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PARLIAMENTARY DEBATES
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HOUSE OF LORDS
OFFICIAL REPORT

ORDER OF BUSINESS

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

Abbreviation	Party/Group
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind LD	Independent Liberal Democrat
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
Lab Co-op	Labour and Co-operative Party
LD	Liberal Democrat
LD Ind	Liberal Democrat Independent
Non-afl	Non-affiliated
PC	Plaid Cymru
UKIP	UK Independence Party
UUP	Ulster Unionist Party

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

House of Lords

Wednesday 12 June 2019

3 pm

Prayers—read by the Lord Bishop of Coventry.

Sexual Violence in Conflict
Question

3.07 pm

Asked by ***Lord Collins of Highbury***

To ask Her Majesty's Government what assessment they have made of the level of support among United Nations Member States for the United Nations Security Council Resolution 2467 on sexual violence in conflict, and of progress in the Ending Sexual and Gender-based Violence in Humanitarian Crises Conference in Oslo on 23 and 24 May.

The Minister of State, Department for International Development (Baroness Sugg) (Con): My Lords, UN Security Council Resolution 2467 was adopted in April, with 13 votes in favour and two abstentions. The UK deeply regretted that language recognising the need for comprehensive sexual and reproductive health services was not included. I represented the UK at the Oslo conference and the momentum was clear: more than 100 Governments and other organisations made commitments to help end sexual and gender-based violence in humanitarian crises. The UK will continue this momentum by hosting the Preventing Sexual Violence in Conflict Initiative international conference in November.

Lord Collins of Highbury (Lab): I thank the Minister for that response. Of course, I pay tribute to the UK's role in ensuring that efforts to address this issue internationally are centre stage. I also welcome our presence at the Oslo conference and the fact that we made a new commitment to fund the tackling of violence against women and girls in Syria. Can the Minister outline how we will turn the PSVI conference into more than just an awareness-training session? Bearing in mind the fact that only 0.12% of the total humanitarian funding goes to tackling gender-based violence, can she tell us more about how we will do something to fund extra work and encourage others to do likewise?

Baroness Sugg: My Lords, as the noble Lord said, in Oslo I announced UK political commitments which included improving access to life-saving sexual and reproductive health services and £7 million of additional funding to support the UNFPA to tackle sexual and gender-based violence in Syria. The Oslo conference saw commitments of a very large amount of funding—$363 million—and hundreds of political commitments. The noble Lord is quite right that it is vital that we keep up momentum. It is also vital that we continue to demonstrate the UK's strong leadership on this issue. The PSVI conference in November is an excellent opportunity to ensure that we and our international partners do that.

Baroness Warsi (Con): My Lords, I pay tribute to the work of my noble friend the Minister and the Government, as well as the work led internationally by Members of this House, including my noble friends Lord Hague and Lady Helic. Will my noble friend explain whether victims' voices will be central to the PSVI conference? Specifically, is she familiar with the UN report on sexual violence in Kashmir? Will she assure me that Kashmiri victims of sexual violence will be heard at the PSVI conference?

Baroness Sugg: My Lords, my noble friend is right to pay tribute to the many voices across the Chamber who contribute to this important debate. Sadly, rape and other forms of sexual violence are still being used as weapons of war in conflicts the world over. The UK, together with our international partners, is working to end this horror. The PSVI conference in November is going to be survivor-centred. I heard some testimony from victims of abuse in Oslo; it is incredibly important that the survivors' voices are heard, not just telling their stories but being involved in the policy debates and informing the next steps.

Baroness Sheehan (LD): My Lords, Resolution 2467 and the Oslo conference both highlighted the importance of addressing the long-term trauma that victims face, as well as the stigmatisation of sexual violence survivors and their families within their communities. I ask the Minister: how does DfID programming address these issues?

Baroness Sugg: The noble Baroness is quite right to address the issue of stigma and the long-term effect that this terrible violence can have on women. Through our programmes at DfID, we are working with our multilateral partners and in our country programmes to address this issue. Recently, we have developed our What Works to Prevent Violence programme, which has shown real improvements in addressing the root causes of violence, and we will continue to expand our work in that area.

Lord McConnell of Glenscorrodale (Lab): My Lords, I have just returned from Dohuk in northern Iraq, where more than 300,000 Yazidis are still living in IDP camps, and where thousands of women and young boys have returned from kidnapping and slavery—which involved sexual violence. What action are the Government taking, not only to provide psychological support and other services for the individuals and families living in these camps but, much more importantly, with the Iraqi Government to ensure that someday the Yazidis can return home to Sinjar?

Baroness Sugg: My Lords, the Government are supportive of efforts in Iraq to strengthen justice and hold perpetrators to account, and to allow returns. We have contributed to the UN Trust Fund to End Violence against Women, which supports projects in Iraq that seek to address and reduce violence. We are also at the forefront of ensuring accountability for the well-documented crimes, and we champion the resolution at the UN Security Council. Indeed, we have a UK QC leading the investigating team in Iraq.

Baroness Nicholson of Winterbourne (Con): While congratulating the British Government and the Minister for the tremendous work that the FCO has undertaken on sexual violence after and during conflict, might she be willing to think about pushing the issue further forward with the Commonwealth Parliamentary Association? At last year's gathering here, I had the opportunity to present the PSVI, as the FCO has it, to the Commonwealth Parliamentary Association delegations. If we could get it into those parliaments, and every single parliament was supporting it, it would have a true long-term impact on this unbelievably beastly issue.

Baroness Sugg: Of course, it is important that we work with all our international partners on this. The UK, rightly, is speaking of this regularly, but we must ensure that it is on everybody's agenda too. My noble friend's suggestion of working more closely with our Commonwealth partners is a very good one, which I will take forward ahead of the PSVI conference.

Baroness Tonge (Non-Afl): My Lords, can the Minister tell us whether UK aid still provides for abortions for women who have been raped in conflict? Can she also confirm that the United Kingdom recognises that international law on these matters overrides the national law of the country in these situations?

Baroness Sugg: My Lords, the UK is committed to empowering women and girls to choose whether and when they have children, giving them greater control over their lives. In humanitarian crisis situations, as the noble Baroness highlights, that is more important than ever. It is our view that in situations of armed conflict or occupation, where the denial of abortion threatens a woman's life or causes unbearable suffering, international humanitarian law principles may justify offering a safe abortion, rather than perpetuating what amounts to inhumane treatment.

Rwanda: CHOGM 2020

Question

3.14 pm

Asked by ***Lord Popat***

To ask Her Majesty's Government what steps they are taking to support the Government of Rwanda in their preparations for hosting the Commonwealth Heads of Government Meeting in 2020.

Lord Popat (Con): My Lords, in asking the Question standing in my name on the Order Paper, I declare my interest as the Prime Minister's trade envoy to Uganda and Rwanda.

Baroness Goldie (Con): My Lords, the UK as chair in office is working closely with the Rwandan Government and the Commonwealth Secretariat to share our experience of hosting a CHOGM. My noble friend Lord Ahmad has discussed the summit with the Rwandan high commissioner in London, and the Minister for Africa, Harriett Baldwin, and officials including the UK Commonwealth envoy have visited Kigali. Rwandan Ministers and officials are enthusiastic and already have preparations well under way, demonstrating their commitment to ensuring a successful CHOGM in June 2020.

Lord Popat: I thank the Minister for her Answer. Last year's CHOGM in London had a strong focus on trade and shared prosperity within the Commonwealth. Does the Minister agree that it is vital that we work with the Rwandan Government, who have an impressive trade record, to continue the momentum shared in London?

Baroness Goldie: Yes, I do. I thank and acknowledge my noble friend for his excellent work as the Prime Minister's trade envoy to Rwanda and Uganda. Rwanda is one of Africa's fastest growing economies; it achieved a growth rate of 8.6% in 2018. It is an important trading partner for the United Kingdom. The UK is the second-largest investor in Rwanda and we are committed to sustaining this partnership.

Lord Anderson of Swansea (Lab): My Lords, Rwanda straddles Anglophone and Francophone Africa—the Commonwealth and La Francophonie. Is not this CHOGM a good opportunity to bring the two organisations more closely together? Will the Government use their best endeavours to encourage the organisers to do just that?

Baroness Goldie: The noble Lord makes an interesting point. There is a desire that the next CHOGM should reflect the success of last year's in the United Kingdom. I am sure that all efforts to bring in interested parties and move relationships forward will be a very positive development.

Lord Chidgey (LD): My Lords, experts are reporting that a terrifying Ebola epidemic is out of control in the DRC, even though it had vaccines and experimental drugs from the outset. The World Health Organization says that regional risk levels are very high. Kigali, the centre for the Rwanda CHOGM, is just two hours' drive by road from the Ebola outbreak. Commonwealth delegates and supporters will be at risk from a spread of the Ebola epidemic, with potentially catastrophic consequences for health and economic development throughout the Commonwealth. Have the Government shared with Rwanda the lessons learned from dealing with the Ebola crisis in west Africa, where more than 13,000 people perished? Have the Government responded to the communiqué from the DRC and Rwanda Presidents promising to wipe out the armed groups that plague their border, undermining the efforts to tackle Ebola?

Baroness Goldie: The noble Lord will be aware that the United Kingdom Government have taken the emergence of Ebola in the DRC very seriously. That was the subject of comment in proceedings in this Chamber last month. He makes an important point and is perhaps aware that a case of Ebola was confirmed in Uganda yesterday. That is the first case outside the DRC since the recent outbreak. The UK is a leading

donor to regional preparedness. Through UK aid, we have been supporting the Government of Uganda and the region to build long-term resilience and prepare for outbreaks. This is clearly an issue that will be monitored very closely and will be of concern to all those who desire to see the CHOGM in Kigali a great success.

Baroness Hayman (CB): My Lords, last year, one of the great successes of CHOGM was the commitment to halve malaria in the Commonwealth within five years. I declare my interest as chair of Malaria No More UK. What conversations have the Government had with the Government of Rwanda about ensuring that the Kigali CHOGM is used as an opportunity to monitor and advance progress on that commitment?

Baroness Goldie: The UK is indeed helping to meet the Commonwealth's commitment to halve malaria cases and deaths by 2023. Between 2017 and 2019, the UK contributed £1.2 billion to the Global Fund partnership organisation between government, civil society and the private sector that operates in 24 Commonwealth countries. The noble Baroness raises an important point that I am sure will remain before the UK Government as CHOGM comes nearer.

Lord Howell of Guildford (Con): My Lords, I declare my interest as in the register. Is not the best way to help Rwanda, as we pass over the chairmanship to that country in June 2020, to bequeath to it much stronger Commonwealth institutions that provide a much better space for civic society, the private sector and professional connectivity, which is the main driving force of the Commonwealth today and tomorrow?

Baroness Goldie: I pay tribute to my noble friend's undoubted authority on this issue. Yes, we think the Commonwealth should be in good functioning order, and in many respects it is. However, the noble Lord is of course aware of concerns expressed about how it is currently operating in relation to the secretariat. That is an important issue, which we would like Foreign Ministers to take forward. One would anticipate that at the next meeting of Foreign Ministers it may very well be on the agenda.

Lord Collins of Highbury (Lab): My Lords, one of the great successes of the CHOGM in London was the engagement with civil society across the board—in the women's forum, the business forum and the civil society forum. I welcome the fact that CHOGM will be in Rwanda, but can the Minister outline the Government's efforts to ensure that we have the fullest participation of civil society there, including those representatives who came to London from communities representing LGBT people?

Baroness Goldie: The noble Lord will be aware that the UK has been engaging closely with Rwanda to support it in ensuring that a very positive and successful CHOGM is delivered. He makes a good point: civil engagement was a major component in preparation for and during CHOGM last year, which sets a good example. It is of course for Rwanda to design its own CHOGM and we do not want to tell Rwanda what to do, but we will certainly support it in any way we can with proposals that could contribute to a positive outcome.

Probate: Delays

Question

3.22 pm

Asked by ***Baroness Browning***

To ask Her Majesty's Government what action they are taking to reduce delays in probate being granted to non-professional claimants.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, urgent action has been taken to address the delays that have been experienced in the probate service. Staffing is being increased and the digital service further improved to help to reduce waiting times.

Baroness Browning (Con): I wonder whether my noble friend can tell us exactly what the waiting time is as of today, and when he expects his department to meet the recommended waiting time of 10 working days. He will know of my opposition—and, I must say, that of the Law Society—to the policy of a change in the £215 flat-rate fee to apply for probate to a sliding scale amounting to many thousands of pounds, with money up-front on the table. When does he think the department is going to meet that target?

Lord Keen of Elie: My Lords, historically the time taken for a personal application for probate has been about four weeks. In the recent past, due to a number of factors, that period increased to about eight weeks. The department then applied additional staffing to the matter of processing probate applications, and on average present grants are being issued within six to eight weeks. We anticipate further improvements as we roll out the online system of probate applications, and by October this year we anticipate that all forms of probate application will be available online.

Lord Marks of Henley-on-Thames (LD): My Lords, delays in grants of probate are causing frustration and hardship, not only for bereaved families, but for many people caught in sale and purchase chains whose property purchases cannot proceed. Does the Minister accept that the current delays result from a rush of applications brought on by the threatened increases in probate fees to which the noble Baroness referred? What consideration has been given to abandoning those increases since this House passed the regret Motion last December?

Lord Keen of Elie: My Lords, there were essentially two features that impacted upon the timing of probate applications earlier this year. First, as the noble Lord alluded to, there was a marked increase in the number of applications—about 22%—in March of this year.

[Lord Keen of Elie]
It is perceived that that may have been in response to the anticipation of fee increases for probate. A second, more immediate, factor was the move over in respect of the digital probate service from three probate registries to the Courts & Tribunals Service centre in Birmingham towards the end of March. To facilitate that move, it was necessary to transfer cases, both digital and paper, from the legacy system on to a new single system called CDM. During the first few weeks after the changeover, there were difficulties with the CDM system, which have now been overcome. There was also the need to further train staff in that new system, resulting in pressures on the service during that period. We have now met those pressures, we have stopped the increase in time taken for the processing of probate applications and we now hope to see it reduce.

Lord Beecham (Lab): My Lords, is it still the Government's intention to make a profit out of the charges levied for probate, or will the fees simply reflect the cost of providing the service, as they should?

Lord Keen of Elie: My Lords, the term "profit" is not really appropriate in this context. As the noble Lord is well aware, any fees over and above cost in the court system are attributed to its other features so that, for example, victims of domestic violence can have their fees waived with regard to court applications. As regards the present state of the legislation, an approval Motion has not yet been laid in the other place.

Lord Bassam of Brighton (Lab): My Lords, is it not the case that when the probate fees were brought before your Lordships' House, part of the argument for increasing them by as much as 200% was that this money would be set aside to fund part of the MoJ's primary service? Does the noble and learned Lord think that this represents good value for money given the delays now occurring in probate?

Lord Keen of Elie: My Lords, I have already explained the reasons for the delays in March of this year with regard to the processing of probate applications, which were not related to the fees or the proposed new fees in respect of probate. In so far as there is any cost plus fee being charged for probate, that cost would be attributed to other court services provided by this department.

Lord Tomlinson (Lab): My Lords, as the noble and learned Lord does not appear to like the word profit, can he tell us how much of the surplus was made available for distribution to other aspects of the justice system?

Lord Keen of Elie: My Lords, I am very content with the word profit, but it should be used in the proper context—that was the point I was seeking to make. As we have not yet applied the fee increases, there is no issue of a surplus at the present time.

Lord Forsyth of Drumlean (Con): My Lords, might it not be a good idea, in order to incentivise the department to be more efficient, to waive the fees where people have to wait more than 10 days for their probate?

Lord Keen of Elie: My Lords, I am all in favour of incentivisation, but there is ultimately a cost for any service provided by this department.

Hong Kong: New Extradition Law

Question

3.28 pm

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

To ask Her Majesty's Government what assessment they have made of the impact of the government of Hong Kong's proposed new extradition law on (1) the autonomy of Hong Kong, and (2) its Basic Law guaranteeing the rights and freedoms of its citizens.

Lord Alton of Liverpool (CB): My Lords, I beg leave to ask the Question standing in my name on the Order Paper and declare an interest as patron of Hong Kong Watch.

Baroness Goldie (Con): My Lords, the Hong Kong Government's legislative proposals, if enacted as currently drafted, could impact negatively both on Hong Kong's high degree of autonomy and on the rights and freedoms guaranteed by the joint declaration. This morning, the Foreign Secretary publicly urged the Hong Kong Government to listen to the concerns of their people and to pause and reflect on these controversial measures. The Hong Kong authorities should engage in meaningful dialogue and preserve Hong Kong's rights and freedoms.

Lord Alton of Liverpool: My Lords, I thank the noble Baroness. She will be aware that, as we meet, tear gas and plastic bullets are being fired indiscriminately, with reports of injuries. In condemning this, will the noble Baroness reflect that in 2018, according to the *Wall Street Journal*, the courts in China's Jiangsu province acquitted just 43 people, while convicting 96,271? Does she recall that a Hong Kong bookseller, imprisoned for eight months in China, was told by the authorities, "If we say you have committed a crime, you have committed a crime"? Does she not agree, with the 30th anniversary of Tiananmen Square in mind, that when the law becomes a tool in the hands of an all-powerful communist state, everyone, from political dissidents, academics and lawyers to detained Uighurs, has legitimate cause for fear? This is not least because people in Hong Kong will be left vulnerable to rendition in unjust trials, effectively giving legal status to previously illegal abductions. Will she reflect on the statement of the International Chamber of Commerce in Hong Kong that there will be,

"an adverse impact on Hong Kong as a place to live and work, and",

on its ambitions,

"to continue growing as a major international business centre"?

While a delay in enacting this law is welcome, can we reiterate that its abandonment would be even more welcome?

Baroness Goldie: I say to the noble Lord that the most important thing is that all of us are concerned at the degree to which protests are taking place as we meet in this Chamber. The Foreign Secretary this morning was absolutely clear when he issued a statement saying:

"The ongoing protests in Hong Kong are a clear sign of significant public concern about the proposed changes to extradition laws. I call on all sides to remain calm and peaceful. I urge the Hong Kong government to listen to the concerns of its people".

As I said yesterday—I do not want to reprise in my response to the noble Lord things that we have already covered—it is legitimate to ask if this proposed legislative changes are breaches of the joint declaration. We do not believe that they are breaches in themselves, but of course there is a risk that future abuse of provisions in the legislation could be.

It is very important to recall, as I said in the Chamber yesterday, that Hong Kong has many strengths, two of the most important of which are the robust rule of law and an independent judiciary. On the one hand we have to recognise that it would not be reasonable for Hong Kong to become a sanctuary for suspected murderers, for example, who could flee there with impunity —that would seem undesirable under international law. At the same time, of course it is important that, whatever measures are being taken by the Hong Kong Government to address this issue, they must be explicitly fair and capable of being understood and they must contain protections for human rights. It is welcome that there has been a deferment in the process of legislation, but a longer period of consultation would enable a likelihood of consensus being found.

Lord Geddes (Con): My Lords, I have twice in my adult life had the considerable privilege of living and working in Hong Kong. Will my noble friend reinforce what I hope I heard her say in her first Answer: namely, that the 1997 joint declaration is being appallingly abused by this proposed new extradition law?

Baroness Goldie: At the risk of being unhelpful to my noble friend, what I said was that we do not believe that the proposals in themselves are a breach of the joint declaration, but that there has to be a concern about what could happen subsequently if there were an abuse of the provisions provided for in the proposed changes. That is why the independence of the judiciary, the robustness of the rule of law and, above all else, clarity in lawmaking and adequate protection of human rights must be explicit in any legislation.

Lord Collins of Highbury (Lab): My Lords, I do not want to repeat what we discussed yesterday, but the Foreign Secretary on Monday made it clear that he had discussed this issue with partners, and in particular international states including Canada. Of course, we all share the concern about where this law may lead: that is what the people on the streets are demonstrating against. Yesterday, the noble Baroness failed to answer my question about what we were doing to build alliances. In particular, will she tell us whether the Foreign Secretary has spoken not only to Canada but to the United States of America?

Baroness Goldie: I do not have information on that specific point. All I can do is to reassure the noble Lord that the UK Government have been highly active on this issue; they have held discussions with the Hong Kong Government, they were instrumental in facilitating an EU démarche, they issued a joint statement with the Canadian Foreign Minister and they have been active in representing our very legitimate concerns. Under the joint declaration we continue to have a legal role to play. We are very mindful of that and are clear that we have a duty to Hong Kong under that declaration. It is a duty we take very seriously. As to the noble Lord's specific point, I have no indication as to whom the Foreign Secretary has spoken with, but I will make inquiries and undertake to report to him.

The Lord Bishop of Coventry: My Lords, a point that was not made yesterday was that many Chinese people of religious faith fled to Hong Kong seeking sanctuary from the Chinese legal system and safety to practise their faith freely. Many Chinese people in Hong Kong today actively support religious believers in mainland China who are under, as we know, increasing pressure. Can the Minister assure the House that the need for protection of the rights of both of those categories of people, in the legally binding ways the Minister talked about yesterday, is being pressed by the Government?

Baroness Goldie: The right reverend Prelate will know that the Government are deeply concerned about restrictions on freedom of religion and belief in China, for example, and the position in which some faiths and their practitioners find themselves there. My noble friend Lord Ahmad raised concerns about restrictions on freedom of religion or belief in China at the 40th UN Human Rights Council in March 2019, and he set out the Government's position in this Chamber on 4 April. The right reverend Prelate makes an important point and it is certainly one of which the Government will remain aware and on which they will be vigilant.

Baroness Northover (LD): My Lords, yesterday I quoted the huge concern of one Conservative elder statesman: the noble Lord, Lord Patten of Barnes. Today I quote another: Sir Malcolm Rifkind. Does the Minister agree with him that there is not a "loophole" that must be closed in Hong Kong but that there is and must be a "firewall" between the Hong Kong and Chinese legal systems? Given that strength is in numbers, as the noble Lord, Lord Collins, indicated, what further discussions are we having with our EU colleagues to help protect rights in Hong Kong?

Baroness Goldie: We are concerned about the proposals, which is why we have been engaging in the very determined and focused activity in which we have been involved. Of course there are concerns; there are issues that have to be clarified and safeguards that have to be provided. These are all matters for the citizens and Government of Hong Kong to work through. The high level of concern is very clear, as the protests demonstrate. We understand that, but it is for the Hong Kong Government to clarify how they will address this issue.

Age of Criminal Responsibility Bill [HL]

Third Reading

3.38 pm

Bill passed and sent to the Commons.

Holocaust (Return of Cultural Objects) (Amendment) Bill

Order of Commitment Discharged

3.38 pm

Moved by ***Lord Sherbourne of Didsbury***

That the order of commitment be discharged.

Lord Sherbourne of Didsbury (Con): My Lords, I understand that no amendments have been set down to this Bill and that no noble Lord has indicated a wish to move a manuscript amendment or to speak in Committee. Unless, therefore, any noble Lord objects, I beg to move that the order of commitment be discharged.

Motion agreed.

UK Net Zero Emissions Target

Statement

3.39 pm

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, with the leave of the House, I will repeat a Statement made in another place by my right honourable friend the Secretary of State for Business, Energy and Industrial Strategy. The Statement is as follows:

"With permission, Mr Speaker, I give the Statement on legislation I have tabled today to end our country's contribution to global warming. There are many issues in this House on which we passionately disagree, but there are moments when we can act together to take the long-term decisions that will shape the future of the world that we leave to our children and grandchildren.

Just over a decade ago, I was the shadow Secretary of State for Energy and Climate Change when the right honourable Member for Doncaster North secured Royal Assent for the landmark 2008 Climate Change Act. I was proud on behalf of my party to speak in support of the first law of its kind in the world setting a legally binding target to reduce greenhouse gas emissions by at least 80% by 2050 relative to 1990 levels.

Today, I am proud to stand on this side of the House to propose an amendment to the same Act which will enable this Parliament to make its own historic commitment to tackling climate change—a commitment that has been made possible by many years of hard work from Members across the House of Commons and beyond.

I want to thank in particular my noble friend Lord Deben for his leadership as chair of the independent Committee on Climate Change, the committee's members and staff, and the honourable Member for Leeds West and my honourable friend the Member for Cheltenham for their recent Bills that have also paved the way for today's legislation. I also pay tribute to the extraordinary work of my friend and ministerial colleague the right honourable Member for Devizes.

Today we can make the United Kingdom the first major economy in the world to commit to ending our contribution to global warming for ever. The United Kingdom was the home of the first industrial revolution. Furnaces and mills nestled in English dales, coal mines in the Welsh valleys, shipyards on the Clyde and in Belfast harbour. They powered the world into the industrial age.

