councillors. The 300-word section on the role of local government states that,

"local authorities continue to play an active role in communities".

It is very kind of the central government to allow them to do so. I was left with the suspicion that some of the enthusiasm for volunteers comes from the hope that unpaid people will do the work previously done by professionals whose jobs have been axed. There are examples of volunteers in the police force and in teaching English as a foreign language now that cuts have been made in paid people.

Much of the *Civil Society Strategy* is Newspeak of the sort that the *Daily Mail* and the *Telegraph* would ridicule if it came from a non-Conservative Government. We are told about the #iwill fund, the enabling social action programme, the good help programme, the good work plan, the Purposely tool—I like that one particularly—to enable,

"social entrepreneurs to embed purpose into their business's DNA",

the inclusive economy unit, the business against slavery forum, the Government's democratic engagement plan, their innovation in democracy programme and even a body called OSCA that describes itself as a social impact lab. I am sure the Minister can explain to me precisely what a social impact lab does.

We are told:

"The public funding of … youth services has always been the responsibility of local authorities ... despite the pressures on public sector finances",

and that the Government will,

"review … the statutory duty on local authorities to provide … youth services",

with some suggestions that charities or the Big Lottery Fund might usefully fund them instead. The Big Lottery Fund appears a good deal as a source of funding,

[Lord Wallace of Saltaire]
together with the dormant accounts scheme, which seems to have been spent three times during the course of 120 pages.

On education, the strategy states:

"we are pleased to support the commitment made by the Careers and Enterprise Company to create a toolkit to help embed social action as part of a young person's career pathway".

There is no mention of the rising number of school exclusions as cutting across any social integration or engagement for many deprived children, or of the impact of cuts in school funding on broader parts of education. The strategy was published several months after the publication of the report of the Lords Select Committee on Citizenship and Civic Engagement, which bluntly stated:

"The Government has allowed citizenship education in England to degrade to a parlous state. The decline of the subject must be addressed in its totality as a matter of urgency".

Again, the *Civil Society Strategy* is dreaming of an alternative world in which such topics are already available, which very clearly they are not.

There is a direct contradiction between calling for greater local community involvement and taking schools—one of the core elements of local communities—out of local control by forcing them into multi-academy trusts, sometimes run by overpaid executives a good distance away from such communities. I should perhaps say to the noble Baroness, Lady Finn, that the ministerial foreword tells us:

"Businesses are rediscovering the original purpose of the corporation: to deliver value to society, not just quarterly returns to shareholders".

Wonderful stuff—no evidence whatever is provided. The 2017 paper *People Power: Findings from the Commission on the Future of Localism* was far more persuasive on the broad approach needed to empower people within communities and to link different public services together, but the government paper on democratic engagement *Every Voice Matters*, which I also read in preparing for this debate, is even more vacuous than the *Civil Society Strategy*.

Several of those whom I have consulted in preparing this speech have told me that local government is much better than central government at understanding the concept of social value. I recall seven years ago being taken round one of the largest estates in Leeds by the head of the neighbourhood police team, who worked closely with local churches and voluntary groups, as well as with other services in Leeds. Now, of course, police cuts have forced the disbandment of most such teams, with the loss of most police community support officers. When I was taken round a similar estate in Bradford last year by our local council leader, we saw no sign of any police presence or of any other representatives of local or central government: no government support for a depressed, left-behind, politically alienated community, 40% of whose housing has been sold off, with much of it now being in the hands of private landlords without a stake or interest in the local community.

We need to empower local authorities and the non-profit sector much more than we have managed to achieve. Again looking at Bradford, I see that our social housing association is training apprentices and is specifically recruiting women and people from disadvantaged areas. Last year, it had several hundred applications for 10 new places. That shows that the demand is there but others are not required to do it.

I could go on, although I shall not, but I wish to propose that we have to deal with reinstating the concept of public value more than private value. We have to get the Treasury's concern with value for money defined in conventional economic terms. We have to revive the concept of local accountable government with adequate funds to provide and co-ordinate local services. I suggest that, given that the current situation we are in has evolved over a succession of Governments, we need to rethink a cross-party approach to redefining some of these fundamental issues concerning the way in which the state, the third sector, the citizen and private enterprise interact in providing such an important part of our national community.

3.13 pm

Lord Stevenson of Balmacara (Lab): My Lords, like others, I thank the noble Baroness, Lady McGregor-Smith, for securing this debate and I also thank her for her excellent overview of the case that she made for increasing the social value of public procurement.