We now stand on the threshold of a new fourth industrial revolution—one not powered by fossil fuels, but driven by green growth and clean, renewable technologies. Once again the United Kingdom and all its parts stand ready to lead the way. It is right that economies like ours, which made use of carbon-intensive technologies to start that first industrial revolution, should now blaze a trail in the fourth industrial revolution. Whether it be through our global offshore wind industry, our leadership on green finance or our unrivalled research base that is leading the charge on electric vehicles, we are showing that the economic benefits of cutting emissions can help to grow our economy.

Through our industrial strategy, the UK is already forging that future, leading the way in the development, manufacture and use of low-carbon technologies. By responding to the grand challenges that we have set—including on the future of mobility and clean growth—we are already creating thousands of new jobs right across the country. We are showing that there is no false choice between protecting our planet and improving our prosperity. We can and must do both.

Low-carbon technology and clean energy already contribute more than £44 billion to our economy every year. In 2017, energy-related carbon dioxide emissions in the UK reached their lowest levels since 1888. Last year, we secured more than half our electricity from low-carbon sources. Just last month, we set a new record for the number of days we have gone without burning any coal, since the world's first public coal-fired power station opened in London in 1882. We have said that we will completely phase out unabated coal-fired power generation by 2025, ending the harmful impacts to our health and environment for good. Together with Canada, we launched the Powering Past Coal Alliance, which has now seen 80 national and local governments, alongside businesses and NGOs, join together in a pioneering commitment to phase out unabated coal.

If our actions are to be equal to the scale of the threat, nations across the world must strive to go further still. We in the United Kingdom must continue to fulfil our responsibility to lead the way. That is why in October, following the latest evidence from the Intergovernmental Panel on Climate Change, the Government wrote to the independent Committee on Climate Change to seek its advice on our long-term emissions targets. Last month, it issued its response recommending that we legislate for the UK to reach net zero greenhouse gas emissions by 2050, taking into account our emissions from international air travel

and shipping, so I am today laying a statutory instrument —in fact, it is already before the House—to amend the Climate Change Act 2008 with a new legally binding net zero emissions target by 2050. Ending our contribution to climate change can be the defining decision of our generation in fulfilling our responsibility to the next.

However, it will require the effort of a generation to deliver it, so I am grateful to all those business leaders, faith leaders, scientists and climate campaigners—and many Members of this House—who have written to the Prime Minister and me to express support for this landmark proposal. It will require government and political parties of all colours to work together with all sectors of business and society. We must fully engage young people too, which is why a new youth steering group, led by the British Youth Council, will be set up to advise government—for the first time giving young people the chance directly to shape our future climate policy.

The assessment of the independent Committee on Climate Change is based on the latest climate science. It drives our ability to drive action on the international stage and considers current consumer trends and technologies. The committee concluded that a net zero 2050 target is feasible, deliverable and can be met within the exact same cost envelope of 1% to 2% of GDP in 2050 as the 80 per cent target when it was set, such has been the power of innovation in reducing costs.

It is, however, absolutely right that we should also look carefully at how such costs are distributed in the longer term, as Professor Dieter Helm recommended in his report to the Government. The Government are also today accepting the recommendation of the independent Committee on Climate Change for the Treasury to lead a review into the costs of decarbonisation. This will consider how to achieve the transition to net zero in a way that works for households, businesses and public finances. It will also consider the implications for UK competitiveness.

In fulfilling the scale of the commitment we are making today, we will need technological and logistical changes in the way we use our land: for example, with more emphasis on carbon sequestration. We will need to redouble our determination to seize the opportunity to support investment in a range of new technologies, including in areas such as carbon capture, usage and storage, hydrogen and bioenergy. But as the committee also found, the foundations for these step changes are already in place, including in the industrial strategy and the clean growth strategy.

Indeed, there is no reason whatever to fear that fulfilling this commitment will do anything to limit our success in the years ahead—quite the reverse. In our industrial strategy, we have backed technology and innovation, including the UK's biggest ever increase in public investment in research and development—the biggest that has ever taken place in the history of this country. The International Energy Agency report on the UK, published last week, found that:

'The United Kingdom has shown real results in terms of boosting investment in renewables, reducing emissions and maintaining energy security'.

By doubling down on innovation in this way, we can expect to reap the benefits as we move forward toward meeting this target by 2050.

I believe that by leading the world and harnessing the power of innovative new technologies, we can seize the full economic potential of building a competitive and climate-neutral economy, but we do not intend for a moment for this to be a unilateral action. If we are to meet the challenge of climate change, we need international partners across the world to step up to this level of ambition. While we retain the ability in the Act to use international carbon credits that contribute to actions in other countries, we want them to take their own actions, and we do not intend to use them.

We will continue to drive this, including through our bid to host COP 26. As the IEA report found last week, the UK's efforts are,

'an inspiration for many countries who seek to design effective decarbonisation frameworks'.

Just as we have reviewed the 2008 Act in making this amendment today, so we will use the review mechanism contained in the Act within five years to confirm that other countries are taking similarly ambitious action, multiplying the effect of the UK's lead and ensuring that our industries do not face unfair competition.

Finally, I do not believe that this commitment will negatively affect our day-to-day lives. No G20 country has decarbonised its economy as quickly as we have. Today, the UK is cleaner and greener, but no one can credibly suggest that our lives are worse as a result. Quite the reverse, we are richer in every sense of the word, for being cleaner, for wasting less and for cherishing, not squandering, our common inheritance.

We may account for less than 1% of the world's population and around 1% of global carbon emissions, but by making this commitment we can lead by example. We can be the ambitious global Britain that we all want our country to be. We can seize this once-in-a-generation opportunity to tackle one of the biggest threats to humanity, making this a defining and unifying commitment of an otherwise riven and often irresolute Parliament—a commitment that is agreed by all, honoured by all and fulfilled by all.

In the first industrial revolution, we applied the powers of science and innovation to create new products and services in which this country came to excel, but which came at a cost to our environment. In this new industrial revolution, we can innovate and lead all over again, creating new markets and earning our way in the world in the decades ahead, but in a way that protects our planet for every generation that follows ours. When history is written, this Parliament can be remembered not only for the times it disagreed but for the moment when it forged this most significant agreement of all. I commend this Statement to the House".

My Lords, that concludes the Statement.

3.51 pm

Lord Grantchester (Lab): My Lords, I thank the Minister for repeating the Statement made earlier in the other place, which we welcome. I am pleased to hear the Government confirm they will be adopting Labour's policy, announced at our 2018 conference, to target net zero emissions before 2050. I look forward to examining the statutory instrument that legislates for this target, and hope that time is found as soon as is reasonably possible to give it appropriate debate. Can the Minister confirm when it might be timetabled?

[Lord Grantchester]

This has become a generational issue. Parliament and Government must recognise the growing challenge of climate change. Meeting the target of net zero emissions by 2050 is the only way to avoid a climate catastrophe and the horrors that could be realised if the world does not come together to prevent a 1.5 degree temperature rise. Net zero emissions by 2050 must not be left as an ambitious aim; it must become a real achievement. The Government are not even on track to meet their existing climate targets, so they have a long way to go to engender confidence. We need only look to the comments made by the Committee on Climate Change and official BEIS statistics to see that the UK is far from meeting its fourth and fifth carbon budgets at present. The Government must show immediately that there is a genuine commitment to this new goal.

Will the Minister outline in detail the immediate steps the Government will take to ensure that the public can be confident that these targets will be met? The UK most emphatically needs a green industrial revolution to answer key questions and target causes of emissions today.

First, what policies does the UK need to clean up our gas supply? We need to develop carbon capture and storage and enable industry to use clean sources. Fracking is not an answer to today's challenge. Secondly, the Government must dismantle the blockages to onshore wind. They need to make sure that the cheapest form of renewable energy is able to contribute, and support new, innovative projects, low emissions and renewables, as the House discussed last week in relation to tidal power. Instead of closing down options, such as feed-in tariff schemes, the Government must enable commercial solar development to flourish.

Thirdly, what is the Government's policy on nuclear energy? What is the appropriate response on size of schemes between the Hinkley Point development and small modular reactors? We need urgent answers. Fourthly, what are the immediate plans of action for transport? Last month's electric vehicle registration figures show that new registrations are down almost 5% on last year and the use of buses is in freefall. Is the Department for Transport signed up to this target? Does the department realise that it needs to develop new policies? Can the Minister confirm what steps the Government will now take to increase the uptake of environmentally friendly forms of transport? How will they ensure that clean transport becomes affordable to working families so that they can feel engaged and contributing, not remaining chained to expensive polluting fuels?

There are many issues right across government. Another example of where clarity is needed is on zero emission homes. Home insulation measures have fallen by 98% since 2010. The UK needs to deal with immediate problems, and any policies put forward on offsetting emissions must be developed not to export or bypass our problems but as a route to going further and faster. The UK must look even further into the future towards paying back its carbon debt.

The threat facing the world from climate change is the greatest in human history, and responsibility for addressing it crosses all departments. While I welcome the Government's Statement and the target of zero net emissions by 2050, it must be realised that every government department should report back to Parliament on how they are contributing to reaching our climate targets.

Baroness Randerson (LD): My Lords, this is obviously a very welcome Statement, and all the more so because it is such a surprise. It has been a real conversion on the road to Damascus by this Government, which as a general rule have not featured environmental issues and climate near the top of their priorities. In fact, the Government have been keen to abandon a number of policies introduced during the coalition Government by Ed Davey when he was Secretary of State for Energy and Climate Change. That has led to a loss of impetus in the renewable energy industries. In practice, 2050 may still be too late, especially if the Government and their successors adopt the tactic of leaving the heavy lifting until last. They cannot simply reach for a few easy plastic straws; they have to tackle the really difficult issues at the start, and there has to be a very steep trajectory of change if this is to have the impact it should.

The noble Lord, Lord Grantchester, referred to transport policy. That will certainly need to be one of the first government policies to be revolutionised as a result of this new approach. Will the Government now rethink their leisurely approach to ending the manufacture of petrol and diesel cars? The date they have set is 2040. The industry is going to get there well before then, but it needs to have the Government supporting and encouraging it as well as pushing it along the way, so 2030 would be a much better date. Will the Government rethink their decision to reduce subsidies for the purchase of electric vehicles and their approach to the abandonment of the electrification of the railways?

Turning to energy, will the Government reconsider their opposition to the Swansea tidal lagoon? It has a huge contribution to make, along with subsequent lagoons around the coast once one is built. As I say, that could make a huge contribution to renewable energy in our country. How can the Government expect to reach this target when fracking is still a UK energy source?

Finally, what steps are the Government taking to encourage other nations to follow suit and to pursue ambitious global targets to mitigate the effects of the climate emergency? The Statement refers to the importance of working with other countries. I would be grateful if the Minister gave some specific examples of the way in which the Government will approach this in future.

Lord Henley: My Lords, I thank the noble Lord and the noble Baroness for their—I suppose I ought to say "relatively"—positive welcome for this Statement. I think I heard a slightly more positive welcome from their colleagues in another place when I listened to my right honourable friend make the Statement I am merely repeating. Anyway, I got some sort of welcome.

I will deal with some of the points made on the negative side of their so-called welcome—first, the allegation yet again that we are failing to meet the existing targets. We have met the first two carbon budgets, are

on track to meet the third and are over 90% of the way to meeting the fourth and fifth. Many of the policies and proposals in the *Clean Growth Strategy* published a little under two years ago are taken into account. Obviously, there is more to be done, but we are making progress, doing what we can and will continue to do what we can. As advised by the climate change committee, we now want to set stricter and more testing targets as necessary.

The noble Lord, Lord Grantchester, asked what steps we are taking. He knows about the 2017 *Clean Growth Strategy*. I hope he is awaiting the energy White Paper that will come out later in the summer, and we will probably have a chance to discuss this matter in greater detail when we get the statutory instrument. He asked when that will come before the House, and at this point I have to say that that is beyond my control. I am awaiting advice from the usual channels and will be ready and available to debate that with all noble Lords as and when it is ready.

The noble Lord, Lord Grantchester, then posed a number of specific questions about various forms of renewable energy, such as why we could not do more onshore. I point him to the success of offshore wind: we have seen a dramatic decrease in the costs of offshore energy, are now the world leaders in offshore wind energy and are making great strides forward. He asked what we are doing about nuclear. As I have made clear in a number of recent debates in this House, we are still committed to nuclear, which can provide carbon-free energy and the baseload we need at this stage. We will continue to pursue the possibilities of nuclear, but not at any cost—as my right honourable friend made clear when he made the announcements about Moorside and Wylfa. Again, we will continue to look at possibilities for expansion regarding small modular reactors, advanced modular reactors and so on.

The noble Lord, Lord Grantchester, then asked about transport. I can assure him that the Department for Transport is signed up, and we will continue to pursue the policy of phasing out petrol and diesel cars by 2040. I do not think it is right and proper that we should bring that forward. To answer the point made by the noble Baroness, Lady Randerson, the automotive industry deals in quite long periods of time. To disrupt it in such a way, as it is beginning the process of moving to electric vehicles, would not be good for that industry. We have seen the problems that Bridgend is facing; a Statement on that was made only two days ago. To bring forward that sort of disruption before the industry was ready would not be right or responsible.

Both the noble Lord and the noble Baroness asked about buildings, homes and so on. Again, I point to recent debates we have had on statutory instruments bringing in new obligations on landlords to ensure that their homes are suitably insulated. We have announced the future homes standards, with new-build homes being future-proofed with low-carbon heating and world-leading levels of energy efficiency by 2025, along with the energy efficiency regulations I referred to.

The noble Baroness also asked about Swansea tidal; again, I do not want to repeat everything I have said about that. We have debated that matter, and we debated the general aspects of tidal lagoons only last week. Yes, it is possible, if it can be done at an affordable price, but there is no point building a lagoon that is going to cost probably two or three times as much as nuclear power when one also has to take into account the carbon footprint of building things such as Swansea tidal. In effect, concrete and other matter is simply poured into the ground. Concrete, as we know, also has a fairly big carbon footprint, so do not think that tidal is going to be the be-all and end-all. It might be, and we will continue to offer help and research in that area, but it is not necessarily the answer to everything.

The noble Baroness also asked about fracking. It is right that we should continue to pursue a policy of looking at shale gas extraction. Gas is obviously going to continue to be a major part of our energy mix for some time. Shale gas extraction has a role to play as a transition fuel, and I hope all noble Lords will bear in mind that it offers us the possibility of greater energy security as we see quantities of gas in the North Sea decline. Is it not far better that we use our own gas, rather than import it from countries of a rather dubious sort in other parts of the world? I would have thought that the answer is yes, and we will continue to pursue the possibilities of shale gas extraction as we can.

Lastly, the noble Baroness asked how we are going to encourage others. My right honourable friend made it clear in the Statement that we are very keen to host COP26 next year. He also mentioned the praise we have received from the International Energy Agency for what we have achieved so far. We are the leading G7 country in this field and we can provide a good example not only for this country but for the rest of the world, and we will continue to do so.

4.08 pm

Lord Cunningham of Felling (Lab): My Lords, I welcome the Minister's Statement, and the Government's decision to set a target. Both are welcome, but the Minister and the Statement are implying profound changes in the lives of everyone in this country, including in housing, transport and workplace experience. The Statement needs to be underpinned by a sector-by-sector approach to how this will be achieved and delivered.

One thing that cannot happen—the Minister and I had an exchange about this earlier this week—is achieving this without a contribution from civil nuclear power. The world, never mind the UK, is not going to get by without civil nuclear power. We have abandoned our own ability to build a nuclear power station. I do not blame the present Government for this; other Governments are culpable, including the one I was a Minister in. The Government should set up a task force to see how we can recreate that ability on our own account, because depending on the Japanese, the Chinese or the French is a high-risk business. I hope the Government will give that serious consideration.

Lord Henley: My Lords, on the noble Lord's first point, he is right that these are great challenges and that there will have to be a change in behaviour. We should go about this in the right way, taking people with us because a great deal of this will involve changes in individual lives. We are already seeing this through a decline in car use by many people. I have certainly noticed that younger people are purchasing fewer cars

[Lord Henley]
and so on. Again, this is disruptive for the automotive industry but if we want to make these changes these things will happen, and changes are happening. We will need to take people with us. However, the Government must offer help in both innovation and research, and we will do that. On the noble Lord's point about nuclear, I have made it clear it that we have not abandoned nuclear but we want it at the right price. As we made clear in the nuclear sector deal last year, we will continue to put research into all aspects of nuclear, whether small modular, large nuclear or whatever.

Baroness Worthington (CB): My Lords, when we passed the original Climate Change Act in 2008, the UK was the first country to pass a legally binding target for reducing our climate-damaging emissions. I am glad that in setting that example we triggered action from other countries; Sweden and New Zealand have now also legislated. Now that we are taking this bolder step to remove all our domestic emissions, we will see others follow. In the past few weeks, both Chile and Japan have committed to moving to net zero targets. I commend the Government and everyone who has contributed to getting to this position. The UK is taking the morally correct path. We are showing leadership at a time when the world is completely distracted by the rise of nationalism and populism. We are saying that there are more important issues that unify us as citizens of this sole planet that we share. We must take every step to ensure that this is not just a paper target but is backed up by policy. We have decades of examples of how we have done this; we are not starting with a blank sheet of paper. We have shown that we can decarbonise fastest among all OECD countries without it affecting our growth or economic development. We are a shining of beacon of hope in fairly dark times. I sincerely hope we will take our message to the UN in September, to Washington and Beijing, and that we will see others stepping up and increasing their ambition. It is easier and cheaper to do this than it has ever been. The technologies are there, the political will is growing and the children are out on the streets demanding that we do more. I am delighted that the Government are showing such leadership. Now we need to take it to Parliaments all around the world.

Viscount Younger of Leckie (Con): My Lords, before the Minister replies, I suggest that questions be kept succinct and short to enable as many Peers as possible to speak in the time available.

Lord Henley: My Lords, I shall try to keep my answers short. I accept what the noble Baroness said: in 2008 we were the first country to legislate and we are now bringing forward tighter proposals to take us to net zero by 2050. I think the French have just brought forward legislation on this. Let us see if we can pass ours before the French.

Lord Howell of Guildford (Con): I declare an interest, as in the register. Has my noble friend seen yesterday's reports that last year worldwide carbon emissions rose faster than for many years past? Indeed, the amount by which carbon emissions increased is said to be the equivalent of putting 400 million new motor cars on the road—that is an additional third of all the cars on the roads on the planet. Energy consumption rose even faster—to record levels—last year. Does this not indicate that whatever we do here, however admirable it is and however we try to promote our example, the fact is that the fundamental approach—even despite Paris—to world carbon emissions is not working. Is not a totally new approach now needed?

Lord Henley: My Lords, my noble friend is right to say that what we do on our own about emissions will not make that big a difference. However, the leadership we can show is important. That is why we are committed to going further and trying to secure the hosting of COP26 next year. We will do all we can to continue to show leadership in that area.

Lord Taylor of Goss Moor (LD): My Lords, I strongly welcome the Government's commitment, particularly given the Chancellor of the Exchequer apparently trying to argue that they should not make it. This is an important moment, supported across the House.

I work in development, housing and renewable heat. I should declare that, but I do so because I am deeply concerned that, while a car may last a decade or so, the houses we build today will—we hope—last a century or much longer. Between now and 2025, when the Minister said we would introduce the new regulations, we will have built some 2 million more homes. Retrofitting old homes to meet zero carbon targets for heat and water is extremely difficult. We have that problem for all those we have already built. We should not build millions more without making that long-term decision now. The Committee on Climate Change has pointed that out and asked for urgent action. London has shown that if you bring in new standards, the market quickly moves to them. Will the Minister bring forward the changes that he has indicated will not come through until 2025?

Lord Henley: My Lords, on his first point, the noble Lord is wrong to say that the Chancellor was trying to squash this: he was merely pointing out potential costs. As was made clear in the Statement, the climate change committee estimates that the annual cost of delivering a net zero target is within the same range as the 80% target was when it was set in 2008. Our own assessment of costs is within that range. It is right that the Chancellor takes an interest in the likely costs—after all, he is responsible for these measures.

The noble Lord is right to point to the importance of what we do about homes. We have an appropriate target and have announced what we want to do about energy efficiency by 2025. We will stick to that date, which will allow us to meet our target.

Lord Haskel (Lab): My Lords, in the Statement the Minister spoke of a review in five years' time. Why is this necessary, particularly after what the noble Baroness said? Surely this will be interpreted as showing less commitment? It would provide an excuse to delay

investment for five years because it provides too short a timescale. Will the Government give this more consideration?

Lord Henley: My Lords, the noble Lord will remember that the idea of a five-year review was part of the original 2008 Act—which I am sure he supported, because the Act was introduced by a Government of which he was probably part at the time. We will continue with this idea, but we can review matters further if there are changes and developments as we commit. We are bound to review every five years but could do so earlier.

Lord Robathan (Con): My Lords, I welcome this aspiration—that is what it is. I notice that air travel was not mentioned, although it leaves a particularly big carbon footprint. Can my noble friend help me: which of this country's political parties does he think will put in its next manifesto that it will stop the good people of this country going on holiday to the Costa Brava or Florida, or, indeed, flying back first-class from Los Angeles to take part in demonstrations in this country? That is contributing greatly to the carbon in the atmosphere.

Lord Henley: I can give my noble friend an assurance. If he had listened carefully to the Statement, he would know that our plans cover net zero for the whole economy, including aviation and shipping. Emissions from domestic flights and shipping are covered by our existing domestic legislation. The Committee on Climate Change accounts for international flights in its advice on setting our interim carbon budgets. This will continue to be the case for the more ambitious target.

Lord Campbell-Savours (Lab): Will the Minister consider seriously the impact assessment for each sector proposed by my noble friend Lord Cunningham of Felling?

Lord Henley: My Lords, an impact assessment is made by the climate change committee. At this stage, departments—this will involve a whole array of them—have not produced individual ones. As each suggestion is made about where we have to go in each area, appropriate impact assessments will be made.

Lord Lilley (Con): My Lords, I draw your attention to my interest as a trustee of the Global Warming Policy Foundation. The Government have embarked on a policy that will result in one of the most expensive programmes since the introduction of the welfare state, without first carrying out a cost-benefit analysis. Is that not extraordinary given that when the previous target was raised from 60% to 80%, in the Government's estimates the cost more than doubled? Going from 80% to 100% will certainly more than double it again. The Chancellor believes that it will cost a trillion pounds, which could otherwise be spent on welfare programmes, health and education; the UN climate committee believes it will cost at least twice what the Treasury estimates; and the New Zealand Government have estimated that it will cost five times as much relative to their economy, as has been suggested. Given that, is it not irrational to enter this, as any, policy programme without first estimating the costs and calculating the benefits? Why are we doing it?

Lord Henley: My Lords, the Committee on Climate Change, as I made clear, has given us its vision of the likely cost of delivering a net zero target; that is within the same range as the original 80% target set out in 2008. It is equivalent to 1% to 2% of GDP by 2050, and our own assessment of costs is broadly within that range. One has to add that the impact of this could be partly offset by the many benefits, such as economic growth, green-collar jobs, reduced air pollution and reducing the risks and potential costs of catastrophic climate change. We will continue with that and, as was made clear in the Statement, the Treasury will also make its own further assessments of the costs. It is quite right that we should take those into account. As I said in response to the noble Lord, Lord Cunningham, it is very important that as we pursue this policy, which we believe is entirely necessary and agreed on most sides of the House, we take everybody else with us.

Lord Howarth of Newport (Lab): My Lords, does the Minister agree that, whatever it costs, we have to tackle climate change effectively if we are to avoid catastrophe? Given that all other policies that Parliament is concerned with are trivial by comparison, will the Government put this right at the top of their priorities?

Lord Henley: My Lords, this goes back again to that point about the importance of taking people with us. So much of what needs to be done comes down to individual decisions about how people live their lives and how they are taxed. If we can take people with us it will be much easier to meet those targets. I agree with the noble Lord that it is a very pressing issue and one of the most important in front of us.

Viscount Ridley (Con): My Lords, I declare my energy interests as listed in the register. Does my noble friend the Minister agree that the people in denial in this debate are those who think we could meet such an ambitious target either by renewables or by asking people to wear a hair-shirt and reduce their consumption of such things as foreign holidays? Given that solar and wind provided 3% of world energy last year, and only a little more in this country, it is unrealistic to assume that they will make a significant contribution to meeting a target like this, as people such as Dieter Helm and the late Sir David MacKay have said. Does the Minister agree that the only way we would hit such a target in an affordable manner would be if we took carbon capture usage and storage, as he has mentioned, and made that into a realistic prospect, in which this country has a definite selective advantage because of the existence of the North Sea oil industry, which could be used to store carbon?

Lord Henley: My noble friend makes the point that it is important that we take people with us. As he says, people are not going to wear hair-shirts or give up their holidays. I agree with him that gas will continue to play a major part in this. That is why one occasionally

[LORD HENLEY]
looks rather hopefully over to the Liberal Democrats and others to seek their support for such things as shale gas extraction. He is also right to refer to the importance of carbon capture and storage. We will continue to research matters in that area. We should also look at further research into the storage of electricity and other forms of energy; again, this came up only recently.

Lord Soley (Lab): Would the Minister accept that research bodies and universities have to play a central role here? This is to do with not just the climate change gases that we produce but the rapid melt of the permafrost in the northern hemisphere. We are seeing some effects of this even in north Scotland, with some fires burning out of control, which did not happen previously. Controlling the use of climate-changing gases is important, but the ability to extract them from the atmosphere is particularly important.

Lord Henley: The noble Lord points out how important it is that we continue all the research we do. A great deal of research is going on into the areas he talked about. I could also take him through research I have seen into wave power, tidal energy and a whole range of other areas. We will continue to support that. Innovation is at the heart of what we seek. It potentially has great benefits for this country, as well as in reducing our carbon dioxide production.

Baroness McIntosh of Pickering (Con): My Lords, I declare my interests as set out in the register, particularly my interest as president of NEA. I am not a scientist; could my noble friend explain how we square the circle between reducing carbon emissions and fracking for shale gas? Can he also assure us that there will be joined-up government in the Bills coming before this House, particularly the Agriculture Bill and the environment Bill? Can he assure us that many of the policies he has set out today will be on the face of those Bills?

Lord Henley: My Lords, I assure my noble friend that both the Agriculture Bill and the environment Bill will be very important in this field. On shale gas extraction, I made the point earlier that it is very important that gas continues to be a major part of our fuel for a considerable time, as a transition fuel as we move towards clean energy, coupled with carbon capture and storage. It also has the advantage of providing us with the energy security we need. If she does not want shale gas extraction as we see a reduction in gas coming from the North Sea, it means we have to get our gas from rather peculiar places, as I made clear earlier.

Baroness Hayman (CB): My Lords, earlier today this House discussed the upcoming Commonwealth Heads of Government Meeting in Kigali. The Statement refers to the UK's bid to host COP 26, but does the Minister agree that it is important to raise these issues with other countries? We want to lead and ask our own citizens to take action, but we also need to discuss this with other countries, particularly the Commonwealth, and encourage them to make this a priority.

Lord Henley: My Lords, it is not for me to say what CHOGM should discuss, but the noble Baroness is quite right to stress the importance of that meeting. We are very lucky to be members of a body such as the Commonwealth that offers us the chance to influence and, I hope, provide leadership in this area. COP 26 also provides an opportunity to do this and that is why we will continue to try to secure the hosting of it in the coming year.

Preparing Legislation for Parliament (Constitution Committee Report)

Motion to Take Note

4.28 pm

Moved by ***Lord Norton of Louth***

That this House takes note of the Report from the Constitution Committee *The Legislative Process: Preparing Legislation for Parliament* (4th Report, HL Paper 27).

Baroness Goldie (Con): My Lords, the noble and learned Lord, Lord Judge, finds himself addressing matters of sentencing in the Moses Room. By agreement through the usual channels, it has been arranged that the noble and learned Lord will speak after my noble friend Lord Dunlop. All relevant contributors to the debate have been informed.

Lord Norton of Louth (Con): My Lords, I beg to move the first of the two Motions standing in my name on the Order Paper. I do so in place of the noble Baroness, Lady Taylor of Bolton, who chairs the Constitution Committee, which has produced the two reports we are considering. She is very sorry to miss today's proceedings.

It is a pleasure for me to open the debate. In 2004, the Constitution Committee, which I had the honour of chairing, published a report, *Parliament and the Legislative Process*. We looked at the legislative process holistically, examining not only the process once a Bill was introduced but what happened prior to a Bill's introduction and after it had received Royal Assent. We took the view that success should be measured not by whether a Bill received Royal Assent—seen by some Ministers as the end of the process—but rather by whether it achieved its intended effect.

Among our recommendations were that Bills should be subject to pre-legislative scrutiny as the norm and not the exception, and that there should be a structured process of post-legislative scrutiny, assessing Acts against the criteria set for achieving their purpose. We also advanced proposals for the more effective examination of Bills as they pass through Parliament, including that every Bill should at some stage during its passage be subject to scrutiny by an evidence-taking committee. Some of our recommendations were subsequently adopted, and now form an integral part of the legislative process, such as improvements to explanatory materials and the Government undertaking a review of most Acts within six years of their commencement.

I fear that Governments have shown less enthusiasm for implementing some of our other recommendations, such as pre-legislative scrutiny of draft Bills being the norm and the establishment of a House business committee. Perhaps our most high-profile recommendation —that the Committee stage of each Bill should provide the opportunity for the public to give evidence—has been adopted for Bills that start in the House of Commons but not for those that start in your Lordships' House. This is a matter to which the committee may return in a subsequent report.

We felt that more than a decade after our first report, it was time to take a step back from individual Bills, to look again at the entirety of the legislative process and examine how laws are developed, drafted, scrutinised and disseminated. Rather than producing one report, we decided to publish four focused reports, targeted at discrete aspects of the legislative process: preparing legislation for Parliament; the delegation of powers; the passage of Bills through Parliament; and after Royal Assent. Two of those have now been published, and are the subject of today's debate.

The first of these, *The Legislative Process: Preparing Legislation for Parliament*, was published in October 2017. The purpose of this stage of our inquiry was to look at the policy preparation undertaken by the Government before legislation is introduced to Parliament. In this report, we are broadly positive about how the Government develop policy using embedded mechanisms to gather and evaluate evidence. We also welcome the Prime Minister's commitment to a greater use of Green and White Papers.

We reiterate the conclusion of our 2004 report—that it should be the norm for Bills to be published in draft, to afford more opportunities for pre-legislative scrutiny. It is regrettable that Governments have generally seen draft Bills as an optional extra, when, in our view,

"pre-legislative scrutiny should be considered an integral part of the wider legislative process".

Although several Bills have undergone pre-legislative scrutiny in this elongated Session, they constitute the exception, not the rule.

Perhaps the biggest area of our concern is the quality of legislation that the Government introduce to Parliament. This is not a reflection on the standards of the drafting of legislation and the work carried out by parliamentary counsel. Our concern is with the quality control function of the PBL Committee of the Cabinet. That control is not what it could and should be. In our report, we endorse the proposal for the creation of a legislative standards committee, to develop and monitor a set of standards that legislation must meet before it can be introduced. This work would ensure that Bills introduced to Parliament are ready for its scrutiny, and that the essential explanatory materials accompanying Bills are complete and satisfactory.

We also address the important parts of the statute book that have become inaccessible to practitioners and the public alike because of a succession of Bills that have amended previous Acts. One has to think only of the changes in immigration law in recent decades. The challenge of navigating that area of the law is now considerable. We urge the Government to consider the pressing need for greater consolidation of the law. With that in mind, we strongly welcome the introduction of the Sentencing (Pre-consolidation Amendments) Bill, paving the way for the Law Commission's sentencing code to simplify sentencing legislation. The standard line from the Government on consolidation and Law Commission Bills is that they might happen when parliamentary time allows. Given the current lull in legislative activity, this might be an especially appropriate time to introduce more consolidation measures.

I turn to our second report, *The Legislative Process: The Delegation of Powers*. Delegated powers are, of course, an important and necessary part of the legislative process. When they are used appropriately, they provide the Government with the flexibility to fill in some of the blanks or update aspects of the policy detail without the need to go through the extensive and rigorous primary legislation process. The Delegated Powers and Regulatory Reform Committee does an outstanding job in policing such matters. If the Government heeded its advice more frequently, the quality of legislation would improve markedly. Regular readers of the Delegated Powers Committee's reports, as well as our own, will know that the Government's use of delegated powers is regularly found to be inappropriate. It is constitutionally unacceptable that the Government seek to create criminal offences as well as new public bodies by secondary legislation, to which only limited parliamentary scrutiny applies.

The Government's response to our report suggested that such uses of delegated powers are,

"likely to be few and far between".

We do not find this persuasive. Indeed, on Monday we published a report on the Rivers Authorities and Land Drainage Bill—a Private Member's Bill supported by the Government—which contains a delegated power to create new public bodies in the form of river authorities. It is not clear why the Government acknowledge that these powers,

"must be approached with caution",

yet they continue to appear in Bills.

Similarly, the committee found that "skeleton Bills"—Bills comprising little more than delegated powers—"inhibit parliamentary scrutiny". We concluded that it was,

"difficult to envisage any circumstances in which their use is acceptable".

Perhaps the most egregious recent example of this is the Agriculture Bill. I quote from the report of the Delegated Powers Committee:

"Parliament will not be able to debate the merits of the new agriculture regime because the Bill does not contain even an outline of the substantive law that will replace the CAP after the United Kingdom leaves the EU. Most debate will centre on delegated powers because most of the Bill is about delegated powers. At this stage it cannot even be said that the devil is in the detail, because the Bill contains so little detail".

The Government's response on skeleton Bills was that the term was sometimes used to describe bills in which the overall policy framework was clearly set out, and states that,

"there have been and will continue to be sound reasons",

[Lord Norton of Louth]
for the use of skeleton Bills in a limited number of cases. It is not clear what the sound reasons are. The response is one of assertion and not justification. I shall return to its inadequacies.

Henry VIII clauses were another area we consider,
"a departure from constitutional principle",
and we conclude:

"Widely drawn delegations of legislative authority cannot be justified solely by the need for speed and flexibility".

Although, as the Government acknowledge,
"a full and clear explanation and justification",
is clearly helpful, Henry VIII powers should be sought much less frequently than has been the case in recent years.

This House has shown notable restraint towards the Government's approach to delegated legislation. Indeed, the House has shown remarkable flexibility in accommodating several hundred EU exit statutory instruments. We pay tribute to the work of the Secondary Legislation Scrutiny Committee for undertaking that task on top of its other important work. However, there are limits. We call on the Government to be more responsive to issues raised about statutory instruments and to use the flexibility of the system to withdraw and re-lay amended instruments when parliamentary scrutiny has identified concerns. We suggest that if the Government do not use their delegated powers appropriately, the restraint shown by this House may become unsustainable.

I turn to the Government's responses to the reports. The two responses were clearly written by different hands; one, on the delegation of powers, addressing each recommendation, and the other, on the legislative process, being more general and thematic. Both, though, have one thing in common: they seek to defend existing practice and concede nothing. The way in which they are written is not persuasive. Some of our proposals are matters for the House, not the Government, such as the recommendation for a legislative standards committee. I very much hope that this recommendation will be taken up by the Liaison Committee as part of its current review of committees, and likewise with the proposal for a post-legislative scrutiny committee.

On matters that are within the remit of the Government, I have a number of questions for my noble friend Lord Young of Cookham. What do the Government now do that they did not do before because of the committee's reports? Following my earlier comments, can he confirm that the Government will maintain the practice of publishing Green and White Papers? What is the Government's strategy for pre-legislative scrutiny: is it integral or an optional extra to the legislative process? Do the Government have plans to introduce any further consolidating measures, and in what circumstances does he think skeleton Bills are appropriate?

I conclude by putting on record our thanks to all those who gave evidence to us, our staff and our two legal advisers, Professor Mark Elliott and Professor Stephen Tierney. Professor Elliott is about to step down from his role to take on enhanced responsibilities in the law faculty at Cambridge, and I place on record the committee's thanks to him for his outstanding contribution to the work of the committee. I beg to move.

4.42 pm

Lord Beith (LD): My Lords, it is a pleasure to follow the noble Lord, Lord Norton of Louth, and to pay tribute to his work on constitutional issues on the committee, in his professional career and in various other organisations that focus on them. I endorse his comments on the staff and advisers to the committee.

The two reports that we are debating today are linked, and not merely because they are two of a sequence of four studies by the Constitution Committee into the legislative process. They are linked by cause and effect. Excessive and inappropriate use of the delegation of powers undermines the quality of legislation, leading to legislation that is unclear, incoherent, inaccessible or badly scrutinised. Furthermore, the excessive use of regulations to fill in the gaps in legislation is often a consequence of a failure to prepare legislation properly. The policy has not been worked through and properly consulted on, so the Bill leaves gaps to be filled by regulations. This is particularly the case when new elements are added to a Bill in the course of its passage through Parliament. All new laws should have to pass the tests suggested to us by the Office of the Parliamentary Counsel: is it necessary, effective, clear, coherent and accessible? Many new laws do not, at least in part, pass those tests.

The legislative landscape is littered with Christmas trees, skeletons and signals. For the uninitiated, Christmas trees are Bills on which departments hang a diversity of provisions that they have not managed to get into the programme as individual Bills; skeleton Bills contain none of the detail and depend on delegated powers; and signal Bills may have no practical effect because their only purpose is as a declaration that the Government want to be seen to be doing something but cannot think of anything particularly useful to do.

The committee sets out remedies for these failings. First, legislation should have an evidence base which has been the subject of wide consultation and thorough scrutiny. Then the norm should be, as the noble Lord said, for Bills to appear first as draft Bills, scrutinised by committees of either or both Houses of Parliament. Issues identified can then be dealt with before the Bills acquire the level of political and government commitment, which leads to a defensive attitude and an unwillingness to amend. Parliamentary counsel should, as it has traditionally done, make clear where a legislative mechanism is unworkable, inappropriate or confusing in its legal effect. If it does so, within government it is the job of the Leader of the House of Commons and the law officers to challenge colleagues over such defects.

The Constitution Committee, as the noble Lord, Lord Norton, has pointed out, supports and reiterates the proposal for a legislative standards committee to test proposed legislation—not on the merits of its policies, but on whether new legislation is needed, whether its impact has been properly assessed and whether it creates coherent law. That process would sit alongside the work of the Constitution Committee and of the Delegated Powers and Regulatory Reform Committee in their examination of new Bills on the issues for which they are each responsible. The Constitution Committee also strongly commends accelerating the process of consolidating Bills. It is satisfying that, as

we speak, the Grand Committee in the Moses Room is looking at the pre-consolidation legislation on sentencing, which accounts for the noble and learned Lord, Lord Judge, today demonstrating his ability to be and speak in two places almost at once.

If new Bills have been well prepared and have gone through the tests we recommend, they will be less likely to have the inappropriate recourse to delegated powers, which we have identified and criticised in our 16th report—the other report we are considering today. There will still be issues about delegated powers and the inadequate scrutiny which so often applies when they are exercised, particularly in the Commons. Some of us have experience of the brief and inconsequential Committee process which attends negative instruments in particular in the Commons.

We need also to reconsider how inappropriate or defective statutory instruments are dealt with in our own House. We were concerned that the question asked by departments and Ministers when considering whether to use secondary rather than primary legislation for important features of a Bill is not always an objective test of appropriateness, but a question of what Parliament will allow—what powers can be pushed through, perhaps on the back of general support for the policy objectives of the Bill.

Delegated powers are a necessary part of the legislative process, but the committee said:

"It is constitutionally objectionable for the Government to seek delegated powers simply because substantive policy decisions have not yet been taken".

The DPRCC said that the Childcare Bill in Session 2015-16 contained,

"virtually nothing of substance beyond the vague 'mission statement' in Clause 1(1)".

Our committee, like the DPRCC, has raised strong objections to the use of delegated powers to create criminal offences legislation or to set up public bodies. The Children and Social Work Bill presented to this House in the 2016-17 Session did both these things and was strongly criticised by us at the time. As the noble Lord, Lord Norton, referred to, we may be faced with a rivers authorities Bill which allows numerous public bodies to be created by delegated powers.

Henry VIII powers, by which statutory instruments can change primary legislation, are necessary for minor tidying—for example, to make sure that the law correctly cross-references legislation passed subsequent to the introduction of the Bill in question. However, their use should be strictly limited. If the Government continue to fail on this test, they will have my noble and learned friend Lord Judge to answer to.

When substantial issues come before Parliament in the form of statutory instruments, with very rare exceptions, they cannot be amended. If they are defective, or if they include provisions which are deeply controversial and might be rejected if presented separately, the House faces a take it-or-leave it decision on the instrument as a whole. Although it would be technically possible to allow for amendments, it would be a significant change. It would require different procedures and the committee is not recommending such a course.

The appropriate response in such circumstances is for the Government to withdraw the instrument and relay it in amended form or, in case of urgency, to bring forward an amending instrument at a later date. It does happen, but Governments are too reluctant to do it. Again, they are defensive: the instrument is their baby and they will not hear a word said against it, although I remember the late Patrick Mayhew, when he was Solicitor-General, announcing in a committee sitting that a Bill he was taking through was not capable of fulfilling its intended purposes and could not be made so, so would not be further proceeded with. That kind of refreshing honesty is something we could do with a little more of. The natural instinct of government, I fear, is not to admit it has got it wrong.

This House has a device to identify and object to failings in statutory instruments—regret Motions—but these have no direct effect; they are not fatal. They may be appropriate, but an expression of opinion is all that your Lordships intend. They are not adequate to prevent the fundamentally inappropriate use of a statutory instrument, which brings me to the case of the tax credits regulations of 2015, which had far-reaching effects. This House passed a delaying Motion. The Government had a blue fit and called in the noble Lord, Lord Strathclyde, to act as a sort of one-man fire brigade, but then abandoned the proposed regulations—an appropriate course of action in the end. In paragraph 109 of our report we set out why we think it is wrong to frame discussions on the question of what happened in that instance as if it were about the balance of power between the two Houses of Parliament, the Lords and the Commons. It is not; it is about the balance of power between Parliament and the Executive, about whether and how the Executive should be held to account.

As we have explained, the Government have the means at their disposal to confine delegated powers to the purposes for which they are legitimately intended and to correct faults in them identified by Parliament. If they fail to do so, they should recognise that an occasional defeat is neither momentous nor necessarily fatal to their policy objective. This House exercises great restraint in these matters, but the committee makes it clear in its unanimous conclusions that:

"If the Government's current approach … persists … the established constitutional restraint shown by the House of Lords towards secondary legislation may not be sustained".

Those words were not chosen lightly.

4.52 pm

Lord Hunt of Wirral (Con): My Lords, I declare my interests as set out in the register, in particular as a partner in the global commercial law firm DAC Beachcroft and of course as a member of the Constitution Committee. I very much welcome this debate. It is hard to believe that more than 18 months have passed since the publication of the fourth report, *The Legislative Process: Preparing Legislation for Parliament*, and more than six months since the 16th, *The Legislative Process: The Delegation of Powers*. I am proud to be associated with both excellent reports, but I hope the House will forgive me if my remarks focus on the latter and on the thorny question of the proliferation of secondary legislation, which has just been dealt with so effectively by my colleague, the noble Lord, Lord Beith, whether it matters and what to do about it if it does.

[Lord Hunt of Wirral]

I pay tribute to my fellow committee members and to the excellent team, led by our clerk, who did such sterling work gathering evidence and drafting the report. I also pay tribute to the work of what I describe as our sister committee, the Delegated Powers and Regulatory Reform Committee, which frequently cuts off inappropriate and excessive proposals for delegation of powers at the pass, saving us all a lot of time, energy and aggravation later in the process. My noble friend Lord Blencathra, who I am delighted to see is to participate in this debate, together with his colleagues, has made that committee a vital part of our system of governance and proper accountability.

Of course, our 16th report makes some detailed recommendations that are well worth consideration, but it also touches on and draws on wider, deeper themes—vital themes for us all. Paramount among these is the great challenge we all face, and the responsibility we all share, of rebuilding public confidence in our institutions. Noble Lords will be relieved to hear that I have no intention of producing an extended exposition on the interminable matter of Brexit. However, I am relieved that the House of Commons has just rejected by 309 to 298—a majority of 11 votes—what I thought was an irresponsible Motion to try to rewrite the Standing Orders. I am sure it was right to reject that, but all of us in public life need to do everything in our power not only to understand the feelings that induced 17 million people to vote for Brexit in 2016 but now to address those profound concerns earnestly, comprehensively and with genuinely open minds.

For some time now, our nation has been suffering a serious and deepening loss of confidence in our social and political institutions. The causes of that are certainly economic as well as political—arguably, primarily economic—but the time has surely come for us to go back to first principles and examine why we are all here in this place and how we might best fulfil our responsibilities to the British people.

Some might grandly dub this a new constitutional settlement. I see it more as a reassertion of time-honoured and tested values and processes. Even before the great deluge unleashed by Brexit, the volume of legislation coming to this House and the other place had become daunting—even overwhelming and, dare I say it, excessive. As a consequence, the process of serious and effective scrutiny has become grievously overloaded.

I was first elected as a Member of Parliament in March 1976. I served in that office for 21 years, and the duration of my service in this House has just overtaken that. Soon after coming into Westminster I found myself appointed a party spokesman, on the Front Bench straightaway, and after the Conservatives won the 1979 election I spent 16 years without a break in various roles on the government payroll, for which I thank the public very much indeed. I recount this not in praise of myself, but to tease out an argument about the role and responsibility of parliamentarians, especially in a system such as ours where members of the Executive are also members of the legislature.

Through all those years, I hope I never lost sight of the primary role of the legislature as distinct from the Executive, of which I was also part. We are here principally to hold the Executive to account. Those dogged maverick Members whose relationship to Ministers is rather like that of a dog to a bone are heroes of our system, relentlessly tiresome to those whom they pursue but vital to the operation of our democratic system. I am glad to see one or two in their places in this House today.

Ultimately, both reports are about ensuring that we have a system of effective accountability that is both methodical and, when the occasion demands, operates in the buccaneering spirit of those great free-spirited parliamentarians. Yes, there is far too much legislation and a concomitant danger of overload, but there is no excuse for the Executive seeking to push significant measures—including some, as my noble friend Lord Norton pointed out, that create new criminal offences or yet more public bodies, as my colleague the noble Lord, Lord Beith, has just pointed out—into the parallel, all too convenient and faster track of secondary legislation.

Whether or not Brexit happens, and regardless of the shape it ultimately takes, we must realise that our parliamentary system has largely lost its former reputation, domestically and internationally, as the very model of how a free nation should govern itself. We now have to rebuild our systems of accountability, our will to challenge in the public and national interest and, thereby, our collective reputation.

As part of that process of restoration, the clear and discernible upward trend in the accretion of delegated powers must stop now and be clearly reversed. Otherwise, our task of holding the Executive to account will simply become impossible. Of course, it is only human that we worry about these matters much more when we are in opposition. When it is our own noble and right honourable friends who take the decisions, perhaps we have tended to become too blasé.

That makes it all the more important that we should take this question as far as possible out of the normal jousting match of partisan politics. I well know from experience that precedents matter and they carry across from one Administration to the next, regardless of party. That is why we must all, regardless of affiliation, take an honest and open look at how and why these so-called Henry VIII powers are creeping back into our lives on a worrying scale.

As our report reminds us, unlike our system for primary legislation, that for statutory instruments contains no mechanism at all for making amendments. We can, of course, reject them, but only Ministers can revise them. The reality is that, for a number of reasons, we hardly ever do reject them. According to the report, since the last war, the two Houses combined have done so in fewer than 0.01% of cases—just 16 out of 169,000. In practice, except where an eagle-eyed Member happens to spot something offensive or deleterious and divides the House, the passage of SIs is little more than a weary and routine process of rubber-stamping.

I was particularly disappointed with paragraph 7 of the Government's response to our report on delegated powers, in which the Leader of the House of Commons said:

> "It is not always possible to set a clear dividing line as to what amounts to a matter of policy and what constitutes 'filling in the detail'".

My answer is: of course it is possible—and vital, too. Why on earth cannot Governments see that, whatever their complexion? As the Secondary Legislation Scrutiny Committee of this House—I pay tribute to my noble friend Lord Trefgarne and his colleagues who are setting the gold standard in producing reports of this nature—warned in paragraph 26 of the 51st report of Session 2017-19,

"significant policy developments should not be merged with a mass of minor adjustments to the extent that they risk being overlooked".

Quite right.

In conclusion, I am well aware that replacing secondary legislation with primary legislation will necessitate more work, both here on the Floor of the House and in Committee. However, in some instances I believe that it is simply vital to the good function of our system of accountability—our very democracy—that this happens. We must step up and make it happen. As we state:

"This House has exercised a remarkable degree of constitutional restraint in this matter".

I am sure it is also correct to warn that this restraint cannot be taken for granted indefinitely.

I warmly commend both reports to the House. I hope that in their small way they contribute to the restoration of the good name of our great Parliament.

5.04 pm

Lord Mackay of Clashfern (Con): My Lords, it is with the greatest pleasure that I follow my noble friend in this debate. I agree with all that he said, I think, without exception. I am also grateful for the reports which are the subject of this debate and for the Constitution Committee which, with its staff and advisers, produces such excellent reports. I join my noble friend in thanking the members of the committee who have helped to keep this show on the road, although that has become more difficult with the amount of work that has been pushed into their trays.

It is possibly right for an elderly gentleman to look back a bit, and I am inclined to do that this afternoon in relation to two Bills that I had the honour of presenting to this House a long time ago. The first of these was the Children Bill, which became the Children Act 1989. The first report that we are considering comments on the necessity for policy to be clear, because you cannot draft a clear statement of something that is not originally clear. If you do not know what the policy is, it is mighty difficult to express it clearly; you have to find that out first. That is important.