There are not many of us here today. I suspect that the timing of the slot has not maximised the attendance. But I hope that lots of people will read this debate, because we have had excellent contributions from around the House, largely in support of the proposition in the Motion and drawing on experiences which, together, have woven a very convincing argument that I am sure will reach out beyond the very small number of people who have been able to attend today.

The general impression is that this issue, having been around for a few years, is now reaching the point where it needs more action and more support. I do not think that there would be very much concern if the Government decided that they wanted to put a motor under it. They should take comfort from the fact that, although there was a bit of a bad smell about this whole area after the big society—which did not really take off and never really seemed to resolve anything in one direction or another—out of it have come other good ideas and good issues that are worthy of consideration.

It is very interesting to read in the wider papers that other people are beginning to talk this up. For instance, there was a piece in the papers this week in which Andy Haldane, the chief economist of the Bank of England, was interviewed. He talked specifically about the need for civil society, which he thinks will be crucial in the technological age, and the need to rebuild it. If that is the level and range of the debate, and if we add in the fact that there is not much party difference on this—I think we can all support it, whichever part of the political spectrum we come from—there is an opportunity to do something.

Having said that, we have to ask ourselves some of the questions that have already been raised. Why has there not been growth in the quantum of activity in the public realm delivered by social enterprise? I remember being involved and interested in this towards the end of the last Labour Government and being very confused

about why, with all the public support, political support and, eventually, legal support in terms of an Act, there had not been the lift-off that one would have expected.

Why has the activity been so patchy across the whole country—not just in relation to government involvement but in other areas, particularly the NHS? Some bits are good but others are not doing it. Why is that? In addition, what is the best legal form that will be required to help it to develop? The report produced by the noble Lord, Lord Young of Graffham, talked about vertical and horizontal increases in terms of the bite of this policy, but no answer was given as to how one might do that.

Others have picked up the important question of why we are not seeing linkages between this initiative and, as we mentioned, many of the other areas in which similar activity, thinking and developments are taking place, with particular reference to the public sector enterprise duty, which is something that I want to come back to. Whether or not we leave the EU at the end of the day, or whatever circumstances we find ourselves in, the point made by my noble friend Lord Haskel about the need to make sure that we protect ourselves and do what is right for the UK against external pressures is something that we need to return to.

The current legal framework, found in the Public Services (Social Value) Act 2012, although not implemented until 2013, requires commissioners to consider securing economic, social or environmental benefits when buying services which come in above the OJEU threshold. As was pointed out by most people, that is a rather weak formulation, and it may well be that it is the major issue that needs to be addressed. However, it poses quite a big dilemma for those who want to make policy in this area.

The social value Act is firmly rooted in best-value commissioning, yoked therefore to a requirement best expressed in pure monetary values. However, in truth, as we have heard, it is best considered as a tool to promote a much wider uptake of a particular approach to commissioning for best value—that is, social capital. At its most useful, the Act provides a way to think about public services in a more coherent way that plays into the redesign of those services for the benefit of users—what I think the noble Lord, Lord Shipley, called the outcomes. However, the tension between the two outcomes specified in the Act is at the root of the problem, and I very much hope that the consultation that is going on will, if not resolve it directly, at least recognise the dilemma and bring forward ideas.

I have already mentioned the review of the original Act carried out by the noble Lord, Lord Young of Graffham, and it is important to have that in our mind as we go forward. He found that where the Act had been taken up, it had had a positive effect, encouraging a more holistic approach to commissioning, which he felt was of value. The Act has made commissioners think about securing value through procurement in innovative ways. Some people are concerned that we have lost innovation, but he found it there, as well as significant cost savings and a more responsive way of delivering better services. But he pointed out a number of concerns that are still relevant and part of the debate.

The incorporation of social values into actual procurement appears to be very low compared with the number and value of procurements across the whole public sector; we have heard figures today from many speakers. Many respondents showed a lack of understanding of how to apply the Act, and that had led to inconsistent practice, making it difficult to evaluate this. The noble Lord felt that commissioners needed to be better able to measure and quantify the social outcomes we are seeking to embed in the procurement process. This comes up time and time again and I am sure the Minister will want to address it in his response. So the Act is delivering positive benefits where it is operating well, but awareness, understanding and measurement are the main problems.

The consultation was launched in 2018 and we have a chance to see whether this can be brought forward. I understand that it is due to finish in early June 2019. The Minister is an expert at ducking questions of timing on this; I am sure he will say that the results will be out "soon" or "shortly"—I await a variation on that if there is one. We need this. As I have tried to hint, there is a bit of space here which could be filled if the Government were to come forward with some really heavy proposals; a lot more progress could be made.