The first Bill, which became the Children Act 1989, came out of a detailed consideration by the Law Commission. I believe that the Law Commission, under the chairmanship of the late Lord Scarman, developed the idea of consultation as a way of developing the law. He and his early colleagues—I was glad to have a chance to chair with him later on, because I was a Law Commissioner in Scotland for some little time—made the point that, as members of an independent body, it was difficult for them to frame policy, because as soon as they did so they became less than independent. Therefore, they have to try to analyse what people feel is required, and proper consultation in detail, and with time, is an important part of that.

The Law Commission had done extremely good work in collating the various views on a very complicated system of child welfare in this country, and put it into an extremely clear report. It was my particular privilege at the time that the commissioner was none other than the present President of the Supreme Court, so my acquaintance with her goes back quite a long time. I believe that the resulting Bill was extremely good, but it was good not because I presented it but because it was well prepared. I very much commend that.

It is not always open to get the Law Commission to do something. Fortunately, it has done something that is the subject of debate in the Moses Room this afternoon. I am glad to see that my noble and learned colleague, Lord Judge, has been able to change the rules so that he can be in both places at once, which is part of his skill that I am glad to admire.

The Children Bill went through with a lot of detailed consideration. I was fortunate, in that not only did I have the Law Commission's support but an extremely good, very experienced social worker to help me with proposals for dealing with delicate matters. One of the most delicate in the whole Bill was the threshold for interruption by the state in family relationships. That is an extremely important and difficult area. Ultimately, together with both Houses of Parliament, a formulation was made.

As far as I know, that formulation has stood the test of time. Reference has been made to various Bills that have come along in the children and social care business since. I venture to think that the main structure of the 1989 Bill has never been improved upon, and was extremely effective.

There is quite a lot discussion in the report about post-legislative scrutiny. One of the things we did, which I think was right, was not to bring the 1989 Act into effect immediately, but to help the people who were going to put it into effect to understand what was wanted and to assimilate the principles, which were very basic, structured and well expressed. They were given time to do that and as a result, when the Act came into force two years later, it worked pretty well. One of the doubts I have—doubts accumulate with the passage of time—is the amount of time that some of these difficult cases took in the family court. Delays became higher than I would have liked. That was partly, at least, due to the amount of expert evidence that was taken in children's cases. I am left in little doubt as to the value of such evidence in all such cases. The time that was taken to set up the Act was very good; it is not customary now to have that kind of interval.

The other Bill I want to mention is connected to embryology and was passed in 1990. We had a brilliant committee report under the chairmanship of the late Lady Warnock. It dealt with a difficult subject involving lot of what you might call theological difficulty, as well as difficulty arising from the science that lay behind the particular problems. The Warnock committee report was a brilliant account of what should be done. A shadow authority was set up under the chairmanship of the late Lady Donaldson, who was the first female Lord Mayor of London. That gave us a good deal of help in formulating the basic structure of the authority,

[Lord Mackay of Clashfern]
which to this day has stood with very little change in the way it is run. That Bill shows that good preparation is the answer to getting a good Bill. Very little change has taken place in that area of the law either, except to try to keep up with the rapid changes taking place in the basic science. There is a discussion going on just now about other aspects of family life that were dealt with in the Bill but require reconsideration in the light of developments.

These two Bills show that the precise way in which preparation is done is not quite so important; it depends on what is available at the time, who is available to do it, and so on. But it does demonstrate that if you want to get a good Bill, you must know what you want in the way of policy before you start.

The Constitution Committee has suggested a standards committee for legislation. I wonder whether that can be done in the abstract. I would prefer to make it a binding obligation, so far as that is possible, on the committee of the Government who authorise a Bill to be placed before Parliament to have regard to the standards required to make the Bill reasonably capable of being dealt with under the available parliamentary procedure.

The other point I want to make in that connection concerns consolidation. I agree with what was said earlier about some of the most important areas of our law; I think particularly of immigration law, which requires very sensitive handling, and yet the law is complicated. Recently, I had occasion to try to understand what it says, on behalf of a relative. I am not without a little experience in looking at these matters, but it was extremely difficult to find out exactly what the relevant provision was in connection with that problem. Consolidation strikes me as a vitally important process in keeping the statute book reasonably accessible.

When I was a Law Lord, I served for a time on the consolidation committee. I have to say that the length of time it takes for a consolidation Bill to go through Parliament is next to nothing. The idea that there is no parliamentary time to deal with it is less than adequately borne out in practice. However, one of the difficulties is that the consolidation committee is a Joint Committee and for some reason, which your Lordships may be able to guess, it is quite hard to persuade Members of the other place who are members of the committee to come along timeously. We spent a lot of time waiting—I hope patiently—for our colleagues to arrive so that we had a quorum and could start. Here, I want to pay particular tribute to the late Lord Brightman, who was the committee chairman when I was first a Law Lord. That responsibility ultimately passed to me, but I was delivered from it by becoming the Lord Chancellor. The detailed consideration that Lord Brightman gave to consolidation matters was extraordinary. He was able to show exactly what was required and where, and he had all of that done before the committee met, and of course he was able to explain it to us. We were all so confident in his work that the time taken was really very short.

The last thing I want to talk about relates to the second report. There has been a terrific, absolutely extraordinary growth in what is called guidance. Whose guidance is it, I ask? My late good friend, a Permanent Secretary at the Scotland Office, used to say that guidance was usually couched in the mysterious passive, which you can see if you look at it. The "mysterious passive" is a favourite expression. It is not "my" opinion or "my" guidance; it is written as, "it is thought that", "it is required that" or "it is considered that". The amount of that has grown beyond all recognition and it is at least as fatal to good lawmaking as any kind of Henry VIII clause. A recent, fairly good example is lessons for schoolchildren. I make no comment on the substance, but the actual nature of the guidance is quite remarkable.

I thank the Constitution Committee for these reports. The subject matter is of fundamental interest and I am glad to have had the opportunity to take part in the debate.

5.19 pm

Lord Trefgarne (Con): My Lords, I am delighted to contribute to this debate, particularly in relation to the second of these impressive reports, the Constitution Committee's report on the delegation of powers. As chairman of your Lordships' Secondary Legislation Scrutiny Committee—a post I have had the honour to occupy since 2015—secondary legislation obviously holds a particular interest for me. As your Lordships can no doubt imagine, over recent months it has been the almost exclusive diet of my reading and has occupied much of my time.

Yesterday my committee published its second interim report, describing our work from April 2018 to April 2019. While it is too early for the Minister to comment on our findings, I hope the report has been of interest to your Lordships and has helped to inform today's debate.

It will come as no surprise when I say that the past year has been a particularly demanding one for the SLSC. Over 1,000 instruments were laid during the period, compared with 659 in the previous 12 months. Nearly 690 were laid between October 2018 and March 2019, and 36% of the total during the first quarter of 2019—an unusually heavy workload. But this was anticipated, and arrangements were put in place to ensure that our capacity could meet the demand. In July 2018, as a result of the expected 800 or so Brexit instruments—a figure later revised downwards—and the extension of our remit to include the withdrawal Act sifting function, my committee was given the power to appoint sub-committees and to co-opt new members. That power was exercised in October 2018 when we formed two sub-committees. The noble Lord, Lord Cunningham of Felling, chaired one and I the other. We also co-opted an additional 11 members to the sub-committees and increased our staff complement. I am pleased to take this opportunity to thank the co-opted members for their invaluable contribution to the scrutiny work of the committee. We have now resumed sitting as one committee, albeit ready to return to two committees should the need arise.

In its report, published in November 2018, the Constitution Committee noted that the sifting procedure was "in its infancy" and that it was then,

"too early to assess its efficacy".

To some extent that remains the case. However, we are beginning to take stock of how well it is working. I am sure that others, in and out of Parliament, will do the same. Meanwhile, it is notable that of the 228 siftable instruments—what we call proposed negative instruments—laid up to April 2019, the SLSC recommended that 41, some 18%, should be upgraded from the negative to the affirmative procedure. I am pleased to report to your Lordships that the Government accepted all our recommendations without exception.

Brexit has dominated our work, but it has also dominated the work of Parliament more generally. However, as the Constitution Committee's report and my committee's second interim report show, a number of issues concerning the use of secondary legislation are of more general significance. For example, the Constitution Committee comments on the nature of guidance published alongside legislation—my noble and learned friend Lord Mackay has just referred to this—deprecating its use to assist the interpretation of legislation or to fill what it calls "policy lacunae". In our annual report at the end of the 2016-17 Session, we echoed this concern when we called for a clear distinction between guidance and secondary legislation, and for legislation to be sufficiently clear,

"to avoid the need for interpretative guidance".

The Constitution Committee is also critical of skeleton Bills—also referred to by my noble and learned friend—a matter on which my committee commented in our response to the Strathclyde review in 2015 when we said we supported,

"those who caution against the use of skeleton bills and skeleton provision in bills".

But the most fundamental issue in relation to the delegation of legislative power is the boundary between primary and secondary legislation. It is, as was amply demonstrated in the debates on the tax credits regulations and the subsequent Strathclyde review, at the very heart of the relationship between Parliament and the Government—between the legislature and the Executive.

The Constitution Committee expresses concern that the balance of power is tipping away from Parliament. It refers to how the boundary is "not always respected", and that statutory instruments may be used,

"to give effect to significant policy decisions".

Over the last year, my committee and the sub-committees have dealt with a number of instruments which may be classified as giving effect to significant policy decisions. They included, to name just a few, regulations about the teaching of relationships, sex and health education in schools, about which we received over 430 submissions from members of the public; universal credit regulations which involved the migration of about 3 million people on long-term benefits to universal credit; regulations changing the maximum stake for fixed-odds betting terminals from £100 to £2; and regulations to set up a stand-alone UK regulatory regime, REACH UK as it was called, for the regulation and control of chemicals. Most recently, following an evidence session with the Minister and submissions from interested organisations, we reported on regulations relating to the Government's decision to cease operating a statutory adoption register.

Finally, I pay special tribute to the staff who have provided unfailing support to my committee and sub-committees and, as a result, a considerable benefit to your Lordships, despite the burden of an exceptional workload over the months. We are all truly grateful.

5.26 pm

Lord Blencathra (Con): My Lords, I have the privilege of being the chairman of the Delegated Powers and Regulatory Reform Committee, and in this capacity, I will focus my remarks on the second of the Constitution Committee's two excellent reports, on the delegation of powers. It is an impressive piece of work, and not just because it praises my committee on numerous occasions.

I thank my noble friend Lord Norton of Louth for his excellent presentation of the reports today, and the chairman of the Constitution Committee, the noble Baroness, Lady Taylor of Bolton, and all the members of that committee, not only for their generous recognition of the work of the Delegated Powers Committee in their report and elsewhere but for the collaborative working relationship which the two committees, and their officials, have developed over the years, to the benefit of the House and the greater good of rigorous scrutiny of legislation.

The Delegated Powers Committee's role is to examine the appropriateness of every delegation in a Bill, and the level of scrutiny applied to it, while the Constitution Committee adopts a constitutional perspective. There is a complementarity in our relationship which serves the House well. I thank my noble friend Lord Hunt of Wirral for his exceptionally kind remarks about my committee and me, but I assure him that the Delegated Powers Committee was doing a fantastic job long before I became chairman, and it will continue to do a fantastic job long after I have gone. The reason for that is that we have some superb colleagues serving on it, one of whom will be speaking in the wind-up tonight, and we are served by an excellent clerk and four superb counsel with more than 100 years' experience as barristers between them. They all know what they are talking about, and I would not survive without their expertise.

We share the view of the Constitution Committee that the proper balance between primary and secondary legislation is "not always respected". It is because of this that the Delegated Powers Committee is needed, and more often than not, our reports include important recommendations on the delegation of powers or the level of scrutiny applied to them. Policing that boundary is our raison d'être and, as we said in our report on the Strathclyde review, events giving rise to the review,

"provided a stark reminder of the importance of our work".

Since Strathclyde we have had the referendum and the decision to leave the EU. Brexit-related Bills have been introduced which have included the delegation of powers to Ministers that have been nothing short of breath-taking in some instances.

On the withdrawal Bill, the Delegated Powers Committee described,

"the distribution of power between Parliament and Government",

as being at the very heart of the Bill—a distribution weighted in favour of the Government by significant Henry VIII powers ranging over, as we said, "an

[Lord Blencathra]

unprecedented number" of policy areas. I think we all accept that some Henry VIII powers were necessary in the European Union (Withdrawal) Bill, but where they were needed there should have been explicit sunset clauses to limit their duration. I am in no doubt now that government departments, including Ministers, civil servants in charge of policy and parliamentary draftsmen, saw the incredible potential advantages of Henry VIII clauses in that they could change any law they liked without having to bring primary legislation before Parliament. Thus we now get Henry VIII clauses routinely tacked on to Bills where they are not necessary.

Departments are also drafting regulations, making clauses of such width that again Ministers would be able to change whole rafts of law with little say by Parliament and to make laws which went much wider than the stated purpose of the primary legislation. Let us take the Healthcare (International Arrangements) Bill. My committee said that,

"the scope of the regulations could hardly be wider".

The Bill, as stated by the Government, was supposed to make reciprocal arrangements as we left the EU to take care of Brits in Europe and Europeans in this country—a simple, sensible provision. However, it went much further than EU and UK reciprocal arrangements. My committee pointed out in our report that there was no limit to the amount of the payments which could be made, no limit to who could be funded worldwide and no limit to the types of healthcare being funded. The regulations could confer functions, powers and duties, including discretions, on anyone worldwide; and the regulations could amend or repeal any Act of Parliament ever passed. That is far more extensive than the Government's stated purpose.

Then we had the Haulage Permits and Trailer Registration Bill, which we said was,

"wholly skeletal, more of a mission statement than legislation".

We said we were "dismayed" at the Government's approach to delegated powers in the Agriculture Bill, which we described as,

"a major transfer of powers from the EU to Ministers".

However, to be fair, the Fisheries Bill, which looked like it had been written by a completely different department or bunch of civil servants, we commended as one of the finest Bills we had come across. So sometimes the Government can get it absolutely right and I am pleased to commend them for that. In referring to a provision in the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, we commented that Parliament was,

"being asked to scrutinise a clause so lacking in any substance whatsoever that it cannot even be described as a skeleton".

Then, in addition to inappropriate secondary legislation, we get tertiary legislation, and raising taxes by tertiary legislation, and we had that wonderfully unique lawmaking power in Schedule 5 to the European Union (Withdrawal) Bill, a power last used in 1539, making law by proclamation—or, in the words of the schedule, by "direction". Paragraph 2 of Schedule 5 permitted a Minister of the Crown to change the law by giving a direction with no parliamentary procedure applying to it whatever. We stated that a direction is what Henry VIII would have called a proclamation—there is a no real difference—and that the Statute of Proclamations 1539, which gave proclamations the force of statute law and later gave rise to the term "Henry VIII power", was repealed in 1547 after the King's death. We found it extraordinary that the Government should try to bring it back in this small area of a Bill 470 years later.

The exigencies of Brexit may have led Parliament into accepting some extraordinary delegations but we need to maintain our vigilance on policing the boundary between primary and secondary legislation. It is essential that we apply the same high standards of scrutiny to all Bills introduced into Parliament. The Delegated Powers Committee operates under a fundamental principle that powers are judged not on how the Government say they will use them at the moment but on what the law allows them to do at any future time—what any future Government could do with the powers created.

There are Bills other than Brexit Bills where the appropriateness of the delegation of powers is called into question. One of our most recent reports, which has already been referred to today, was on the Rivers Authorities and Land Drainage Bill, a so-called Private Member's Bill of immense complexity but supported by the Government. That Bill caused our committee serious concerns for a number of reasons, not least our view that the Bill was, in effect, in our words, a "ploy" to avoid having to pass a hybrid Bill.

The Government even admitted in the Commons that the Bill applied only to Somerset but that, if they made it a Somerset-only Bill, it would be a hybrid Bill and would take, in the Minister's words, three to 10 years to get through Parliament—a nonsensical claim in itself. They came up with this ruse to ostensibly make the Bill one which applied nationally to get around the hybrid Bill procedure. I consider that to be a gross abuse of our parliamentary procedures. It deprives the people of Somerset the chance to have a proper say, which they would normally get with a hybrid Bill. Even if 99% of the people of Somerset think that the substance of the Bill is the best thing since sliced bread, the other—hypothetical—1% should still have the right to have their case considered. We welcome the Constitution Committee's unreserved support for this criticism. I hope the whole House will support me in moving amendments so that this Bill is converted back to a proper hybrid Bill, which it is in reality.

I want to conclude on the point made by the Constitution Committee in its first conclusion in its summary of conclusions and recommendations, where it says:

"It is a responsibility for all, including Parliamentary Counsel, to uphold constitutional standards in relation to delegated powers".

On reflection, that is an exceptionally good point, which needs emphasis. In my opinion, criminal defence lawyers will lie, cheat and connive to get their client off. That is what they are paid to do. We expect different and much higher standards of government policymakers and parliamentary draftsmen.

Who thought of the ploy of dehybridising the Somerset land drainage Bill? There cannot be more than dozen MPs in the other place who know about hybrid Bills—they are the unlucky ones who have been forced to serve on the hybrid Bill committee. I am

therefore certain that Ministers did not come up with this scam, although they must take ultimate responsibility. It had to be lawyers who thought of this ploy to get around parliamentary procedures.

Of course, Ministers will want to build fairly wide powers into a primary Bill for secondary legislation, but did they dream up this power of making law by declaration or taking powers from the EU healthcare Bill that would have permitted the Government to pay for a Texan having a hip replacement in Dallas? I think not. I am giving notice to departmental policymakers and parliamentary draftsmen, as well as to Ministers, that we may summon them before our committee not simply to justify the extraordinary powers being sought but to find out who dreamed up these attempts to get around our procedures in the first place. I think it is a very valid question.

I was about to conclude there, but my noble and learned friend Lord Mackay of Clashfern has prompted me to tell a little story from about 1996, when I was a Minister of State in the Home Office and we were signing off yet another massive criminal justice Bill. I was invited to go to LEG committee and was briefed by civil servants. It was agreed around all the departments: "Minister, there's nothing to worry about. Everyone's content. It's a routine matter". I had in my beautiful red folder a one-page note to that effect and a draft copy of the Bill.

I got to LEG committee and the room said, "It's all straightforward. It's all agreed. Nothing to worry about. We'll introduce the Bill tomorrow." The then Scottish Secretary—my noble friend Lord Forsyth of Drumlean—piped up to say, "Could the Minister of State please answer this point? The age of criminal consent is different in Scotland. In Clause 56(5), could he explain why this is the case?". I pretended to flick through my notes but knew I had nothing on it. I had to say, "Well, I think it is probably not a material point. It's probably some misunderstanding".

At that point, the then Lord Chancellor—my noble and learned friend Lord Mackay of Clashfern—piped up to say, "Well, it is a material point. The Bill could be fatally flawed. The Minister of State must be able to answer this point", which the Minister of State could not. The then Lord Privy Seal, the late Tony Newton MP—the late Lord Newton—had a cigarette in both hands by this time, saying, "Oh my God, this is terrible. The Bill is fatally flawed. We cannot lay it tomorrow. The Minister must go back to the Home Office". I was sent with my tail between my legs because the Bill was apparently not properly prepared. Within 30 minutes of getting back to the Home Office, after some strong words, it was all cleared by the department; it was a misunderstanding. But the point of this little story is to reinforce the point made by my noble and learned friend Lord Mackay of Clashfern that Bill—and ministerial—preparation is everything.

Whether it is Brexit legislation or no, vigilance in respecting the critical boundary between primary and secondary legislation must be at the forefront of this House's concerns. The Delegated Powers and Regulatory Reform Committee has a vital role to play in that and we will be undaunted in discharging our responsibilities.

5.40 pm

Lord Cope of Berkeley (Con): My Lords, in view of that last speech, I should first declare an interest: I am a resident of Somerset. Judging from what my noble friend said, I am probably in the 99% but there it is.

I congratulate the chair and members of the committee on these valuable reports. They are of interest to me because, like others here, I have been a legislator for 45 years. As a matter of fact, I was involved in the preparation and passage of legislation even before I became an MP in 1974. I am a chartered accountant and a considerable part of my earlier experience was with finance Bills and taxation. One of the advantages of being in the House of Lords is that I am no longer required to take part in Bills on taxation as long as I am here.

The report on delegated legislation seems the latest episode of that long-running saga, "The struggle for power between Parliament and the Crown and its Government". Having played on both sides, I was interested to read the latest twists in the game, but the scoreboard on page 25 of the report should worry us all. So indeed should the extra information in the report of my noble friend Lord Trefgarne's excellent Secondary Legislation Scrutiny Committee, which was published yesterday and gives a lot more information.

On the scope of statutory instruments, the Constitution Committee asserts:

> "Broad or vague powers, or those sought for the convenience of flexibility for the Government, are inappropriate".

I agree with that, but the Government's response—provided by the then Leader of the House of Commons—in paragraph 13 was:

> "The Government does not agree that broad powers are, by definition, inappropriate".

That sweeping statement is modulated a little by some of the following sentences but it still seemed to me, to say the least, cavalier, not only in the sense of taking a swashbuckling cavalry attitude towards rules, but in the more direct 17th century sense of the Crown or Executive attempting to evade the scrutiny of a Roundhead Parliament.

I was also interested in the other report that we are debating on the preparation of legislation, particularly the passages about drafting legislation. My noble and learned friend Lord Mackay of Clashfern is right that it is most important that the policy is clear before the parliamentary draftsmen can do their work. I have a high respect for the skills of parliamentary draftsmen, although I have to say that while I was a Minister, at the Treasury and elsewhere, I found them pretty elusive. Sometimes, for example, I thought that legislation I was being asked to take through Parliament could be worded in a plainer English. But my dealings with the parliamentary draftsmen concerned were usually indirect, being filtered through the departmental solicitors and so on, and usually unavailing. I gather that they are more open these days, as Sir Richard Mottram indicates in his quote in paragraph 158.

I think it is true, as the committee suggests, that legislation is sometimes more clearly worded now than it was. Sir Ernest Gowers did not write entirely in vain

[Lord Cope of Berkeley]
in 1948. His great work is apparently still in print and I think it should be on every civil servant's desk.

The Select Committee is right to single out taxation legislation as one area that is not clear. Indeed, it is appallingly complex in places. Some might think that this benefits accountants and tax lawyers, and of course, people from both categories have been the reason for extra complexities being introduced in the cause of anti-avoidance. Both the Institute of Chartered Accountants in England and Wales, to which I still belong, and the Chartered Institute of Taxation complained in their evidence to the Select Committee about the lack of clarity and inconsistent definitions. The problem is recognised by government; the existence of the Office of Tax Simplification demonstrates that. I wish its new chairman, Kathryn Cearns, and all involved every success.

I note in passing that one of the candidates for leadership of my party wants to replace VAT with a so-called simpler sales tax. As it happens, I was in at the birth of British VAT and it was then regarded as a huge simplification of and improvement on purchase tax, the sales tax collected at the wholesale stage. Purchase tax lost favour, to put it mildly, because of the inherent definitional problems inevitably involved in practice when you came to write it into law and vary it over the years. VAT remains an excellent, ingenious, clear concept and its replacement would not lead to simplification for long, if at all, and meanwhile there would be huge disruption. I mention this because it is a special example of the problems of proposed legislation being written into manifestos. This is discussed in the committee's report in respect of changes in government after general elections, but it has some relevance this week too.

Clearly, like the committee, we all welcome consolidation in principle, but recognise that not enough of it is done in practice, notwithstanding the Bill in Grand Committee this afternoon. My noble and learned friend Lord Mackay of Clashfern spoke much more expertly and eloquently than I can, and I agree with him about this. I was interested in the reference to "rolling consolidation"—namely, making use of the valuable website legislation.gov.uk. I find it extremely useful when considering legislation. I was delighted to see the First Parliamentary Counsel, Elizabeth Gardiner, explaining on page 41 of the report that her office is trying to draft new legislation which alters existing legislation through clauses that could replace the existing legislation—in her words, "consolidating as we go".

An example may explain the concept a little more clearly. A change in the law may be proposed by an amendment saying something such as, "except that subsection (5)(b) will not apply in the following circumstances". Is it not better to have an amendment that proposes to leave out subsection (5)(b), or whatever it is, and insert a new subsection altogether, incorporating the changes required? That technique leaves the legislation in a cleaner position, and a consolidated one, to a degree. Footnotes on the website can direct readers to the old version in case that is required. There will not always be a choice between the two ways to frame a change but, where there is, the First Parliamentary Counsel is quite right to prefer it.

The subject of these reports will for ever be with us, and, for that matter, with our successors, but the Constitution Committee has made a most useful contribution to the current debate, and I commend it.