As we have heard, the framework within which this has been discussed is a cross-governmental framework for social value with common policy themes, outcomes and metrics; that answers the questions raised by the noble Lord, Lord Young, about the difficulty in getting on with this if we do not know what we are trying to measure. I agree with those who have said that the minimum 10% social value weighting should be higher. There is a need for training and development for buyers working across central government procurement teams, and this will be brought out by having champions and those who might lead both centrally and locally.

There are questions arising from the consultation, which I am sure the Minister will respond to. How do we get the law better suited to the aspirations? Suggestions have been made today about extending it so that all public bodies have to do this, and to make sure that it covers all aspects of procurement: goods, services and works. If we add in the comments made on equality, not talking about major construction contracts looks like a strange decision.

Social value is not always a strategic priority; it is sometimes considered as something for procurement teams only, so opportunities are being missed. We have to make sure that those who implement this recognise that social value is about finding ways of using public money to support the well-being of all our citizens. If it is to be successful, measurement and reporting will have to be systematised within a national framework. However, with a national framework would come a concern that we would lose innovation—the chance to do things in a different way. Perhaps the mutuals that the noble Lord, Lord Maude, spoke about would find it difficult to chance their arms on an area that was not in the national framework. We should be careful about national frameworks if they suppress the sorts of things that we want to talk about.

[Lord Stevenson of Balmacara]

The Government have been quite innovative in some of these areas. We should not forget the work on GDP, or on happiness as a substitute for GDP as a measure of the success of the economy. This work is bringing issues such as social value into the forefront of consultation and debate. So why do we not try to build on that? There is also a suggestion, which has some merit, about a "social value budget" based on social values generated by all departments affected by this, in the same way as for the green budget. That would be a way to get more discussion and debate going across the country.

I conclude by suggesting a number of questions to which the Government should respond. How will they make Whitehall the leading adopter of social value? Many people have spoken of the need to root out the differences between the various departments and the different approaches being taken. Obviously that is an ongoing and much wider debate. But the Cabinet Office is in a good position to do it. What is the trick that will make this work?

Can we come up with a proper definition of social value? In its broadest sense, it is about added value that creates jobs or uses more environmentally sustainable products, but what is the nature of the metric that we are talking about here? How will we ensure that we have a framework that will not prevent people being innovative? That is a point that I have already made. Will the Government lead on this, or will some other body be created that has responsibility? Will some sort of non-departmental body take this on? The system of government that we use will be important. Whatever is in place, it must be rigorous, and lead to comparable and transparent outcomes.

The Government might want to think about the difference between the social value Act and the requirements of the public sector equality duty because of the difference between "consideration" and being made "accountable". If people have only to consider social value, they will not have the same approach as if they have to account for what they do in social-value terms. That is a very important point.

I was struck by the points made by the noble Baroness, Lady Finn, about the difficulties faced by SMEs. I endorse her view that this would be a great opportunity to try to resolve the bugbear about payment ratios to SMEs. She did not mention, but might want to look at, our argument in recent months for the need to give more powers to the Small Business Commissioner. If that person had more responsibility for making sure that prompt payment codes were implemented, they could also have a role to play on social value. That is a possible way forward. The post already exists and we would like it to take on these extra powers.

During a political hiatus such as that we are currently in, it is often the case that things that have clear political support all around can make progress. As I have hinted before, we would certainly like to get something done on this to make sure it works. I wish the Government well if they want to do so.

3.25 pm

Lord Young of Cookham (Con): My Lords, I begin by thanking my noble friend Lady McGregor-Smith for initiating and introducing this important and timely debate, and thank all noble Lords who have taken part. It is has been a well-informed, consensual and thoughtful debate on a subject that, as many noble Lords have said, is not often discussed. It has been particularly helpful to the Government, since our policy is, as I shall explain, in the process of development.

To sum up the debate, the view is that what we have done is good, but we need to do more, and do it better and faster; that is the message I shall take away. My noble friend Lady McGregor-Smith produced an ambitious menu of reforms, which we take seriously. If I do not address them all, I shall write to her. I know that this subject has been one of her special interests for some time and I very much welcome her input.