5.50 pm

Lord Cormack (Con): My Lords, it is a great pleasure to follow my noble friend Lord Cope of Berkeley. I was fascinated to hear his confession and that of my noble friend Lord Blencathra—that wonderful account of being present when a Bill he was due to present was forensically destroyed in front of him. I am particularly glad to be taking part in a debate opened by my noble friend Lord Norton of Louth, to whom the House, and indeed Parliament, owes a very great deal, for the clarity of his expositions and his extremely sensible approach to legislation.

Next week, on 19 June, I shall enter my 50th year as a parliamentarian. I have been here a very long time, in a career unblemished by ministerial office, so I am taking a special look at the root cause of our having to debate these things, which of course lies in our constitution. My noble friend Lord Hunt of Wirral referred to it in his excellent and admirable speech: the separation of powers. Unlike our great democratic partner, the United States, the Executive here are always drawn from the legislature. This has led to many bouts of schizophrenia over the years. I have noticed how the most forceful of Ministers become the best of poachers when they lose office or find themselves in opposition. I could give many examples but will refrain from doing so because I do not want to lose any more friends.

Fundamental to today's debate are the conclusions in the two admirable reports before us. My noble friend Lord Norton made two particularly interesting comments when he gently but firmly criticised the general quality of legislation. It is frequently, to use the famous and often-used words of the noble Lord, Lord Reid of Cardowan, "not fit for purpose". My noble friend also very gently but firmly demolished the replies by the then Leader of the House on behalf of the Government when he said something that really struck a chord with me: they were assertions, not justifications. That is precisely what they are. Sometimes we forget—certainly Governments forget—that Parliament does not exist for the convenience of the Government. That is a fundamental proposition that we should all recite every night: Parliament does not exist for the convenience of government. It is not an arm of government; it is not a servant of government. Parliament is not doing its job adequately unless it is constantly challenging the Government and holding them to account. That may be uncomfortable, but you are not attacking the man or the woman, you are attacking the measure or the proposal—and we ought to be much more rigorous in doing both those things. Delegated powers are not there to enable the Government to circumvent Parliament.

I am delighted that we will hear later from the noble and learned Lord, Lord Judge, who has done perhaps more than anyone in this Parliament to draw our attention constantly to this. He talked in one debate about his grandchildren saying that he "banged on",

but he has banged on brilliantly about delegated legislation, about Henry VIII powers and about Governments having frequently treated Parliament with disdain—and, frankly, never more so than during the agonising years since 23 June 2016. When we have a new Prime Minister and a new Government, I hope there will be a re-evaluation of priorities, a recognition that Parliament is not here to serve a Government but that a Government are here to serve Parliament. Parliament collectively represents the people, and the Government are constantly answerable to those who are in Parliament as the representatives of the people.

I was privileged to have the noble Lord, Lord Beith as a colleague in the other place for many years, after he won that spectacular by-election in Berwick-upon-Tweed, way back in the early 1970s. He held his seat because he was a very good parliamentarian. In his very interesting and rather witty speech, he referred to those catchphrases that we use—the skeleton Bills, the Christmas tree Bills and signal Bills. It is the duty of a Government to bring forward legislation that has been properly thought out and properly drafted. My noble friend Lord Cope of Berkeley referred to the parliamentary draftsmen. As a very young Member of Parliament, I remember being told by a very sage Member, sadly now no longer with us, that a parliamentary draftsman appears to need an "MO degree". When I asked what that was, he said, "Master of obfuscation".

We need to rebalance the Executive and Parliament, and to have a Government who will bring forward legislation that is always subject—as our committees have recommended in the past—to pre-legislative scrutiny and, after the passage of a year or two, to post-legislative scrutiny. Has what has been enacted been properly enforced and has it achieved what those who brought the legislation before Parliament wanted?

I shall say two other things. We have to flex our muscles a little more. My noble friend Lord Norton referred to Parliament being very restrained. Perhaps we must reconsider our excessive restraint; the time when we should do so has long passed. I use those words particularly in the context of statutory instruments. My noble friend Lord Hunt talked about the statistics—how, of well over 100,000, only 16 instruments had been voted against in the years since the war. It should become normal to amend statutory instruments. They are crucial; they are a vital part of the legislative armoury of any Government, and Parliament should not merely meekly acquiesce whenever a statutory instrument is brought before it.

The two reports that are the subject of tonight's debate are representative of the signal service that the committees of this House provide for us. We owe the Constitution Committee under the noble Baroness, Lady Taylor of Bolton, and the committees under my noble friends Lord Blencathra and Lord Trefgarne a very real debt of gratitude. If we are to repay that debt of gratitude, we all—individually and collectively—have to flex our muscles a little more.

6 pm

Lord Dunlop (Con): My Lords, it is a pleasure to follow my noble friend Lord Cormack. I am afraid that I cannot compete with his 50 years of service. Nevertheless, I also support the remarks of my noble friend Lord Norton of Louth, particularly his recognition of the hard work and support that we get from our committee staff, which is hugely appreciated.

Today's debate could not be timelier. In the 19th century, John Bright first coined the phrase "mother of parliaments" to describe England. This phrase is commonly but mistakenly attached to our Westminster Parliament itself. This reminds me of the burning question, previously posed by my noble friend Lord Norton: if England is the mother, who is the father? Perhaps as a Scot I will leave that question hanging in the air, but the phrase nevertheless captures the long-held and widespread admiration around the world for our system of parliamentary democracy. It is fair to say that the process of exiting the EU has tested perceptions of this pre-eminent standing as never before. It is therefore more important than ever to demonstrate the effectiveness of our democratic procedures. The parliamentary arithmetic means that the traditional balance of power between Parliament and the Government has now shifted. Parliament is now very much in the spotlight and we must demonstrate that our processes are fit for purpose.

What does this mean in the context of legislative process? The job of Parliament is to produce good law. As the noble Lord, Lord Beith, has already said, the classic tests of good law, as described by the Office of the Parliamentary Counsel, are that it is necessary, effective, clear, coherent and accessible. We are more likely to achieve good law when parliamentary scrutiny is transparent and effective, just as good government is more likely when the Administration in power are kept on their toes by strong and constructive opposition.

What is the current state of play? The evidence received by the committee suggests that the quality of legislation remains variable. Our report card can perhaps best be summed up as, "Some improvement, but could do better". Against that background, I want to focus my remarks on two aspects covered in our first report: the first is legislative standards, which my noble friend Lord Norton touched upon in his introduction, and the second is consultation. The Government's response to our report seems to regard the quality of legislation as simply a matter of drafting. I agree with my noble and learned friend Lord Mackay and others that good law also relies crucially on clarity of policy purpose. Even the very best parliamentary draftsman, adhering to the most rigorous guidance, cannot transform vague and ambiguous policy into clear, coherent and effective law. If there is a lack of legislative clarity, then the burden inevitably falls on the court to interpret and adjudicate—not something that either Parliament or the judges should wish for.

There are many reasons, identified in our report, why the policy intent might be vague or ambiguous. The policy might still be evolving, there might be unresolved ministerial differences or Ministers might wish to preserve their room for manoeuvre in how policy is implemented. There is a link here, as we have already heard, to our second report and the committee's concern about the growth and use of delegated powers since the early 1990s. As the second report sets out, we are now averaging 3,000 to 3,500 statutory instruments a year, with a near doubling in the accumulative length, running to nearly 12,000 pages a year.

[Lord Dunlop]

The desired standard is that all policy objectives be in the Bill, with only the technical details left to secondary legislation. However, there can be no doubt that often, significant policy choices are being left to delegated legislation. The Space Industry Bill, containing 100 delegated powers, is a recent example cited in our report. That is why it is so important to see the secondary legislation in draft when considering the primary legislation, to appreciate how the legislative scheme works overall. One approach to tackling this variability in quality is that legislation should not be brought before Parliament unless and until it has met a threshold of legislative standards, as we have heard. At present, prime responsibility for policing the quality of legislation before introduction lies with the Parliamentary Business and Legislation Committee of the Cabinet. Specific responsibility is placed on the shoulders of PBL's chairman, the Leader of the House of Commons, and the law officers. This is a responsibility that the Constitution Committee regards as particularly important.

My own experience as a Minister attending PBL is that it often did challenge robustly whether legislation was necessary. It did worry about the extent of and justification for delegated powers, not least because of the certain knowledge that your Lordships' House—and perhaps in particular, the noble and learned Lord, Lord Judge—would be forensic in its scrutiny of such powers. However, other aspects of parliamentary counsel's good law test were perhaps the subject of less discussion. Unsurprisingly, political imperatives will always loom large, given the five-year electoral cycle and the 18-month average life—apparently—of a Minister in a particular post.

The Constitution Committee has reiterated its support for an external check, with the development of legislative standards applied by a legislative standards committee, supplementing and enforcing the gatekeeper role of PBL. As the House has already heard, this is not a new proposal, but it remains as relevant today. This should not become some tick-box exercise perhaps akin to impact assessments, which, I have to confess, as a Minister I always found less something to be desired than an afterthought in the preparation of legislation. One could envisage that over time, the reports of such a committee would acquire influence with government, thus helping to change behaviour and raise standards.

My second point is about consultation. Our first report highlights the importance of evidence-based policy-making while pragmatically recognising that sometimes, evidence will not exist. Of course, it is perfectly valid for Ministers to exercise their political and professional judgment in policy-making, for which they will be answerable to the voters. However, when an evidence base does exist, the committee believes that it should be routinely published. Perhaps the Minister could indicate when he responds whether he agrees with that. One way to build evidence is to consult those who are affected by a policy or a piece of legislation. The key here is that the informal and formal consultation processes should be accessible to a wide range of affected parties and not just the usual suspects, who already understand how the system works. For example, we will not create a fully dynamic economy if we listen only to incumbents and do not reach out to challengers too. Equally, in areas of social policy, the most vulnerable and disadvantaged might be the least organised and equipped to ensure that their voices are heard.

We therefore need to be proactive, as our report makes clear, to ensure that policy and legislation are informed by a diversity of views. Perhaps the Minister could say how the Government are addressing this point. Progress has been made to improve the quality of legislation, but more work is clearly required. I hope that the Government will engage positively with the recommendations in the two reports we are debating today.

6.09 pm

Lord Judge (CB): My Lords, I thank everyone in the House for their kindness in allowing me to move about up and down the list. It is always difficult to change your place in the list when you are before some difficult judge, but no one has been too difficult today.

I am speaking to the delegated legislation part of this debate. I do so as a member of the Constitution Committee, on which I have now served for four years, and it has been the most wonderful experience. I want to underline something that is absolutely obvious to us as committee members: when it comes to evaluating the recommendations of a committee such as this and indeed all the committees of this House, it is perhaps worth underlining that in those four years, although we are divided equally into four Conservatives, four Labour, two Liberals and two Cross-Benchers—and we have had different chairmen, the noble Lord, Lord Lang, and then the noble Baroness, Lady Taylor—there has not been a single moment when I as a Cross-Bencher have been able to detect the tiniest, flimsiest division along party lines. There were disagreements but they were nothing to do with party. That should add a proper respect for the reports that have been produced, not just by us but by the various committees in this House. It is very easy to overlook it, and it is easy for the Executive not to realise that the committee reports are cross-party and therefore should carry more weight.

There have been 10 speeches in this debate. As a judge, after 10 I might have said, "I agree and have nothing to add", and in a sense I do not; I agree with them all. However, behind the courtesies of this debate, the very carefully measured language of the speakers and of the reports themselves and, dare I say it, the carefully measured fulminations of the Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Committee, there is a constitutional predicament that we are not grasping. We, by which I mean parliamentarians in both Houses, seem to be on an extraordinary, irrevocable course to vesting the Executive with more power. This is not deliberate; we are not sitting here saying, "Hooray, let's give the Executive more power". It is the consequence of the way in which we are failing to address the issue of delegated legislation.

Although "delegated legislation" is two words in one phrase, there are two aspects of it that we tend to see separately but which are actually totally integral to each other. There is the enactment of primary legislation, which empowers the ministerial use of delegated

legislation, and then there is our failure to reject the secondary legislation that Ministers subsequently produce. The two stand together. It is obvious that nothing I want to say suggests for a moment that I want to undermine the usefulness of delegated legislation; we obviously have to have it, matters of detail have to be addressed and we have to have procedures to enable primary legislation to be fully scrutinised in both Houses to be implemented and updated. So the problem is not with delegated legislation but with its misuse, and its constant misuse within our constitutional processes.

Our report underlines that there is not just one form of misuse. Let us just look at skeleton Bills. I want to read these words aloud and slowly and then ask a question. They are,

"we find it difficult to envisage any circumstances in which their use is acceptable".

I would love the Minister to stand up—I know he cannot and will not; he would cause a revolution if he did and, I am sorry to say, none of this would believe him anyway, but it would be wonderful—and say, "That's it, there will be no more skeleton Bills; we agree". We say all this, but they still come. I shall come to Henry VIII clauses in a minute, but the report is saying nothing new when it says they are,

"a departure from constitutional principle".

Would it not be nice if the Minister stood up at the end of the debate and said, "I agree; they're a departure from constitutional principle, to be contemplated only where a full and clear explanation and justification is provided".

I am being not forceful but—I hope—direct, because we are very courteous in how we issue our complaints about the way in which the Executive behave. All these different processes, cumulatively combined, undermine parliamentary control of the Executive, full stop. Each of them has been discussed time and again. We always overlook the very simple proposition that if you give power to someone then it will be used and, having given power to them, you are not going to get it back. That applies here as anywhere else. So I want to highlight what I shall identify as the "try-on" approach to legislation, which is one more manifestation of the problem.

The try-on is simply this: "Let's see if we can get away with it". For me, the starkest example was the recent sanctions Bill, which proposed that by delegated legislation the Minister should be able to create criminal offences—not fines but criminal offences—punishable by 10 years' imprisonment, which is a major criminal offence. But what else was the delegated legislation going to allow them to? The proposal was that the Minister should, by delegated legislation, be able to decide what defences there should be. Of course I am glad they thought that there might possibly be a defence to a crime that they had created but, worse, it would have enabled the Minister by delegated legislation to change the rules of evidence for any relevant trial to which the individual was brought, just like that. What is the point of having a criminal justice system? The Minister can say, "Oh, you can't use that" or "This can be admitted in evidence against you", although perhaps five centuries have demonstrated the dangers to safety of convictions of admitting it.

So delegated legislation was proposed which would have constituted a remarkable gift to the Executive to interfere with the administration of justice. It was a try-on, and we noticed it. Good. This time we were able to argue against it, and the end result was that the House was horrified and it did not pass, but it was in the legislation as a try-on. Good heavens above, how many times has the Constitution Committee said that the creation of a criminal offence by delegated legislation requires full parliamentary scrutiny? Do not worry about that; just ignore it and stick it in.

On Monday, we debated the courts and tribunals Bill. The breadth of that Bill is quite astonishing. By legislation, if it is passed unamended, a Minister, the Lord Chancellor, will be vested with powers to change the entire processes of family, civil and tribunal justice on the basis of a recommendation made by a committee of which he, the Lord Chancellor, has appointed a majority of the members. Wow. So by delegated legislation, the try-on is that the Executive will be given control over the judicial processes in those courts. I regard it as a try-on because, if not, it is an indication of ignorance of basic constitutional principles, and the relevant department is the Ministry of Justice.

In view of the other things that have been said, I want to say a brief word about Henry VIII. I have gone on about Henry VIII—I refer to the Constitution Committee six years ago. Everyone knows that Henry VIII clauses are a menace but they come rolling along like the Mississippi, except that the Mississippi rolls between pretty well-known banks but in this case the river just grows and the sides are flooded. What attention did anyone pay? I ask this question rhetorically, although there may be an answer to it: when did we last see a Bill in which a power given to a Minister to dissapply or amend existing primary legislation was missing? There must be a robot in every department that sticks this provision in, or maybe it is a consequence of the development of modern technology. "Good heavens, there is a computer, let me press the button—H8, press it". It does not merely stop at one clause. Sometimes Bills are decorated with Henry VIII powers—festooned with them. It overlooks something rather important. We call them Henry VIII powers because they are unacceptable to us: Henry VIII was an ogre and a menace, so we think that shows how we disapprove of them. However, it overlooks this simple fact: under the Proclamation by the Crown Act 1539, Parliament declined to give him the power to overrule a statute. It expressly stated—it was not by implication—that he had the power to work through proclamations, but not if it interfered with an existing statute—if my memory is right, particularly one passed during his reign, which I thought was a rather nice touch.

I want us all to pause for a moment. Which would we prefer? Would we find a summons to Henry VIII to explain ourselves for some piece of legislation that was going on and to account for it—and our failure to support him—marginally more alarming than a call to visit No. 10 for an interview with Mr Blair, Mr Brown, Mr Cameron or Mrs May? I think we might; but we are giving these powers to the Prime Ministers of our day which the men of the 1539 Parliament were not prepared to give to the dictating ogre who ran the country in theirs. We give powers that Parliament would not give to the great king.

[LORD JUDGE]

I have a couple of more points. I completely agree with the noble and learned Lord, Lord Mackay, about guidance, but I highlight something which was not covered in our report because we have only just noticed its emergence: a new scheme, or maybe an old scheme revived. You produce a Bill—for example, the Trade Bill. You set it all out in regulations—nine separate regulation-making powers, all based on delegated legislation—but it is not enough, because these are merely "for example" or "among other things". What is that supposed to mean? "Please, Minister, do what you like". We have to watch for that and we need to be very alert to it.

I come to the scrutiny process—the second limb. I must try to be moderate about this but the scrutiny process is a nonsense, is it not? It does not happen. It is 40 years since the House of Commons rejected a statutory instrument; not one piece of secondary legislation merited being rejected. I have made plenty of mistakes in the last 40 years and I expect we all have, but, funnily enough, not a single piece of secondary legislation was so deemed.

I turn to the tax credits which were referred to earlier in today's debate. When this House exercised its undoubted constitutional authority to reject that legislation, it was the sixth time in the last 50 years—not exactly a declaration of independence, was it? But, lo and behold, we had an entire review put into place and we were told that the Lords had interfered with a decision of the Commons. You might have expected the Government to go back to the Commons and say, "Please, just tell the Lords they are wrong". But the Government did not, so when the Lords rejected it, the Government did not go back for support. The original secondary legislation was a case of, "let us see if we can get it through". I have looked up to see how much time seemed to have been spent on that legislation in the Commons and it was not very long.

We overlook something else which this is revealing. Maybe the point of the review was just to discourage us from rejecting secondary legislation; but the incident graphically highlights the dangers of giving Ministers power to use secondary legislation. The power exercised by the Conservative Government in relation to tax credits was based not on their own legislation but on legislation enacted when Labour was in power—the Tax Credits Act 2002. Some 13 years or so after a Labour Parliament had given a Labour Minister these powers, those same powers were being exercised by a Conservative Government. The Opposition in this House certainly involved a great number of Labour Peers who spoke against it, which eventually led to its defeat. I cannot remember the specific words they used at the time, but the meaning of their words conveyed that this was a misuse of power—what a lesson to us about the long-term consequences of enacting powers in a Government to use secondary legislation to do almost anything they like, and it was not petty cash that was involved in the issue.

I understand that there are some problems--our system has not caught up with the way we do our work—but in the end, virtually rubber-stamping laws proposed by Ministers exercising secondary legislation powers simply will not do. We have got into the habit of accepting it, and when you become habituated to a situation in which you do nothing or very little, however much you may not like it—even if you do not agree with it—and cease to question, the habit becomes entrenched. We must be hawk-eyed in our scrutiny of delegated legislation.

I have one last point. We are enmeshed in Brexit. Some 10 years from now, Brexit will have come or gone and some of the disappointment the public have in their political processes will have declined; but these powers will still be there. Unless something is done about them, this is what we should shall expect to happen. The public can be very strange in the way the democratic process works. When the public are utterly disillusioned with their political arrangements, as I think they are now, they may vote into power a party of extreme authoritarian views—for the left or the right, either equally unacceptable to us today. But who knows? That new Executive, if elected, will not have to hunt in very obscure corners to find legislative powers necessary to carry out an abhorrent programme.

6.28 pm

Lord Tyler (LD): My Lords, it is a very difficult experience for me to follow the noble and learned Lord, Lord Judge. I look forward with great interest to the Minister's response to him. I have known the Minister for a very long time and I have great respect for his debating skills, but he has to produce quite an answer for us this evening because the noble and learned Lord, Lord Judge, brings expertise, experience and powers of persuasion to your Lordships' House which not many others of us can hope to replicate.

I was extremely impressed with the introduction to this debate by the noble Lord, Lord Norton of Louth, who, of course, had a major role in the production of these reports over the years and of the whole series that he described—these are just two of four. This is a whole comprehensive analysis of the way in which Parliament does business. They contain a formidable and forensic analysis of a major weakness of our Parliament, one that Members on all sides of the House have referred to today—I think particularly of the very interesting description by the noble Lord, Lord Hunt, of their severity.

We have also had the benefit of four members of the committee bringing different aspects of their experience to bear on this problem—the noble and learned Lord, Lord Judge, of course; my noble friend Lord Beith with his long experience of analysis of legislation in the Commons; the noble Lord, Lord Dunlop, as a former Minster; and the noble Lord, Lord Norton, himself—so we heard a whole range of views. The approach has been so comprehensive over the years, and now with these two reports, that it is very difficult to find any fault in the reports. A great deal of thought can be given to what we can do to implement their recommendations.

For example, I have not been around as long as other Members in either House, but I remember the days when we used to have a Green Paper, a White Paper, occasionally a draft Bill and then the Bill itself. Then, of course, there has been the suggestion that we should have post-legislative scrutiny afterwards. When

did we last have an effective Green Paper process, let alone a good White Paper that was sufficiently comprehensive to deal with all the issues that were going to be raised in the draft Bill? These reports are extremely timely and very relevant, of course, after the bruising experience we have had—all of us, in both Houses, with primary and secondary legislation—during the Brexit process. As some of us anticipated early on, all too often we have been urged to cut corners and short-circuit normal procedures in the interests of expediency, with no regard for the very dangerous precedents we might be setting, as the noble and learned Lord, Lord Judge, just said.

My prime example is one that has already been referred to by the noble Lord, Lord Blencathra. Curiously, it is that of a Private Member's Bill handed down by Defra, which Ministers feared would not be handled at speed if, in the Brexit shambles, it was processed in the correct way, as a hybrid Bill. He referred to the report we produced in the Delegated Powers Committee. I want to quote one sentence from the conclusion, which he did not mention, that demonstrates what our committee felt:

"It is an attempt, upon flimsy grounds, to set aside the procedures which Parliament has put in place to protect the interests of citizens who would be unfairly affected by legislation".

At this point I pay tribute to the noble Lord, Lord Blencathra, the chairman of that committee. I think he will understand that when he took over as chairman from the noble Baroness, Lady Fookes, some of us had some concern and just a little hesitation: after a distinguished ministerial career, we wondered whether he would be quite as forthright and robust as the noble Baroness. I have to say he has been more than, and has been extremely effective as our leader and chairman. I am delighted to pay tribute to him as I come to the end of my service on that committee.

This is an exceptional but demonstrably vivid example of the way in which the Executive have been trying to undermine parliamentary scrutiny and the opportunities in this case for public engagement, but the charge sheet is collecting other examples. I will concentrate on the delegated powers report, because of my DPRR Committee work, but my approach to both sets of recommendations owes much to my previous membership of the Joint Committee on Conventions of 2006. Here, I pay tribute to the noble Lord, Lord Cormack. He emphasised that holding the Executive to account is the prime function of Parliament and of course, that Joint Committee of both Houses looked very carefully at the scrutiny role of your Lordships' House in that context. Central to its recommendations were some extremely important suggestions about how we in this House should operate. It had the endorsement of MPs as well, as I shall come to in a moment. For today's debate, I shall mention a couple of points.

In updating the so-called Salisbury/Addison convention, the committee was unable to make a definitive recommendation on the status of legislation brought forward by a minority Government. Having identified Bills introduced by an incoming majority Government as "manifesto Bills", which deserve respectful treatment by the Lords, obviously the status of a Government whose manifesto had not been supported by a majority was less easily defined, so we were not able to make a recommendation on that point. However, the committee made a very robust recommendation about secondary legislation. I am sorry to read it at length but I think it is extremely important in the context of today's debate.

"The Government appear to consider that any defeat of an SI by the Lords is a breach of convention. We disagree. It is not incompatible with the role of a revising chamber to reject an SI, since (a) the Lords (rightly or wrongly) cannot exercise its revising role by amending the SI or in any other way, (b) the Government can bring the SI forward again immediately, with or without substantive amendment, as described by the Clerk of the Parliaments, and (c) the power to reject SIs gives purpose and leverage to scrutiny by the Joint Committee on SIs, and by the new Lords Committee on the Merits of SIs. The Government's argument that 'it is for the Commons, as the source of Ministers' authority, to withhold or grant their endorsement of Ministers' actions' is an argument against having a second chamber at all, and we reject it".

That is the context of these reports from the Constitution Committee and it should be noted, first, that the noble Lord, Lord Strathclyde, was then Leader of the Opposition, so he was a vigorous and vociferous supporter of that view. Secondly, the committee's report and recommendations were unanimously agreed by both Houses. As the noble and learned Lord, Lord Judge, has consistently argued, not least this afternoon, there is obviously a democratic deficit here, one which has been brought into sharp relief in recent years, especially during the tsunami of Brexit secondary legislation in the last 18 months. As an example of the totally inadequate care taken in drafting major legislation, reporting on the Agriculture Bill our committee described the number of delegated powers as "ominous" and concluded that,

"it cannot even be said that the devil is in the detail, because the Bill contains so little detail".

The noble Lord, Lord Blencathra, our chairman, referred to that Bill earlier.

In passing, I also strongly endorse the views expressed by the noble and learned Lords, Lord Mackay of Clashfern and Lord Judge, and the noble Lord, Lord Trefgarne, about the extent to which the use of "guidance" seemed to have slipped into this system: it seems very often to be given the same significance and credibility as ministerial assurances to us as an attempt at more substantial orders. The noble and learned Lord, Lord Judge, referred to the use of "for example": this seems to be one step further.

In the report we are discussing today, the Constitution Committee is characteristically forthright, saying:

"If the Government uses delegated powers to propose secondary legislation which makes technical provision within the boundaries of the policy and has previously been agreed in primary legislation, Parliament is unlikely to wish to block statutory instruments. However, we are concerned"—

and this report has shown—

"that these boundaries are not always respected and that ministers may seek to use statutory instruments to give effect to significant policy decisions. Without a genuine risk of defeat, and no amendment possible, Parliament is doing little more than rubber-stamping the Government's secondary legislation. This is constitutionally unacceptable … If the Government's current approach to delegated legislation persists, or the situation deteriorates further, the established constitutional restraint shown by the House of Lords towards secondary legislation may not be sustained".

[Lord Tyler]

As the noble and learned Lord, Lord Judge, has said, this is a committee representing all parts of your Lordships' House. This is not just the opposition parties, or just those who have never had experience of ministerial office; it is people of real experience from all sides of the House who are putting down a very important marker for us all. I remind your Lordships that this report was published as long ago as 20 November last year, since when I think it would be fair to say that the situation has undoubtedly deteriorated further. The avalanche of ill-considered Brexit-related SIs is really extraordinary.

The response of the then Leader of the Commons was dated 25 January. I entirely understand the point made by the noble Lord, Lord Norton of Louth, that the committee did not find that answer very acceptable. Had there been another answer since then as a result of some of the recent experiences we have all had, we would find it even more complacent. In her letter, she wrote:

"The Government agrees that all those involved in the preparation of legislation have a responsibility to assess thoroughly whether a proposed grant of a delegated power is appropriate. The Government will continue to work to ensure that this is something that is properly scrutinised during the bill preparation phase so that powers are included in bills only where appropriate and where their use can be justified to Parliament".

The noble Lord, Lord Cope, described that response as cavalier. He is always so tactful, having had experience in both Houses; now we would say something even stronger as a result of our more recent experience. Subsequent experience of the balance between primary and secondary legislative proposals from her ministerial colleagues suggests that her attempt at reassurance was entirely without foundation. The noble Lords, Lord Trefgarne and Lord Blencathra, have had such a difficult time in their respective committees dealing with the SIs that have come forward in recent months.

Members of your Lordships' House may not be aware that some MPs are also increasingly appreciative of the increasing deficiency in the balance of power between the Executive and legislature in this respect. There has been widespread welcome among MPs for early sight of DPRRC recommendations. Indeed, they have used them in Bill Committees there. Although this was a pragmatic response to vital Brexit legislation, I am sure that the enthusiastic use of these reports will ensure that they continue to be supplied in good order and good time to Members of the other place.

Members of the other place have also observed in the context of Brexit the unfortunate precedents which could be established in the name of expediency. The series of crash-out no-deal SIs that came before both Houses as the then 31 March deadline loomed persuaded many MPs, as well as Peers, that we were all being treated as voting lobby fodder. In that context I particularly admire the work done under very difficult circumstances by the noble Lord, Lord Trefgarne, and his colleagues in the SLSC.

What is to be done? Ideally both Houses, perhaps with a Joint Select Committee, will have to address these issues. However, given the constitutional challenges now threatening the Commons and likely to preoccupy MPs for many weeks to come—as we have again been reminded today—maybe your Lordships' House should take the lead. Given the widespread acknowledgment that we have given much more attention to this scrutiny role, that may well be logical and acceptable to all sides.

Personally, I hope that we can look again at modifying the all-or-nothing bilateral choice between acceptance and rejection of SIs. Perhaps we could again look at instituting a Motion that asks the Executive, with our reasons given, to reconsider. That would reduce the need for extreme veto and probably phase out meaningless regret Motions. As my noble friend Lord Beith said, regret Motions do not really have a happy history. What is surely unarguable is that the clear, consistent and compelling recommendations of your Lordships' Constitution Committee cannot be left to gather dust on some bureaucratic shelves in Westminster or Whitehall.

6.44 pm

Baroness Smith of Basildon (Lab): My Lords, this has been an interesting debate, and the experience and knowledge of this House has been extremely evident. It is hard to do great justice in one day to these two very detailed reports. I thank all those on the committee who took part, particularly the noble Lord, Lord Norton of Louth, who gave a very concise and precise introduction to today's debate.

This may be a futile suggestion, but I wonder whether we should suggest that these reports be read by every Minister, aspiring Minister, parliamentary draftsperson and civil servant. If we were to act in accordance with the principles held within these reports, our process of legislation might be slightly slower but it would also be more effective and prevent problems further down the road. Both reports are largely about process, but they also rightly acknowledge the political environment we operate in and that political judgments have to be made. Inevitably, this will create tensions from time to time, but good process—as outlined in the reports—can minimise that.

We must recognise that there has been progress with process. I have been reflecting on my time in Parliament since I was elected to the House of Commons in 1997. Back then, Explanatory Notes were perhaps a sentence or two about what the clause did—they were not really Explanatory Notes at all. That has changed. We have seen progress in pre-legislative and post-legislative scrutiny. I served on one of the first standing committees that started its deliberations on a Bill with evidence sessions before moving on to the Bill's clauses.

We are making steady progress, but when reading through the reports what struck me was that Ministers, in their evidence and discussions with the committee, clearly understand the value of good process. There was very little disagreement about how things should be done, but there seemed to be a complacency in how close the Government think they get to good practice. Given the agreement on basic principles, the key question is why, given the agreement from Ministers when giving evidence to the committee, the legislation brought before Parliament often falls short of those principles.

I was disappointed by the Government's response to the committee. We have to get defensiveness out of the government mindset on this. I hope that the Minister tonight, who is not known for being defensive or rejecting good ideas, will perhaps be more positive.

There is a wealth of information here, but I shall make a few comments about three broad themes. My first point is on the issues around evidence and judgment. Good evidence and process cannot replace political judgment, but they do enhance it. Whether we agree or disagree with an actual decision obviously depends on our own political perspective—that goes to the heart of the political principle of a Bill—but most of our deliberations in this House are on the viability of legislation and whether it achieves what it aims to do. We examine any possible unintended consequences and the evidence for that proposed course of action.

Although there are some examples, which are in the report, where legislation was unnecessary to enforce a policy, I am not automatically critical of a Government who feel that the importance of an issue is so great that legislation is perhaps not strictly necessary but is nevertheless desirable or helpful. It may be just to send a very public message about the commitment on an issue, which is not ideal, but they may also consider that the longer-term sustainability of that policy requires a legislative base. We cannot dismiss a public demand or political desire to do something in response to an issue, but that is not to give permission to ignore evidence or introduce badly drafted legislation.

I think it was on the Immigration Act 2016 that the Government sought to outsource immigration checks to landlords. This House was able to force the Government to introduce a pilot scheme first, although I am not convinced about a pilot scheme that seeks to prove that something can work rather than to test the viability of whether it will.

The passing of the Trade Union Act in the 2015-16 Session was a really good example of political views taking precedence. Even after passing all its stages in the House of Commons, we still had no sight of any impact assessment. I was grateful when the House overwhelmingly supported my proposal to allow a very controversial, highly political part of the Bill to go to a separate but parallel Select Committee. The evidence sessions that took place brought more light than heat to the debate; interestingly, as we moved back on to the Floor of the House, one Peer, who had strongly supported the Bill throughout, later candidly admitted how little he had previously known about trade unions.

Another example of politics overriding evidence was the Parliamentary Voting System and Constituencies Bill. During the course of the Bill, I asked for the justification and evidence base for reducing the number of MPs to 600. I was told by the then Leader of the House that it was "a nice round figure". We never had any other explanation for how that number was arrived at, but I sometimes wish the Minister had been talking about himself and not the number of MPs that he was reducing the House to.

However, that does not denigrate all political judgments. As a Minister, I recall being informed that I had to authorise a certain course of action because legal advice had been taken—unbeknown to me—and the lawyers said that I had to sign it off. It was completely against my principles to do so and I took the view that I was entitled as an elected representative and as a Minister to make a value judgment on the evidence before me and my own views—so I did.

After two days in court, when I was judiciously reviewed, the judge fortunately agreed with me. It is an important judgment because it says that if you have the evidence, you can bring political judgment to bear as well—it is not just a legal decision. If it is to be just a legal decision, we might as well do away with politicians and just have lawyers. However, those value judgments and political judgments have to be made transparently and with evidence. Clearly, the committee's recommendation for producing the evidence base or explaining the justification is the right one.

In some ways, I should like us to look more at impact assessments; that is one way in which we could get better evidence. I regret that the Government do not often follow their own guidance on the availability or content of impact assessments. At times, the content has been of little value. When one looks at the alternatives, it just says, "It doesn't achieve the objective". It does not say why or what other options have been looked at. A good impact assessment could be a great tool for examining legislation and a real help to the Government and Parliament.

I apologise to the noble and learned Lord, Lord Mackay of Clashfern, for being briefly out of the Chamber while he was speaking. My noble friend Lord Stevenson took some notes for me and I look forward to reading them. The noble and learned Lord made a wise speech, talking particularly about delaying the implementation of a Bill to give further consideration—a point certainly worth considering.

On pre-legislative scrutiny, the reports—and noble Lords tonight—have commented on consultations. Governments set great store by consultations. I am not sure why the consultation period has been reduced and hope the Minister will explain that. However, perhaps a more serious point is that, as consultations have become more embedded in our political culture, they have become largely meaningless. They are sometimes an exercise that must be gone through, with no one taking note of what they contain.

If the Minister does not have the information to hand, perhaps he could write to let us know the number of Government consultations in any one year; the average and longest time it takes the Government to respond; and—a point drawn out in the report—how consultees are chosen or informed of the consultation.

I recall meeting officials to consider consultation responses before signing off a final report on a particular issue. We had a good response, with several good suggestions within the overall policy framework set by the report. However, no changes were proposed to the final report. I asked, "Are there no suggestions worthy of change?" There were, but they were not put in until I raised the question. We made those changes, but too often I fear that good suggestions go into the paper shredder because there is not enough desire to make the changes—it is too much bother once the draft has been printed.

I also recall a time when the consultation response was not even available in time for consideration of the Bill. If we are to have consultations, they have to be meaningful. Let us not pretend that we are consulting when all we do is go through the motions.

[Baroness Smith of Basildon]

I welcome the comments on draft Bills. I know how well this works and that it avoids later problems. I appreciate that, immediately post-election, it can take time for a new Government to get legislation ready, as we saw with the skeleton Bills this House received in 2015. The Childcare Bill started in this House because it was considered non-controversial. In policy terms, it was completely non-controversial, but with a skeleton Bill policy was unacceptably left to delegated and secondary legislation—as the noble and learned Lord, Lord Judge, pointed out—just because it had not been worked out. That Bill had highly controversial detail, although the policy framework was not controversial. It had a pretty rough ride in your Lordships' House.

There is a way round that. In most cases, discussion between the Government and Opposition can take the Bill in segments or take part of the Bill and come back to it. We can get good scrutiny without trying to derail the Government's programme. I entirely endorse the value of Green Papers and White Papers.

A point was made about the role of the Law Commission. I wrote an article for the *Times* Red Box recently, saying that, given the current hiatus in legislation, we should be asking the Law Commission whether there is an opportunity to do more consolidation, with sentencing Bills welcome. We all know that legislation is hard to decipher. It causes mistakes, in sentencing, for example, and in interpretation. There is an opportunity here to use the time when we are not doing as much legislation as we could be to look at some of those consolidation Bills.

On the appropriate use of delegated powers, I can recall, back in the day, about four years ago, when even the most experienced of political journalists had no knowledge of and showed no interest in secondary legislation. Then came tax credits and the Government's wildly exaggerated response to the actions of your Lordships' House in the form of the report of the noble Lord, Lord Strathclyde. I take a slightly different view from the noble and learned Lord, Lord Judge, on this. This House did not reject the tax credits—it tried to find another way without rejecting them completely. The fatal Motion was rejected by your Lordships' House. The Motion passed asked the Government to have another look. It was the late, great Patricia Hollis's Motion that said, "Have another look at this". This House provided a breathing space for the Government to reconsider and they took the opportunity to do so. We had to be creative to do that, but perhaps we should look at building that into our processes on secondary legislation, so that we do not have an all-or-nothing approach of either accepting or rejecting, as the noble Lord, Lord Tyler said. There is something else we can do to be constructive.

That problem was of the Government's own making. It was not that the previous Government had allowed for the changes; the Government were abusing the system. I think the noble and learned Lord, Lord Judge, made that point as well. When the Government misuse the delegated powers procedure—it has been abused once—we have to be creative in our response. The content of the tax credits SI—the significance of the change that was being made—was far more appropriate to primary legislation. That is why this House responded as it did.

We are now in a position where the number and range of SIs, as shown in the charts and documents, is unsustainable. Something I have suggested in the past, particularly in relation to Brexit but it applies across the board, is to have an earlier sight of drafts of SIs so that public and House consultation can take place. The report makes the point that amendments can be made before they get to the House. However, as I said, secondary legislation has been used when policy has not been worked out. A trusting and generous person might suggest that this is to provide additional time for the Government to bring forward the detail. But a suspicious person—I would not put myself in that category—might suggest that it is to evade proper scrutiny and the possibility of amendments.

Looking at the committee's recommendations, I may be wrong, but I sense that the House would be reluctant to end the constitutional restraint that we respect. We are an unelected House; we recognise the primacy of the Commons and the value we bring to legislation. That restraint, however, must not be abused by the Government. That is the problem at the moment. If we keep to our side of the deal, there is an obligation on the Government to do the same and I do not think that is happening at the moment.

The current position is deteriorating and it is in no way due, as the Strathclyde report tried to make out, to any tension between the two Houses of Parliament. The only tension is between the Government and this House when the Government use statutory instruments inappropriately. It was Patricia Hollis who proposed to the Procedure Committee that there should be a middle way—a different way of looking at SIs—and I think that is something we should revisit. I entirely agree that a Motion to Regret is a way of putting something on the table and making a point, but the Government rarely listen, except in the most extreme cases. I should like that to be further considered by the Procedure Committee and this House.

I have gone on for slightly longer than I intended, partly because of the quality of the debate. I hope we will hear a positive response from the Minister tonight, but we have work here. This is not something that we will debate today and walk away from. Two further reports are to come. The message is that this House is restrained. We play our part and undertake our role seriously, but we expect the Government to hold to their obligations and responsibilities as well.

7 pm

Lord Young of Cookham (Con): My Lords, I begin by thanking the noble Baroness, Lady Taylor of Bolton, in her absence, and the members of her committee for their excellent reports, and my noble friend Lord Norton of Louth for introducing them. They have provided the basis for a well-informed, thoughtful debate on a specialised subject that may not feature on "Yesterday in Parliament" but which is vital to the effective holding of the Executive to account and, as a result, the operation of our parliamentary democracy—a point well made by my noble friends Lord Hunt, Lord Cormack and Lord Dunlop. That is the context in which we should approach this debate: these documents are essential to what Parliament is all about.

Some of the recommendations—such as for a legislative standards committee, mentioned by my noble friend Lord Dunlop—are for the House to reflect on. I shall try to address the recommendations directed to the Government. The noble Baroness, Lady Taylor, and I have much in common when it comes to the subject, both of us having held the office of Leader of the House of Commons, and so chair of the PBL Committee, and that of Government Chief Whip, who has a key role to play in the deliberations and conclusions of PBL. Although I am standing here in my capacity as spokesperson for the Cabinet Office, I hope to respond to the debate with the experience I just mentioned at the forefront of my mind. I hope this means that I can address the issues from a similarly well-informed position to that of the noble Baroness who chaired the committee.

I will start with the committee's fourth report, *The Legislative Process: Preparing Legislation for Parliament*. The Government considered the report carefully and provided a written response addressing specific areas of interest. I will set out some of the steps we are taking to improve the preparation of legislation for Parliament, and respond to some of the suggestions made in the debate. The committee said that the decision to legislate should not be taken lightly, and I could not agree more. At the moment, we find ourselves in atypical times in which it would be hard to say that we are overburdened with legislation. When I recently appeared before PBL with a Bill in my hand, the committee was actually pleased to see me.

In normal times, the PBL Committee remains a very strict gatekeeper. Demand for legislative time greatly exceeds supply—a point made by the noble Lord, Lord Beith. I am sure that any Minister, former or current, would agree that appearing before PBL is one of the most challenging experiences of being in office—a point made by my noble friend Lord Dunlop. It is a rigorous cross-examination, conducted without the Minister having recourse to any professional advice from his or her department and in which ignorance of the details of his Bill can result in delay or loss of the slot. Ministers have certainly left empty-handed, and any Minister looking to use legislation as a way to shine or to introduce legislation that is purely declaratory would have a very hard time. I can also say as a former Chief Whip that failure to impress PBL can also have an adverse consequence for the career of a Minister, however senior.

I was asked whether pre-legislative scrutiny was just an option. PBL asks all Ministers whether they can publish a draft of a Bill or go through pre-legislative scrutiny, so it is much more than an option: it is infinitely preferred. As the committee also observed, legislation is only ever as good as the policy development underpinning it. Evidence is vital—a point just made by the noble Baroness, Lady Smith. As acknowledged, this Government are placing renewed importance on ensuring that their policies have a sound evidential base. The case was excellently made by my noble and learned friend Lord Mackay when he spoke about how the Children Act was improved by access to expert evidence and experienced social workers, and that legislation has endured the test of time as a result.

We are now placing renewed importance on ensuring that our policies have a sound evidence base. For example, the What Works Network, set up in 2015, provides government departments, Ministers and front-line professionals with independent assessment of the available evidence in specific policy areas. There is now a central team in the Cabinet Office that helps bring these findings to the attention of policymakers. In its first five years, the What Works centre has produced 288 evidence reviews, including 48 systematic reviews on a wide range of topics.

I was interested to read the complaints by the Tobacco Manufacturers' Association—here I want to settle some old scores—that,

"the loss of in-house departmental expertise as a result of central government retrenchment … has led to a situation in which policy development is informally contracted out to other organisations",

leading to what it describes as,

"regulatory capture by politically-oriented and often taxpayer-funded campaign groups",

That drew a hollow laugh for me as I recalled that when I was a Health Minister 40 years ago, public health measures to reduce the number of deaths caused by smoking, supported by the health department, were systematically blocked by the TMA's lobbyists and its supporters in the House of Commons, but I must now move on to the serious issues addressed.

The committee welcomed the Government's commitment to a greater use of Green and White Papers —a question asked by the noble Lord, Lord Tyler. The committee's report notes that the Prime Minister recently indicated that,

"she would normally expect a Minister, before having legislation, to have gone through a Green Paper stage for discussion and then a White Paper stage to set out policy".

I can tell the noble Lord, Lord Tyler, that we remain committed to that process and agree that it is a feature of good and proper policy development. However, time pressures to deliver legislation do not always make it possible.

Recent examples of such documents include the domestic abuse and online harms White Papers, and Green Papers on our integrated communities strategy and mental health provision for children and young people. Not only do those papers show the Government's workings for their legislative proposals, they facilitate vital engagement with stakeholders, including parliamentarians. Many noble Lords have made the point that you cannot develop legislation in a vacuum, and the committee stressed the value of consultation, both formal and informal, as well as pre-legislative scrutiny by parliamentarians.

I was slightly surprised by what the noble Baroness, Lady Smith, just said about the regard that Ministers have for consultation. She has been a Minister, as have I. I have certainly paid attention to the results of consultation on policy areas for which I had responsibility, be it housing, transport or taxation. One advantage of modern technology is that it is now easier for government to reach stakeholders and the general public and engage them in consultation.

The noble Baroness asked me a number of detailed questions, and I will of course reply to her, but the report noted that the Government now collate all open consultations on a single webpage and that this is an important step in attracting extensive, diverse and expert input. This was a point raised by my noble

[Lord Young of Cookham]
friend Lord Dunlop. Our consultation principles stress the importance of targeting a full range of stakeholders. The committee notes that the department should consider targeting specific groups and suggests tailoring consultation to the needs and preferences of particular groups.

The committee rightly attached great importance to pre-legislative scrutiny. I reassure noble Lords that the Government hugely value Parliament's scrutiny and the contribution it makes to the development of draft legislation. Noble Lords will be aware that in this Session, Bills that have undergone this scrutiny include the Parliamentary Buildings (Restoration and Renewal) Bill, the draft registration of overseas entities Bill and the draft domestic abuse Bill. So far this Session we have published 10 Bills in draft, nine of which have been scrutinised by either a Joint Committee or the relevant Select Committee in the other place; the 10th is the draft finance Bill. We hope to do even better. I thank all noble Lords who have been involved in the process of pre-legislative consultation. The hours of detailed scrutiny have led to the introduction of better legislation and an easier passage through both Houses.

A number of noble Lords mentioned post-legislative scrutiny. As noble Lords will know, departments produce post-legislative review memorandums for every Act three to six years after its commencement, as my noble friends Lord Norton and Lord Cormack mentioned. This is an initiative of the committee whose report we are discussing today and is now embedded practice. These documents provide a valuable opportunity to improve our process further by reflecting on whether legislation is operating as intended. If I could express a personal view, I am sorry that these memorandums, which the Government take very seriously, do not attract greater attention from those who follow the legislative process.

Finally, on this report, I would like to say a few words about the quality of legislation, an issue raised by my noble and learned friend Lord Mackay and my noble friend Lord Dunlop. The committee stressed the importance of clear, well-drafted and accessible legislation, to which the Government also attach great importance. We have come a long way in the clarity and accessibility of our legislation. My noble friend Lord Cope welcomed that improvement. The skilled lawyers within the OPC are constantly working to improve on this. For example, they have revised and updated their drafting guidance, strengthened their internal quality assurance processes and invested heavily in training new counsel, operating an apprenticeship model so that experience is shared. I place on record my thanks for their ongoing efforts to achieve this goal. Progress is still needed, particularly in the area of taxation, as mentioned by my noble friend Lord Cope.

Many noble Lords mentioned the work of the Law Commission, which has pointed to the particular value of reform and consolidation in the fields of immigration and sentencing law in England and Wales. Our commitment to tidying up our statutory landscape is reflected in the recent introduction of the Sentencing (Pre-consolidation Amendments) Bill, mentioned by my noble friend Lord Norton. This legislation is the first step towards making this complex area of law simpler, fairer and quicker to operate. First, we need to deal with the Bill; the sentencing code will be announced in due course. I note the suggestion that in this lull in parliamentary activity, we might use any spare capacity to make further progress with consolidation.

My noble friend Lord Cope mentioned the online statute book, which is delivered by the National Archives and is free to access. This is continually being updated to consolidate textual amendments into existing Acts. I am pleased to say that the update of primary legislation is almost completely up to date.

While we sometimes disagree on the content of legislation, our aspirations for the process are well aligned. We have come a long way in how we prepare and bring forward legislation, and remain committed to producing good law. As the committee's fourth report set out, it is in everyone's interest for our legislation to be evidence-based, influenced by diverse and expert input, scrutinised effectively and of the highest quality in drafting.

On skeleton Bills, the Government agree that Bills that contain vague powers because policy decisions have not yet been taken are usually not acceptable. However, a Bill setting out policy framework clearly, but using delegated powers to fill in details or implement part of it, may be justifiable in some cases.

Turning to the other report, on the delegation of powers, I pay tribute to my noble friend Lord Blencathra and his Delegated Powers and Regulatory Reform Committee. I take on board his warning about the Rivers Authorities and Land Drainage Bill, on which he has proposed summoning the author before his committee to discover exactly what is going on with it. The committee made a number of recommendations on the important role of delegated legislation in the legislative process. We have carefully considered the committee's report and provided a detailed written response to each of its recommendations. As a Government, we very much endorse the committee's emphasis on the valuable role we all play here in scrutinising delegated powers.