My noble friend Lord Maude should be answering this debate as he knows much more about it than almost anyone else. I would like to say how much I welcomed his input when I was working with him. He secured very real changes, reforms and savings in public procurement when he was in office. He reminded me of how things have changed since I was first a Minister some 40 years ago. I remember the narrowly focused, time-consuming, bureaucratic tendering. What a contrast that is with the changes he has introduced: the more flexible, market-oriented approach, which enables the taking account of social value. As he said, he has put this into the DNA and the genes are doing well as they flow around the system. He identified the barriers to entry: the performance bonds, the tender documents and the three-year requirement to produce accounts that have historically stopped some of the SMEs getting involved. I will say a word about that in a moment.

My noble friend mentioned public service mutuals. I remember him championing these in the health service when he was in office. They have an important role to play in delivering high-quality public services. At the moment there are 115 mutuals operating in diverse sectors from health to libraries, delivering approximately £1.6 billion of public services. In January last year, DCMS launched a package of support worth £1.7 million to help new mutuals to emerge and existing ones to grow and flourish.

My noble friend also asked about the Commissioning Academy, a development programme for senior decision-makers across the public sector. It supports participants to learn from best practice across the country and is a key component in the culture change that many noble Lords have been advocating. We continue to provide leadership through the Commissioning Academy, working with the social enterprise PSTA—the Public Service Transformation Academy. The DDCMS has worked with the PSTA to ensure good commercial practice, promoting early engagement with the market, contract management, and social value.

I was interested in what my noble friend and the noble Lord, Lord Wallace, said about local commissioning and a cross-government approach. Again, perhaps I have been in government too long, but I remember the Property Services Agency, which owned the government estate and the Government Car Service. That was able to look at a town such as Horsham, then look at the totality of the government estate—the DHSS and all the other departments—and engage local contractors. After a time, government departments thought this

was a remote, bureaucratic and expensive organisation and demanded autonomy, because we charged them quite a lot to change a lightbulb. It was devolved to local departments, which then discovered that they were all having to replicate particular skills and were losing the ability for local commissioning. We now seem to be moving back towards the PSA model, on which I have an enormous wealth of experience.

My noble friend and one or two other noble Lords mentioned the liquidation of Carillion. That has been used by some, although not in this debate, as a case for stopping the outsourcing of the delivery of public services to the private sector. The Government's view, and that of previous Governments, is that the private sector has a vital role to play in delivering public services in this country, bringing a range of specialist skills, world-class expertise and deeper knowledge to bear. As we have heard, the public sector is the largest purchaser of goods and services in the UK, spending over £250 billion on procurement. Central government alone accounts for £49 billion of that figure.

As we have heard, there is so much more that the Government could do to create and nurture a vibrant, healthy, innovative, competitive and diverse marketplace of public service suppliers, with values at its heart, where wider social benefits matter and are recognised. This is reflected in the *Civil Society Strategy*, mentioned by my noble friend, which was published last year. It commits the Government to use their huge buying power to drive social change by championing social value through their commercial activities and levelling the playing field for all types of businesses, including small businesses, voluntary and community-sector organisations and social enterprises—a theme mentioned by many noble Lords in this debate. In turn, that would encourage employment opportunities, develop skills and improve environmental sustainability.

The Public Services (Social Value) Act 2012 already places a requirement on relevant contracting authorities to consider in respect of procurement for services: first, how the economic, environmental and social well-being of the relevant area may be improved by what is being procured; and secondly, how, in conducting the procurement, they might act with a view to securing that improvement. Contracting authorities must also consider whether to consult the market on these issues before the procurement process starts. There have been a number of suggestions during our debate about how that Act might be amended.

I confess to noble Lords something that may already be apparent: that this is a subject with which I was less than familiar before my noble friend tabled the Motion and it fell to me to reply to it. I am a lot wiser after this debate. To get my mind around what was going on, I asked officials for an example of how incorporating social value in the tendering process would lead to a different outcome. They came up with a Ministry of Defence contract with Future Biogas and the energy company EDF to develop an electricity supply for RAF Marham in Norfolk. The MoD could have taken the conventional lowest-price approach, without considering the social, economic and environmental benefits that could flow to the local area, but did not. Instead, it engaged up front with the supply market and developed an ambitious social value plan.

The airbase will now get 95% of its electricity from biogas generated by fermenting crops grown by local farmers, an option which did not exist before the engagement. This will directly save £300,000 a year on electricity costs, but there is more to it than that, which is what struck me. The fuel is a green and sustainable solution, helping to tackle climate change. Locally grown crops will power the plant, supporting the local rural economy and ensuring continued business and employment in the area. Building, running and maintaining the anaerobic digestion plant supports skilled, long-term employment opportunities in Norfolk. Future Biogas employs five highly skilled engineers on site and an apprentice who started a four-year apprenticeship at the end of 2018, and an agricultural contracting business supporting the plant has increased its full-time employees by five and seasonal staff by a further 10. As part of an improved crop-rotation regime, soil quality is boosted and the weed and pest burden lessened, and the digestate output from the plant is a sought-after organic fertiliser, improving yields of food crops and locking up carbon in the soil.

I found that a very helpful illustration of the case for social value and it is that sort of lateral thinking that we want to promote. Other cases were included in the helpful briefings sent to noble Lords for this debate. My noble friend Lady McGregor-Smith mentioned Crossrail, as did my noble friend Lord Pickles. The important thing about RAF Marham is that it is in the Chief Secretary's constituency. There have been one or two comments about the potential inflexibility of the Treasury in taking social value on board. Perhaps she has now been persuaded by that local example.

In June last year, the Chancellor of the Duchy of Lancaster announced the Government's intention to extend the application of the 2012 social value Act in central government. While the Act currently requires commissioners to only "consider" social value while awarding contracts, the new proposals will strengthen this further by making it an explicit requirement in central government contracts with the private and third sectors. This work to extend the application of the Act across all central government procurement represents one of the most significant changes in public procurement in recent years. It will ensure that contracts are awarded on the basis of more than just price, looking, as all noble Lords have suggested, at a contract's social impact too, and giving firms much-deserved recognition for their positive actions in society.

The objective for the Government's commercial activities will always remain achieving good commercial outcomes for the taxpayer. However, it is right that commissioning and procurement should support social outcomes as well, providing that these outcomes are relevant and proportionate to what is being procured.

A number of noble Lords, including my noble friend Lady McGregor-Smith and the noble Lords, Lord Shipley and Lord Stevenson, wanted the Government to increase the minimum weighting for social value in central government procurement awards from 10% to 20%—or up to 50%, in her case. As mentioned, we launched a consultation paper in March. One of the areas on which we are seeking feedback is whether a minimum 10% weighting is appropriate.

[Lord Young of Cookham]
The 10% weighting was developed with input from supplier representatives; we are genuinely consulting on this and have an open mind. It is important that we change at a rate that suits each sector. In particular, we want to prevent barriers to entry for SMEs.

The noble Lord, Lord Haskel, and my noble friend Lady McGregor-Smith were worried that public procurement favours large companies. I will say a word about that in a moment. The expanded use of the social value Act is widely recognised as a measure that will encourage greater diversity in public sector supply chains.

The noble Lord, Lord Haskel, warned me that he would raise BSI 95009. The standard is aimed at public and private sector buyers, and proposes a framework for those in procurement to demonstrate or assess trustworthiness, transparency and ethical practice. The Cabinet Office is in discussions with the BSI. We have not yet endorsed the standard, but will consider it most important to ensure that we do not burden suppliers unnecessarily—a point I made earlier—and create barriers to entry for SMEs.

The noble Lord, Lord Shipley, asked if we would show leadership on social value by committing to producing an annual social value budget, showing how much social value has been created by central government procurement each year. On 25 January last year, the Chancellor of the Duchy announced the Government's intention to extend the application of the social value Act in central government departments. This included a requirement to report on social value.

A number of noble Lords, including the noble Lord, Lord Shipley, asked if we would expand the social value Act to cover goods and works as well as services, so that the value of every penny of public money is maximised. As part of the joint Cabinet Office and DCMS programme of work, central government departments should apply the terms of the social value Act to goods and works, as well as services. There will be markets common to both central government and the wider public sector so it will have a broader impact.

The noble Lord, Lord Shipley, asked whether the social value criteria were compulsory and whether the Government will be using them. The new social value framework will be mandatory for central government departments, their executive agencies and non-departmental bodies for procurements subject to Part 2 of the Public Contracts Regulations.

Lord Shipley: My query specifically related to whether it was simply advisory for local government or whether local government should be required to do what central government departments do.

Lord Young of Cookham: My understanding is that it is advisory, because it was not included in the mandated list I just read out. If I am wrong I will write to the noble Lord.

The noble Lord asked why the strategy guidance has not been issued and whether we will produce a quick guide on it. We actually published guidance on how to work with central government, including social value, working with the VCSE Crown representative Claire Dove. The DCMS and the Cabinet Office are working with the advisory panel to understand the needs of the sectors and to prepare for the changes to social value. We will work with the sector representative bodies to produce the guidance the noble Lord just asked for.