I will briefly set out some of the key points from the Government's response. The noble and learned Lord, Lord Judge, expressed surprise that no statutory instruments had been rejected. I think he will find that quite a lot have been withdrawn and then resubmitted. This is probably a better process to go through than actually having them defeated. I know that some have been introduced, subsequently been found to be incorrect and a separate SI introduced to put them right. So it is not quite as black and white as the noble and learned Lord implied.

The committee observed that all involved in the legislative process have a responsibility to uphold what it referred to as "constitutional standards" in relation to delegated powers. The Government agree that a number of broad principles can be applied when considering delegations of power, although ultimately, it is for this House and the other place to consider whether a particular delegation is appropriate. It is impossible to prescribe a hard and fast set of rules to be applied uniformly to all delegations of power, as each delegation must be considered on its merits. In this respect, the Government agree with the committee's

observation that it is the constitutional obligation of Parliament to decide whether a proposed delegation of power is acceptable.

One of the committee's key concerns is that delegated powers are increasingly being used by the Government for the purposes of legislating for policy and other major objectives, whereas they should be reserved for minor and technical matters. The Government agree that delegated powers should generally be reserved for prescribing matters of detail. I note my noble friend Lord Hunt of Wirral's comment that it is not always possible to draw a clear dividing line between policy and detail. He takes the opposite view, and we will reflect on that particular point. I assure your Lordships that the Government always seek to ensure that the balance between what is contained within primary legislation and what is left for secondary is struck in an appropriate way.

A further concern expressed by the committee is the Government's perceived use of broad, or even vague, powers on occasion. The Government agree that vague powers are to be avoided and we make every effort to ensure that proposed powers are formulated with a sufficient degree of precision and certainty. In any given case, it is for your Lordships to determine whether they are satisfied that the Government have justified the level of detail in a proposed power. As for broad powers, there may be some occasions where these are unavoidable. In these cases the Government aim to assist your Lordships by producing draft secondary legislation alongside the proposed power so that noble Lords can better assess how the power may be used in future.

The committee raised particular concerns over powers enabling the creation of criminal offences and the establishment of public bodies—a point made by the noble and learned Lord, Lord Judge. The Government agree that the cases for such powers are likely to be rare, although they may be appropriate occasionally if their use can be justified to your Lordships.

The committee also raised concerns over Henry VIII powers, and stressed the need for these to be fully justified. It is worth reading out what the committee said about Henry VIII powers. Henry VIII powers are,

"a departure from constitutional principle. Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided".

The Government agree that such powers should be taken only where they are strictly necessary. We are committed to providing a full and clear explanation to the House when taking such powers through information provided in the memo to the DPRRC. Each Henry VIII power needs to be considered individually on its merits. Sometimes, use of Henry VIII powers will produce a clearer legislative result than prescribing things in secondary legislation. Paragraph 19 of our response makes that point.

A number of noble Lords suggested that it should be possible to amend statutory instruments. That is not proposed by the committee, but the noble Baroness, Lady Smith, made a suggestion that the committee might like to reflect on—that it look again at the "take it or leave it" position of SIs. I would be interested in its reflections on that.

I am conscious that time is running out, but if I was asked to provide one example from my short time in your Lordships' House—and to answer a question posed by my noble friend Lord Norton about what has changed—it is the effectiveness of scrutiny here. I would point to our recent debates about Henry VIII powers. I personally have no doubt that the trenchant criticism we have received, often from members of the Select Committee and usually from the noble and learned Lord, Lord Judge, has caused us to be more considered and cautious in our approach to utilising Henry VIII powers. I bear the scars of some of those debates and I believe that they have altered the terms of trade between primary and secondary legislation, and certainly business managers and the PBL will look carefully at any proposed Henry VIII powers even more so than they do at the moment. I think someone said that it was all a rubber stamp. Certainly, when taking these SIs through, the only thing that is stamped on is usually the Minister.

Finally, perhaps I might say a quick word to my noble friend Lord Trefgarne and thank the SLSC for the work it does. As he said, we will be providing a response to his report in due course, but we have gone further than any previous Government in being open and transparent about our plans regarding secondary legislation.

The Government's responses to the reports have met with some headwind from noble Lords, and criticism of the Government is not unusual in Select Committee reports. However, the subject of these reports is different in some respects from others in that it focuses on a continuous process—namely, legislation—rather than, for example, a controversial policy decision that is difficult to reverse. To that extent, it is possible for the Government to take on board the gist of the criticisms in these reports, and indeed in our debate today, and seek to do better. That is what the Government propose to do and we will be incentivised in so doing by the threats from the noble Lords, Lord Tyler and Lord Beith, my noble friends Lord Hunt, Lord Cormack and Lord Norton, and the noble and learned Lord, Lord Judge, that the patience of your Lordships' House is not unlimited. The Government have been warned.

7.21 pm

Lord Norton of Louth: My Lords, I am grateful to all those who have spoken in the debate, which has been a very good one indeed. The contributions have reinforced the recommendations made in the two reports. I listened carefully to what my noble friend Lord Young of Cookham said. I fear that he appeared to be justifying existing practices rather than explaining what the Government are now doing that they did not do before because of the committee's reports—other than saying that the Government will listen carefully and, "Oops, we may be scared"—but in concrete terms there has been no significant change. In so far as he commended changes, it was those which have been made by the two Houses, not by the Government.

My noble friend will have noticed that the contributions to this debate have not been confined to those who serve on the Constitution Committee, which reflects the importance of the subject. This is not a discussion

[Lord Norton of Louth]
about some technical matters of interest only to those who are interested in procedure. We are discussing issues that affect the health of our political system. Law affects everyone and bad law can have devastating effects, so it is crucial that we get it right. It is in the Government's own interest to ensure that Bills are well drafted so that they achieve their intended purpose. Being defensive about how they treat legislation is not to the benefit of government. I am sure that my noble friend the Minister will take on board all that has been said today and report back to his colleagues to ensure that action does indeed follow. I beg to move.

Motion agreed.

The Delegation of Powers (Constitution Committee Report)

Motion to Take Note

7.22 pm

Moved by ***Lord Norton of Louth***

That this House takes note of the Report from the Constitution Committee *The Legislative Process: The Delegation of Powers* (16th Report, HL Paper 225).

Motion agreed.

Regulating in a Digital World (Communications Committee Report)

Motion to Take Note

7.23 pm

Moved by ***Lord Gilbert of Panteg***

That this House takes note of the Report from the Communications Committee *Regulating in a digital world* (2nd Report, HL Paper 299).

Lord Gilbert of Panteg (Con): My Lords, I have the privilege to introduce this debate on the report of the Communications Committee. I do so as chairman of that committee. I am most grateful to the staff of our committee for their assistance in preparing the report: Theo Pembroke, the clerk; Niall Stewart and Theo Demolder, the policy analysts; and Rita Cohen, the committee assistant. They have turned their excellent minds to a whole range of complex issues and have given the committee first-rate advice. I also thank Professor Andrew Murray of the LSE, who provided in-depth and expert advice throughout this inquiry. Of course I thank the members of the committee, who have brought have brought great expertise, experience and insight to this study of a complex and vitally important area of public policy. I declare an interest as a freelance consultant to Finsbury, a PR company, and I am an electoral commissioner.

The internet has enabled people and organisations to communicate, participate in society and democracy, and to transact business on a scale which would have been unimaginable only a couple of decades ago. However, regulation has not kept pace with the nature and scope of the digital services which now affect the lives that we live. A large volume of activity occurs online which would not be tolerated offline, including abuse and hateful speech. A handful of very large tech companies have come to dominate the environments in which they operate, buying up potential competitors. Self-regulation by online platforms is inconsistent, unaccountable and inadequate, so there is a compelling and urgent case for further regulation.

What is needed is not just more regulation but a new approach to regulation. More than a dozen UK regulators have a remit covering the digital world, but no single body has complete oversight. Regulation of the digital environment is fragmented, with gaps and overlaps. Problems are neglected until they become emergencies. Policymakers offer knee-jerk responses to media stories which may have unintended consequences. One of our witnesses described this as "regulation by outrage" and compared it to whack-a-mole. Regulation needs to be better co-ordinated, more consistent and in line with the public interest.

In our report we set out proposals to ensure that rights are protected online as they are offline while keeping the internet open to innovation and creativity, with a new culture of ethical behaviour embedded in the design of services. UK regulators have a world-class reputation and help to make the UK an attractive place for business. Tech companies should work with regulators to build well-considered, stable regulation which leads to consistent and predictable outcomes. There is a great opportunity for the UK to benefit from the soft power that comes with the international reputation of its regulators and for tech companies to be part of a programme of thoughtful, measured reform.

We had two key recommendations which shaped our report. First, we recommended the creation of a new digital authority to co-ordinate regulators and to identify and address gaps in regulation. Its board would consist of the chief executives of the relevant regulators with independent non-executives. It would work, crucially, with Government, Parliament and civil society to draw up priorities and work across its component bodies. It would continually assess the regulatory landscape and from time to time make recommendations on what new regulatory powers were needed.

The authority would also play a vital role in providing the public, the Government and Parliament with the latest information on technological developments. Under our vision, there would be an important role for Parliament in monitoring progress and responding where regulatory gaps are identified by granting new powers as necessary. To this end, we proposed a new Joint Committee of Parliament with a remit to consider all matters related to the digital world. This will enable Parliament to maintain democratic scrutiny over the regulators. The work of this Joint Committee would be informed by the digital authority, which would regularly report to it.

In their response to our report, the Government state that they aim to provide co-ordination and oversight through their digital charter programme. They note several initiatives to strengthen the regulation of digital technology, including the work of expert reviews. However, our concern is that implementing the recommendations of each of these separate pieces of work could further fragment the regulatory landscape. Many reviews and

reports have recommended new regulators. However, we believe it is time for co-ordination, not proliferation, of regulators. That is why we propose the digital authority as a forward-looking, horizon-scanning body that consolidates and supplements what is already there. We think the horizon-scanning role is vital, enabling us to get ahead of technology changes that will affect our society and to design, with the industry, public policy solutions to address emerging risks.

For those who worry about the impact of regulation on innovation and freedom of expression I argue that, by anticipating the future impact of technological development, regulation is likely to be more proportionate and considered. With much greater co-operation from industry in the process, credible solutions at the design stage are also more viable. That is why we see the digital authority as a UK centre of expertise that can support our regulators, Government and Parliament and attract talent that is so often poached by the big tech companies.

Our second key recommendation was that all online regulation should be underpinned by 10 principles, including accountability, transparency, respect for privacy and freedom of expression. These principles would help the industry, regulators, the Government and users work towards a common goal of making the internet a better, more respectful environment that is beneficial to all. Responding to our report, the Government said that these were aligned with the principles set out in their online harms White Paper. However, we argued for principle-based regulation that is flexible and seeks to ensure appropriate outcomes. This is necessary in the fast-changing world of the internet. Our principles are not just an aspiration for what regulation should look like; they are intended to inform both the development of policy and the implementation of regulation. In each case, they cannot be taken separately; policymakers and regulators must consider them together, carefully balancing competing factors such as regulation and innovation, online safety and freedom of expression.

The Government have done considerable work to address online harms through their White Paper. I welcome efforts to introduce robust regulation, but our concern is that they appear to be doing this in isolation from other work. To begin, we noted that questions of design are at the heart of how the internet is experienced. It affects how users behave online and how decisions are made about them. The architecture of many online services is designed to capture users' attention so that their data—essential to the business models of most of the large tech companies—can be extracted. Personal data are processed using black-box algorithms that are not transparent. Extraction is not limited to data that users upload; behavioural data are gleaned from users' online activity. We recommend that users should have greater control over the collection of personal data; maximum privacy and safety settings should be the default.

The Government noted that the general data protection regulation addresses a number of these points, but this law is new and its application untested. We identified grey areas that the Government should clarify, such as inferred data. We also suggested ways to increase transparency and accountability in line with our principles. For example, we recommend that data controllers and data processors should be required to publish annual data transparency statements detailing which forms of behavioural data they generate or purchase from third parties, how they are stored, for how long, and how they are used and transferred. This is quite different from the privacy statements that currently exist.

The internet presents challenges to competition law. Digital markets develop quickly, whereas the competition regulator relies on meticulous and ex post analysis. There is widespread concern that competition authorities place too much emphasis on price. Meanwhile, the digital economy is characterised by the concentration of market power in a small number of companies that operate online intermediary platforms. These platforms benefit from network effects to gain dominant positions in their respective markets. Some of them provide services to consumers without charge. As intermediaries in markets they can shift costs from consumers to suppliers, while both are dependent on them. Information gained from direct access to consumers also gives platforms a competitive edge, and they have huge big data sets. There is concern that they use this information to identify and buy up emerging competitors. The Government should consider creating a public interest test for data-driven mergers and acquisitions. To deliver this, the digital authority could help co-ordinate the work of the Competition and Markets Authority and the Information Commissioner's Office, both of which gave us thoughtful evidence.

Regulation should also recognise the inherent power of intermediaries. Greater use of data portability might help, but this would require more interoperability. I welcome the review by Professor Jason Furman that explored these issues and made recommendations. The noble Lord, Lord Tyrie, has called for the Competition and Markets Authority to have greater powers to regulate in the interests of consumers; I look forward to his contribution to this debate. Technology companies provide venues for illegal content and other forms of online abuse, bullying and fake news. Although they acknowledge some responsibility, their responses are not of the right scale to deal with the problem.

The Government's proposal to introduce a duty of care accords with our recommendation. However, we did not wish to recommend a new regulator to enforce this duty. We recommend that, at least initially, Ofcom should be responsible for enforcing the duty of care. In so doing it should focus on the process for dealing with online harms rather than on content or on specific instances of wrongdoing. Big platforms should invest in better moderation processes. They should be held to the standard they set out in their own terms of service. We also recommend that online platforms should make community standards clearer through a new classification framework akin to that of the British Board of Film Classification. I would be grateful if the Minister could respond to that recommendation. I also ask him for assurances about the impact of the duty of care on the press and how the Government intend to balance journalistic freedom with regulation of online harms.

Looking at the speakers' list, I know we will enjoy a thoughtful and fascinating debate this evening and look forward to noble Lords' contributions. I beg to move.

7.37 pm

Lord Gordon of Strathblane (Lab): My Lords, it is a great pleasure to follow the noble Lord, Lord Gilbert, and to have the first opportunity of thanking him for his chairmanship of our committee—a task he carried out with great skill, bearing in mind that the landscape we were surveying was changing as the report was being written. I also echo his thanks to the clerk of the committee, Theo Pembroke, and his team, and to our specialist adviser, Professor Andrew Murray.

I agree with the noble Lord, Lord Gilbert. The internet has already brought huge benefits to society: shopping, travelling, research and even managing one's own health and fitness are easier. But in some ways, the awe and wonder at the things the internet could do for us that greeted its initial arrival seem to have worn off and to have been replaced by a degree of mistrust. The feeling is that somehow the internet is trying to control us; people imagine a *Nineteen Eighty-Four* scenario coming about. The feeling is that we are being manipulated by internet companies, that our data is being taken from us without our knowledge, misused and sold on, and that it has all got slightly out of control. Now there is a danger of legislation overreacting, and I hope the House will agree that we should adopt the same approach as the title of a seminar I intend to attend next week: How to Regulate the Internet Without Breaking It.

Undoubtedly in some countries, legislation is being proposed which would not only regulate the internet but stretch its resilience to breaking point. If we take, for example, the GDPR, as the noble Lord, Lord Gilbert, alluded to, it has not yet been fully implemented. We do not know how its interaction with the internet is going to work—we all hope it will work well.

Another reason why the gloss has come off the internet slightly is that it has made two big enemies in recent years. One is the advertising industry, which is extremely powerful and suddenly felt it was being rather defrauded by internet companies. They must make their peace with the advertising industry, and they will be set a high bar of improvement before they are let off the hook. The other body that has turned against the internet is the press, understandably. The press has largely been put out of business by the internet, so any misdemeanours by internet companies are not short of publicity in our newspapers.

As the report says in its very title, we live in a digital world, and it is important that we recognise that digital is part of that world and should not be treated separately from it. I would be interested, for example, in at some point having a debate on the Competition and Markets Authority inquiries. If it is inquiring into high street retailers, should it include Amazon? If it is inquiring into private transportation, should it include Uber? If it is inquiring into hospitality and hotels, should it include Airbnb? All of these are major players, yet are somehow classified as separate from the functions they exercise. That does not seem to make very much sense.

The approach to regulation should be the one suggested by the noble Lord, Lord Gilbert, and the committee. We need a principles-based approach which is nuanced, because we face difficult decisions. If we take, for example, the issue of anonymity, some people looking at the abuse on social media by people who remain anonymous say that the situation could be remedied by forcing everyone who makes a statement online to leave an address at which they can be traced, so that action and redress can be sought by the person who has been offended. This is a very good idea in its own right, but what effect would it have on whistleblowers who perhaps live under regimes where they would be exposed, even to loss of life? It is going to be difficult to get it right, and knee-jerk reactions are not appropriate.

Ideally, we need a blend of the stick and the carrot. The stick is the threat of legislation, and as the noble Lord, Lord Gilbert, has outlined, we have suggested a digital authority with new, real powers to enforce statutory regulation if required. Clearly preferable, if we could achieve it, would be self-regulation and co-regulation. The idea of ethical design will not work unless the companies embrace the 10 principles we have put forward and recognise that they are in their own self-interest, as well as the public interest. Self-interest should also lead them wholeheartedly to adopt the principles that we have advocated. Unless there is trust in the internet, people will not yield their data for use, and the internet business model of a great many companies will be out of the window.

In recent days, I have been in contact with the Internet Advertising Bureau, and there is further progress with its gold star system. After giving evidence to us, it emerged that the number of companies taking part has gone up from 52 to 105, and the number of people certified has risen from 12 to 91. The gold star is awarded only if they pass a reasonable standard in avoiding ad fraud, producing transparency and preserving brand positioning. If the regulation is inadequate, it is up to the advertising industry to drive a harder bargain. Likewise, in other forms of regulation, it will be up to the digital authority to say that the bar could be set a little higher. With gentle nudging—once we have got the issue of regulation accepted as a principle—where the bar is put is a matter for negotiation. If we can get 95% of what we are looking for by self-regulation, it is worth forgoing the other 5% unless it is absolutely vital; but others will differ, and there will be some issues where we need 100% support.

Turning to the powers of the digital authority, I do not want to go over what the noble Lord, Lord Gilbert, has put forward, but rather link it to the debate we have just had on Henry VIII powers, abuse of powers by government and statutory instruments. This is another area where our suggested model could be of some help. Our idea is that there should be a digital authority answerable to the highest level in government. Where that is set is up to government, but it has to be somebody who can call the shots: rather than simply asking the health service to do something, it has to be a body powerful enough to tell the health service to do something—or even the Treasury, which, as your Lordships will recognise, would be a constitutional breakthrough.

The Joint Committee of both Houses, apart from producing a quarterly report on the landscape, would have the power to say that there is an urgent problem which needs dealing with. Let us be honest, Parliament

is hopelessly inadequate to deal with the internet. By the time legislation is introduced and passed, a year will have gone by with no bother, the landscape will have changed and evasive action will have been taken. We need action to be taken quickly, and if the committee of both Houses were to endorse giving the Minister the powers to deal with the problem, it would carry a lot of weight in both Houses. They would feel that it was not simply a question of giving the Minister Henry VIII powers, but that those powers had been subject to some degree of scrutiny.

If we can get this right, it could be life-changing for our country. The internet is, in its own way, a much more important invention than printing, because of its interactivity. If we can get it right, and if we can align public interest and self-interest, we will harness one of the great positive forces for good in our society.

7.47 pm

The Lord Bishop of Chelmsford: My Lords, I too want to say what a great honour—and, indeed, an education—it has been to serve on the Communications Select Committee for this House, and to have had a small say in the production of this important report. It is always a great joy to follow the noble Lord, Lord Gordon, and, indeed, the noble Lord, Lord Gilbert, who has chaired our committee with such wit and patience.

The Government have already committed themselves to making the United Kingdom the safest place in the world to be online. The ideas in this report explain that this does not necessarily require more regulation, but a different approach to regulation. It is not an exaggeration to say that this is one of the big moral challenges of our day. We need to get it right, especially for our children, for there are no longer two worlds, the online and offline, but the one digital environment that we all inhabit and that needs a set of principles to govern not just its oversight but its future development.

When I take my child to the park or cinema, go to a restaurant, travel by public transport, go shopping or, to escape the hustle and bustle of either this place or my day job, lie on the beach or snooze on a park bench in Parliament Square, those who own and manage these spaces have responsibilities to those of us who use them. These responsibilities are laid out in legislation overseen by various different bodies. However, behind it is the principle that we have responsibilities of mutual care and respect. If the salad Niçoise I order in the restaurant is dressed with bleach, or the film has no guidance about the appropriate age for a child to watch it, or the deck chair I hire gives me splinters in unmentionable places—I will not say what I was going to say; I have to remember I am a Bishop; with this outfit it should not be difficult—those who have responsibility for the space are liable.

We have a phrase for this in the English language: common sense. However, common sense is rooted in a thoughtful and developed moral tradition whereby we recognise our common humanity and resolve to live by an agreed set of principles and standards. The digital world cannot be exempt from this moral framework. Neither is it sufficient for regulators to mitigate and alleviate its worst excesses. Why should we have to ask Facebook to take things down? Would it not be better if they were never put up in the first place?

This need not curb free speech. In fact, in the ever-increasing world of fake news and all the rest of it, it might be the salvation of free speech—for freedom is not freedom to say what I like and do as I please without regard to others, but to be free to do what we must to serve the good of all.

Self-regulation is manifestly failing. A few powerful companies dominate the digital landscape. They say they are platforms, with little or no responsibility for those who walk upon them, but they are actually public spaces with a duty of care to those who enter. I am pleased that the Government have embraced that concept but they seem reluctant to fully embrace the principles-based approach to the internet that this report recommends. The principles-based approach is, yes, to regulation but also, critically, it is to policy and development so that we might create a different future. We believe that will require an overarching body, as the noble Lord, Lord Gilbert, has explained, that we call the digital authority. However, if we do this it might break the Gordian knot of a tangle of competing bodies and rules and therefore hold the possibility of the UK taking a lead on an issue that is significantly rising up the agenda of public concern and we ask the Government to look at it again. Those clever algorithms which are so good at selling us stuff could be used to design the internet differently. What is now required is the political will to make it happen.

Finally, I remind the House of the regulations which have already been introduced. Several bishops, including myself, recently wrote to the Information Commissioner, Elizabeth Denham, in support of what I think is called—the noble Baroness, Lady Kidron, will correct me later if I have got it wrong—the kids' code that has been put forward in draft. We made the point that the online world shares the offline world's ethical duty to differentiate between children and adults and to respect and protect both the vulnerable and the marginalised in the digital world.

We cited the example—hey, we are bishops and this is the way we do things—of Jesus's most famous story of the Good Samaritan, where the Good Samaritan crosses boundaries in order to transcend the normal ways in which we do things in the different social and political jurisdictions we inhabit. Likewise, the tech sector and the digital world need to accept the demands of responsibility above profitability and to acknowledge their corporate responsibility to uphold the common good. We are concerned that the Government may row back from their commitment to introduce this code and fulfil their responsibility to children.

In the coming days, we will write to the Secretary of State on this matter. However, importantly, for this debate today, let us not keep reimagining a better future without also grasping the opportunity for that future to start today.

7.55 pm

Viscount Colville of Culross (CB): I too thank the noble Lord, Lord Gilbert, for his heroic chairing of this lengthy and complicated inquiry. I also thank the

[Viscount Colville of Culross]

clerk, Theo Pembroke, and the specialist adviser, Professor Murray, for gathering a distinguished array of witnesses and shaping this report, of which I and other members of the committee are justifiably proud.

I want to concentrate my comments tonight on chapter 3, on ethical technology. The committee put some energy into understanding the role of algorithms in the digital world and the problems that might arise from unregulated artificial intelligence. I have been particularly struck by the evidence given by witnesses such as Professor John Naughton, who told us that the wider community, including government and industry, were dazzled by technology. He warned:

"We always have to be prepared to apply to it the standard levels of human scepticism that we apply to everything".

In the report, we raised the awareness of the many concerns surrounding AI decision-making. The committee responded with recommendation 6, calling on the Information Commissioner's Office to set out rules for the use of algorithms in accordance with the principles laid out in chapter 2. We also recommended that the ICO publish a code of practice on the use of algorithms.

The GDPR is supposed to ensure that any data processing is transparent, fair, avoids bias and discrimination. The Data Protection Act, passed last year in May, enacts these requirements in English law. Yet, despite the DPA, recent surveys show that people are still concerned about the use of algorithms. They are worried by what kind of data is selected to influence the algorithmic decision, the accuracy of the algorithms being used and whether they are fair and not affected by bias and discrimination.