The noble Lord asked for an annual report on social value procurement. Again, in his announcement in June last year the Chancellor of the Duchy of Lancaster included a requirement for central government departments to report on social value.

I was asked why large government contracts are out of scope for social value procurement. The answer is that the balanced scorecard is already in place to cover procurement of over £10 million. That already covers socioeconomic factors. The new social value framework covers everything below £10 million and above the Public Contracts Regulations threshold.

Lord Stevenson of Balmacara: On that point, use of large construction contracts was particularly mentioned. Could the noble Lord take that back and consider it further? The point is not so much the value of the goods and services concerned, but the point made by the Equality and Human Rights Commission—that the impact on employment and the way it is inclusive of a diversity of employees and on apprenticeships and training is so great that the sheer numeric value cut-off was limiting the effect of the social value Act. Would he consider that again?

Lord Young of Cookham: I will reflect on that. I understand exactly the point that the noble Lord makes and that there would be value in extending it upwards. Perhaps I will write to him when I have taken advice on that.

We would be very happy to discuss the network of social value champions with partners in the sector.

One of the main themes emerging from the debate has been the need for the Government to encourage as wide a range of suppliers as possible to deliver the objectives we have been discussing. We remain fully committed to supporting small and medium-sized enterprises and the voluntary, community and social enterprise sector, and indeed helping the mutuals that my noble friend referred to. Our work with sector bodies and individual companies through the Crown representative network will continue, unlocking more opportunities for smaller businesses and those owned by underrepresented groups, as well as mutuals and charities.

Initiatives around prompt payment, simpler bidding processes, better visibility of opportunities in the supply chain and the Public Procurement Review Service have all been established to stimulate SMEs and VCSE organisations as the lifeblood of the economy. Our approach underpins this. I understand the point made by my noble friend Lady Finn and the noble Lord, Lord Stevenson, about prompt payment. I believe prompt payment is a condition of any public sector contract. If a contractor does not promptly pay he runs the risk of being removed from the list of approved contractors. I was interested in the noble Lord's suggestion that the Small Business Commissioner might have his energies harnessed in this area. I will certainly reflect on that.

With the Crown representative for VCSEs we are producing supporting guidance for smaller organisations bidding as part of consortia, and have helped buyers to better understand how they can level the playing field for SMEs and VCSEs in our introductory guidance on the social value Act. In line with best practice in policy-making, we are piloting the outline framework to see how it will be applied in practice and to help formulate the guidance on evaluating bids fairly and consistently. Two of these pilots are for major national contracts and one is a national framework agreement. Let me be clear that, in doing so, the Government are absolutely committed to ensuring it does not add complexity or cost to the procurement process. We do not want to restrict markets or exclude small businesses and voluntary, community and social enterprise organisations from government contracts.

It is always the misfortune of the Opposition spokesman to have the answers to his questions arrive right at the end of a debate. I am afraid that misfortune has fallen once again on the noble Lord, Lord Stevenson. I will convert the handwritten notes I have in front of me into something legible and typed up and write to the noble Lord to deal with the issues he raised about instilling social value procurement, what steps we are taking to create a standard definition, how this will link to the public sector equality duty, which is an important point that he raised, and how we will make Whitehall a leading partner in social procurement.

We want to see more good practice and to accelerate the opportunities available for the UK's small businesses and VCSEs. In the words of I think my noble friend Lady Finn, we want to put social values at the heart of service delivery. This new approach is the next step in our journey of transforming how the Government are delivering smarter, more thoughtful and effective public services. We will utilise our huge purchasing power to deliver on our promise of a fairer society that works for everyone.

3.46 pm

Baroness McGregor-Smith: My Lords, I thank all noble Lords for their excellent contributions. I am passionate about how we can do more to improve public procurement, and how we can use social value to help us. We all know that lowest price on public procurement does not work any more, and that we need to do more on social value. I particularly welcome the recommendations from the British Standards Institute, including an increased weighting on social value, improving the delivery of contracts, thinking more about local commissioning and partnerships, extending this to all of our public spend and really thinking about front payment. I particularly enjoyed my noble friend Lord Maude's comments, in which he discussed "liberated and empowered workforces"—which, for someone like me who ran a very large provider, is an incredibly important thing to really bring to life.

So I hope that we can all work together to help improve public procurement and ensure that the ambition of the Civil Service strategy can be achieved. I beg to move.

Motion agreed.

House adjourned at 3.47 pm.