The ICO's interim report, *Project ExplAIn*, published last week, attempts to lay the basis for ethical guidelines in AI decision-making. It explains that there is a distrust by many digital organisations of transparency in AI decisions. They fear it may lead to breaching commercial sensitivities, infringing third-party data and their programmes being gamed by users. However, these concerns need to be set against individuals' requirements for organisations to give appropriate detailed explanations of AI decision-making. The report suggests that there is space to help bridge this divide and help organisations to foster a culture of informed and responsible approaches to innovation in AI technologies.

This work sounds like a good basis for the ICO to publish draft guidelines on ethical designs in July, with final publication in October. These will go a long way to ensuring that there is improvement in the accountability of AI decision-making. I encourage the Government to ensure that these guidelines are in line with the principles set out in the report. Even so, they will be only guidelines. However well thought out they might be, I fear the digital world will always harbour organisations and individuals who do not want to abide by them.

The GDPR is limited. Article 22 of the GDPR and Section 14 of the Data Protection Act adopt suitable measures to safeguard individuals when using solely automated decisions. This allows data subjects to appeal against an AI decision only when it is fully automated and there is no human involved. However, once human involvement in this decision is determined, the data subject cannot appeal. As many AI decisions are augmented by human intervention, this seems to be a loophole. Do the Government plan to plug this loophole and ensure that relevant legislation is brought forward to deal with any potential problem arising from this?

Ethical design is also relevant to my other great concern, raised in the report in paragraph 82, under the heading "Capturing attention". It points out that digital companies are driven by the commercial imperative to seek and retain users' attention. The EU Competition Commissioner, Margrethe Vestager, warns that this can lead to a form of addiction. On Monday, Barnardo's issued a report expressing concern that children's early access to electronic devices could lead to both addiction and a loss of key social skills as families spend less time talking to each other. This could cause the children problems with mental health and emotional well-being. The committee's report anticipates these concerns and recommends that digital service providers, including entertainment and games platforms, record time spent using their service and give users reminders of extended use through pop-up notices.

In the debate on the online harms White Paper on April 30, I said that I was concerned that this problem was not being taken seriously by the Government. The White Paper says that the CMO's review, which covered online gaming and internet addiction, did not find evidence of a causal relationship between screen-based activities and mental health problems. The White Paper shockingly concludes that the evidence did not support the need for parental guidelines or requirements for companies to behave responsibly in this area.

This lack of action is made particularly serious by the failure to confront the growing problem of gaming addiction, which affects so many young people, especially young men. Policymakers and psychologists across the developed world see this as an issue that needs to be addressed now. However, the White Paper almost ignores it.

In his reply to my April speech, the Minister said:

"I completely agree with what was said about the resistance of the gaming sector, in particular, to engage with this issue".—[*Official Report*, 30/4/19; col. 933.]

He gave me his support, for which I was very grateful. It is now six weeks later. Can the Minister give me some assurance that the Government are working to ensure that the gaming industry's resistance to dealing with gaming addiction will be seriously addressed? Failure to confront this issue quickly and comprehensively will lay the foundations of social and mental problems for generations to come.

8.01 pm

Baroness Harding of Winscombe (Con): My Lords, I will begin by commending and congratulating the Communications Committee and its chairman, my noble friend Lord Gilbert, for an excellent and very far-sighted report. I should declare my own interest: I was a trustee of Doteveryone until recently, and the chief executive of TalkTalk less recently.

I have personally campaigned for balanced internet safety regulation for a long time. I passionately believe in the good that the digital world is bringing to society.

I also believe in free markets and competition driving that good. However, it is clear that we also need to have a civilised digital world and that it needs regulation to protect the vulnerable and to ensure a level, competitive playing field in order to continue driving innovation.

That position has felt quite a lonely place for quite a long time, with many of my fellow tech leaders arguing strongly that liberal markets will solve these problems; that the internet should be a completely open, unregulated space; or that no regulation is possible, because technology is moving too fast. On the other hand, campaigners have argued for blanket bans and blocks. I am therefore delighted to see—in this report, in the Government's response in the online harms White Paper and in views expressed on both sides of the House, in this Chamber and in the other place—that there is a growing consensus that self-regulation of the digital world is not enough and not working, and that we need regulation that is thoughtfully designed across a whole range of potential social and economic harms.

I am particularly pleased to see agreement on legislating to create a statutory duty of care. That puts into practice the first principle that the committee's report sets out: that we need to look for parity between the offline and online world wherever possible. A statutory duty of care that, in a sensible and balanced way, puts the onus on organisations to look after their customers and stakeholders seems to me a fantastic way forward, and we have plenty of offline precedent to guide us in our online regulation.

I would also like to congratulate the committee on its work in setting out a principles-based approach to regulation; its 10 principles are excellent. Why are some of those 10 principles not replicated in the Government's thinking in their response? It seemed to me that they are a balanced and comprehensible set of guidelines for us to shape regulation for the future.

I would like to move to an important issue raised by my noble friend Lord Gilbert, on which I am less convinced that there is consensus: whether we should be addressing digital regulation piecemeal in each different part of society as it arises, or in a co-ordinated and more strategic way. In business, almost every large historic, physical, non-digital business has worked out that you need to bring digital leadership into one place for at least a period of time—you need to bring together all the teams looking at driving change on your digital agenda if you are really going to get momentum. It does not need to be done for ever. I have tried it both ways in my business career—keeping it separate or pulling it together—and, if you really want to create a step change in a physical organisation that is learning about the digital world, you need to have an overarching digital strategy and a team of people who specialise in looking at all the interconnectivity of these different digital issues.

It seems to me that the recommendation in this report to create the digital authority does exactly that in our physical society as we learn to integrate it with digital. The skills are too limited to keep them spread and the issues are too overlapping. It requires a different way of thinking from the old physical world. In all my experience in business, if you organise that together, you will get an acceleration of thinking and learning that can then be embedded in all the different parts of the system.

I think the committee is really on to something here. I am concerned that the Government do not appear to agree and instead prefer a more fragmented approach, creating additional regulators—which, as a good liberal Conservative, I do not like anyway—in what looks like an attempt to glue together this approach in a digital charter. To me, it looks more like a digital work plan than a charter, when compared with a statutory digital authority.

I am concerned for a number of reasons. First, I am worried that the digital charter is too close to politics. These are complex and technical issues that require a lot of detailed thought from experts who really understand the subject. Regardless of who is in charge in whichever Government we have, I am nervous about the digital charter being glued into the DCMS in a purely informal way. I also think it is too easily captured by powerful lobbyists. The tech industry is not separating out its approach to lobbying on digital regulation. Do not think for a moment that there are disparate teams working on online safety and online competition: there is one unified thought process coming through the tech industry. If we are going to get to the right, balanced answer, we should be doing the same.

It is dangerous to have your core digital strategy interwoven with an economic Ministry in DCMS. We are asking our DCMS Ministers and civil servants to be poacher and gamekeeper: to attract inward investment, but at the same time to create a fair, level playing field and safety net for the vulnerable.

Those are all reasons why, in principle, we should accept the recommendation of this report and establish a digital authority. I think we can see in practice why we should as well. Like the right reverend Prelate, I am concerned that the kids' code—the age-appropriate design code—will get watered down through hugely effective lobbying from people who will tell you that it is impossible or that it should be very narrow. I am sure that the noble Baroness, Lady Kidron, will give us more detail on this when she speaks, so I will try not to steal her thunder. It is a great example of why, if we are not very careful, it is impossible to balance poacher and gamekeeper.

In conclusion, I would like to congratulate the Communications Committee and its chair on this excellent report, and to ask the Minister to reconsider the Government's response and bring forward legislation to set up a digital authority and to implement the 10 principles set out in this report. I suspect that all of us in the Chamber this evening agree that this presents a real opportunity for us to do what we did in this country 150 years ago: to manage that balance between being open to innovation and protecting everyone in society as technological innovation gathers pace. This is a hugely exciting report and I am delighted to be part of the debate this evening.

8.09 pm

Baroness Kidron (CB): My Lords, it is always a pleasure to follow the noble Baroness, Lady Harding, who, not for the first time, has beautifully articulated

[Baroness Kidron]

some of my points. But I intend to repeat them, and I hope that they will emerge not as stolen thunder but as a common cause, and perhaps a storm around the House as others speak also.

Since my time on the committee shortly comes to an end, I take this opportunity to record my personal thanks to the noble Lord, Lord Gilbert, for his excellent chairmanship throughout, and to pay tribute to my colleagues, who make our meetings so fantastically interesting, collaborative and, occasionally, robust. I also thank the clerk, Theo Pembroke, who has always met our insatiable curiosity with extraordinary patience and good humour. I draw the attention of the House to my interests as set out in the register, particularly as chair of the 5Rights Foundation.

In its introduction, *Regulating in a Digital World* offers the following observation:

"The need for regulation goes beyond online harms. The digital world has become dominated by a small number of very large companies. These companies enjoy a substantial advantage, operating with an unprecedented knowledge of users and other businesses".

Having heard from scores of witnesses and read a mountain of written evidence, the committee concludes that regulatory intervention is required to tackle this "power imbalance" between those who use technology and those who own it. As witness after witness pointed out,

"regulation of the digital world has not kept pace with its role in our lives";

the tech sector's response to "growing public concern" has been "piecemeal"; and effective, comprehensive, and future-proof regulation is urgent and long overdue. It is on this point of the how the sector has responded to these calls for regulation that I will address the bulk of my remarks today.

Earlier this year, Mark Zuckerberg said:

"I believe we need a more active role for government and regulators. By updating the rules for the internet, we can preserve what's best about it ... while also protecting society from broader harms".

Meanwhile, Jeff Bezos said that Amazon will,

"work with any set of regulations we are given. Ultimately, society decides that, and we will follow those rules, regardless of the impact that they have on our business".

These are just two of several tech leaders who have publicly accepted the inevitability of a regulated online world, which should, in theory, make the implementation of regulation passed in this House a collaborative affair. However, no sooner is regulation drafted than the warm words of sector leaders are quickly replaced by concerted efforts to dilute, delay and disrupt. Rather than letting society decide, the tech sector is putting its considerable resource and creativity into preventing society, and society's representatives, applying its democratically agreed rules.

The committee's proposal for a digital authority would provide independence from the conflicts built into the DNA of DCMS, whose remit to innovate and grow the sector necessarily demands a hand-in-glove relationship but which also has a mandate to speak up for the rights and protections of users. More broadly, such an authority would militate against the conflicts between several government departments, which, in speaking variously and vigorously on digital matters across security, education, health and business, are ultimately divided in their purpose. In this divide and rule, the industry position that can be summed up as, "Yes, the status quo needs to change but it shouldn't happen now or to me, and it mustn't cost a penny" remains unassailable.

The noble Lord, Lord Gilbert, set out many of the 10 principles by which to shape regulation into an agreed and enforceable set of societal expectations, but they are worth repeating: parity on- and offline, accountability, transparency, openness, privacy, ethical design, recognition of childhood, respect for human rights and equality, education and awareness-raising, and democratic accountability. I want to pick up on one single aspect of design because, if we lived in a world in which the 10 principles were routinely applied, maybe I would not have been profoundly disturbed by an article by Max Fisher and Amanda Taub in the *New York Times* last week, which reported on a new study by researchers from Harvard's Berkman Klein Center. The researchers found that perfectly innocent videos of children, often simply playing around outside, were receiving hundreds of thousands of views. Why? Because YouTube algorithms were auto-recommending the videos to viewers who had just watched "prepubescent, partially clothed children". The American news network MSNBC put it a little more bluntly:

"YouTube algorithm recommends videos of kids to paedophiles".

However, although YouTube's product director for trust and safety, Jennifer O'Connor, is quoted as saying that,

"protecting kids is at the top of our list",

YouTube has so far declined to make the one change that researchers say would prevent this happening again: to identify videos of prepubescent children—which it can do automatically—and turn off its auto-recommendation system on those videos.

The article goes on to describe what it calls the "rabbit hole effect", which makes the viewing of one thing result in the recommendation of something more extreme. In this case, the researchers noticed that viewing sexual content led to the recommendation of videos of ever younger women, then young adults in school uniforms and gradually to toddlers in swimming costumes or doing the splits. The reason for not turning off the auto-recommend for videos featuring prepubescent children is—again, I quote the YouTube representative's answer to the *New York Times*—because,

"recommendations are the biggest traffic driver; removing them would hurt 'creators' who rely on those clicks".

This is what self-regulation looks like.

Auto-recommend is also at the heart of provision 11 in the ICO's recently published *Age Appropriate Design Code*, which, as the right reverend Prelate said, is commonly known as the "kids' code". Conceived in this House and supported by many noble Lords who are in the Chamber tonight, provision 11 prevents a company using a child's data to recommend material or behaviours detrimental to children. In reality, this provision, and the kids' code in general, does no more than what Mark Zuckerberg and Jeff Bezos have agreed is necessary and publicly promised to adhere to.

It puts societal rules—in this case, the established rights of children, including their right to privacy and protection—above the commercial interests of the sector and into enforceable regulation.

Sadly, and yet unsurprisingly, the trade association of the global internet companies here in the UK, the Internet Association, which represents, among others, Amazon, Facebook, Google, Twitter and Snapchat, is furiously lobbying to delay, dilute and disrupt the code's introduction. The kids' code offers a world in which the committee's principle—the recognition of childhood—is fundamental; a principle that, when enacted, would require online services likely to be accessed by children to introduce safeguards for all users under the age of 18.

The Internet Association cynically argues that the kids' code should be restricted to services that are "targeted at children", in effect putting CBeebies and "Sesame Street" in scope, while YouTube, Instagram, Facebook, Snapchat, et cetera, would be free to continue to serve millions of children as they alone deem fit. The Internet Association has also demanded that children be defined only as those under 13, so that anyone over 13 is effectively treated like an adult. This is out of step with the Data Protection Act 2018 that we passed in this House with government agreement, which defines a child as a person under 18. Moreover, in the event that it is successful in derailing the code in this way, it would leave huge numbers of children unprotected during some of the most vulnerable years of their life.

Perhaps the most disingenuous pushback of all is the Internet Association's claim that complying with regulations is not technically feasible. This is a sector that promises eye-watering innovation and technical prowess, that intends to get us to the moon on holiday and fill our streets with driverless cars. In my extensive conversations with engineers and computer scientists both in and out of the sector, no one has ever suggested that the kids' code presents an insurmountable technical problem, a fact underlined by conversations I had in Silicon Valley only a few weeks ago. Yes, it requires a culture change and it may have a price, but the digital sector must accept, like all other industries have before it, that promoting children's welfare—indeed, citizens' and community welfare more generally—is simply a price of doing business. Let us not make the mistake of muddling up price and cost, since the cost of not regulating the digital world is one that our children are already paying.

Regulating in a Digital World establishes beyond doubt that if we want a better digital world, we must act now to shape it according to societal values, one of which is to recognise the vulnerabilities and privileges of childhood. I recognise and very much welcome the future plans of the Government in this area, but if we cannot get one exemplar code effectively and robustly into the real world, what message does that send to the sector about our seriousness in fulfilling the grand ambitions of the online harms White Paper?

When replying, could the Minister give some reassurance that the Government will indeed stand four-square behind the Information Commissioner and her ground-breaking kids' code? In doing so, will they meet the expectations of parents, who have been promised a great deal by this Government but have not yet seen the change in the lived experience of their children. More importantly still, will they meet the needs and uphold the rights of UK children, rather than once again giving in to tech sector lobbying?

I will finish with the words of a 12 year-old boy who I met last Thursday in a 5Rights workshop. A self-professed lover of technology, he said, "They sacrifice people for cash. It makes me so angry. I can't believe that people are so unnecessarily greedy". His words, remarkable from someone so young, eloquently sum up the committee's report.

8.22 pm

Lord Maxton (Lab): My Lords, first, I thank the committee for its very thorough report and its chairman, the noble Lord, Lord Gilbert, for introducing it so ably and with such eloquence. However, I am one of the few Members who disagree with some of what the report says.

First, it is impossible to regulate the internet in a small nation state such as the UK. The internet is international. It is broad and goes across the whole world. Therefore, it is impossible to regulate it within one country. It may be that this is my anti-Brexit speech, but so be it. The fact is that you cannot regulate the internet in one country and one country only. You have to be part of a broader international scene to do that.

Secondly, there is a danger in overregulation of the internet, in that it stifles innovation. Innovation is at the core of all that we do in this matter. On balance, we are probably looking to overregulate the internet in this country—in this country only—and some of these big international companies will simply move elsewhere rather than stay here. Certainly, we must be very wary of overregulating the internet if as a result we stifle innovation, which is so important in the modern world.

Thirdly, if anything, the balance on the internet is in favour of the internet. More good comes out of it than harm. I think the report is negative, to some extent, in that it tends to go overboard on what is wrong with the internet, rather than telling us what is right about it. For instance, I do all my banking—or nearly all of it—on the internet. I do not go to the bank. When I went to my own bank branch recently, which has now closed, I looked around and said, "Oh, you've done this up". One of the clerks said, "Yes, five years ago, Mr Maxton". I have a Bank of Scotland app, with all of my bank accounts. I transfer money from one account to another, pay by BACS and pay on the internet. When I put my card into a machine at a bank, in a shop or wherever it might be, that too is the internet at work.

Most of the apps I use are simply there to provide a service. I read on a Kindle; I do not read books any more. A lot of authors are now bypassing publishers, going straight to Amazon and asking to write for it directly. If they go to Amazon, they get a greater return. The price is lower than a book, but they do not have to pay a publisher, a bookseller or all sorts of people to advertise it. It is advertised by Amazon and their return is higher. I group my websites and I have three golf clubs, a running club and a rugby club on my apps under "sport".

[Lord Maxton]

Lastly, I say to everybody who produced this report that the one thing that has not been mentioned is "school" or "education". Perhaps it was briefly mentioned in the report, but schooling is important. Surely that is where this ought to begin. We ought to start there by telling children how to deal with the internet. Instead, we tell them how to make computers, and a small proportion of them may be able to do that. The fact is that we do not tell them about the dangers the internet possibly has—I stress "possibly". I will finish there, because I am very aware that we want to finish quickly.

8.28 pm

Lord Inglewood (Non-Afl): My Lords, like other speakers, I congratulate the noble Lord, Lord Gilbert, and his committee on this useful report. I say at the outset that I am a director and trustee of Full Fact. It has been a great pleasure to discuss Communications Committee matters with many Members of your Lordships' House, as I had the great privilege of doing that years ago when I was fortunate enough to chair the committee; those were some of the happiest times of my life in this House.

To make this report manageable, it was really sensible to set on one side many of the technical aspects of the internet—not least because I for my part cannot understand them—and a number of the aspects and implications of the phenomenon of large-scale data transfer in the context of areas such as the internet of things. Rather, we have a report that seems to concentrate on the relationship of the internet with individual human beings essentially in a personal capacity.

In this context, the internet is a complicated and potentially complicating intermediary between two separate things—a source of information and its consumer—which in turn may well involve commercial transactions and/or marketing of products or services in a way which, until recently, was unthinkable. I say as an aside that this may be one of the most abstract House of Lords reports I have read. This is not a criticism; it is a symptom of the difficulty of the problem we are looking at, which, in its domestic form, is merely part of a wider global problem which is embedded here in the United Kingdom—this is picking up on a point made by the noble Lord, Lord Maxton. We are talking about a fast-moving and ever-changing technology, and the techniques used to apply it, set in a global system.

I think this is the right starting point, because the report rightly comments that a "principles-based approach" is probably the only way to put in place a remotely relevant framework in such a fast-changing environment. From this starting analysis, it is important that the relationship between government—not only our Government—and those who effectively have the greatest influence and control over the net, the FAANGs of the moment, amounts to a reasonably amicable modus vivendi, each understanding the role of the other. The latter, who can organise much of their activity beyond the reach of any traditional Government, must retain consumer and public confidence, while Governments must try to ensure the benefits of this new technology are maximised for their citizens' benefit.

It follows that Governments in the western world, many outside it—excluding certain authoritarian regimes—and the big tech companies, taking a longer view, have a mutuality of interest in working together. As Tim Berners-Lee, who was quoted at the beginning of the report, has said, the internet is potentially a great force for good. One should add to that proposition that it is one that is not going to go away. On the one hand, Governments need to enlist internet players to assist in dealing with human, financial, political and reputational harm, as well as bettering the human condition more generally. At the same time, internet businesses, by being involved in that, can expect a regime in which they will get a reasonable return—on which appropriate tax should be paid.

An important point contained in the report is that there should be as seamless a join as possible between online and offline rules of behaviour and conduct, although clearly there are some attributes unique to the internet, such as algorithms, which may require their own rules. Rules must be not only enforceable; where appropriate, they must be enforced.

As I have mentioned, while some of the problems which arise are essentially domestic, many are not. Sometimes those which are not are less obvious; for example, some of the corruption we have seen in domestic UK elections of late. Natural boundaries and traditional jurisdictions are in many cases irrelevant. Our country, like every other, must accept that.

A shortcoming of the report, which may be deliberate—for reasons I have touched on already—is the almost complete silence about the cross-border, cross-jurisdictional aspect of the internet's workings. The noble Lord, Lord Maxton, pointed this out, and allusion is made to it in the text. As the report points out, leaving the EU presents some real difficulties in this regard. They can, and no doubt will, be negotiated and dealt with in another way in a post-Brexit world, but the problem has always gone much further than the European Union. Collectively, Governments of the world must somehow evolve a universal and consistent framework for the modus operandi of the internet, as viewed from the perspective of consumers and enforcers, although exactly how that might be done is beyond my pay grade at the moment.

I think there are two parallel problems. First, jurisdictional difficulties need to be set aside to try to achieve some kind of workable international transactional homogeneity. As part of this, those who influence the way in which the internet works need to be brought into the rule-making process. This is not the traditional approach to lawmaking within the nation state, but there is a need for a system which brings about an agreed and accepted outcome into which there is general buy-in, subject in the last analysis to effective enforcement. If there is not, it will not work. Secondly, however that may be brought into being, the arrangements must be living, or they will rapidly become outdated, as has already been said.

Currently, in the midst of the Brexit crisis—if I may describe it that way—much of the focus of the debate has been on the legislative structure of the European single market. The system that emerges may make that

look positively simple. If so, so be it, because unless we grasp this particular nettle, the likely outcome is an anarchic muddle.

At the start of my remarks, I commented on the somewhat abstract character of the report, only to then make a generalised and somewhat abstract speech myself. However, it seems to me that if a requirement of a regulated, working internet is to achieve its full potential in the wider public interest, it must be brought into being as a result of some quite radical actions, and radical thinking is required to do that. This is not simply a domestic issue which relates to domestic activities. It goes much further than that. International problems require international solutions.

8.36 pm

Baroness McIntosh of Hudnall (Lab): My Lords, the hour is late and everything that needs to be said has been said, but not yet by me. However, your Lordships will be happy to know that that is the way it is going to stay because I really just want to emphasise one issue, which has been widely addressed by other contributors to the debate. I thank our chair, the noble Lord, Lord Gilbert, who led this committee with tremendous grace. I will not say that it was made up of cats or that it was especially difficult to herd its members, but it had its challenges, as the noble Baroness, Lady Kidron, said. We also had fantastic support from the clerks and our adviser, as has also been said.

I also thank the Government for responding so promptly to the report, which allowed this debate to happen while its findings were still current. This has not been the case on every occasion, and in this particular realm there is a need for issues to be addressed quickly because otherwise they are not the issues today that one thought they were yesterday.

Digital technology is not my area of expertise, so I have learned a very great deal more from witnesses and colleagues than I have been able to contribute. I have discovered, however, that there is some value in being a relative innocent in the digital realm. The value to me was that I have had to work jolly hard to understand what was being put in front of me. I do not think that I have always understood all of it, but I have certainly understood something. The main thing that I have understood is blindingly obvious: the digital world, referred to in the title of the report, is not a parallel universe that we can step into or out of at will. It is the world. It affects and infects every aspect of our lives, whether we like it or not. I will simply give the House a few obvious examples. It affects our politics and our democracy; it affects the way we buy and sell things; it affects the way we access public services and medicine, and it infects and affects our domestic and private lives.

I do not know how many noble Lords are watching the BBC TV series "Years and Years", written by Russell T Davies. It is an absolutely brilliant piece of dystopian imagination. Threaded all the way through it is the dependency on digital technology, which every single person who is part of the world it is describing—which is only a few years on from today—has to recognise. The wonderful thing about it, apart from the brilliant writing and performances, is that some of what can be seen in it is clearly not exactly what we have today but so close as to be recognisable. I mention it because it tells us that it does not take very much—of course, Mr Davies's imagination is a good deal more far-reaching than all of ours—to realise just how close we are to that kind of really deep-rooted dependency.

I was part of a conversation earlier today, as part of my work on the committee, with a group of 17 and 18 year-olds—year 12, in other words—who came to talk to us about their viewing habits and how they accessed television. Of course, what they described was a way of working with the technology that they have available to them. This is certainly quite different from the way that I work with what I have available to me because they are completely familiar with it. They understand the way that it works and the opportunities that it offers to them. These young people were using this technology very creatively; they were very clever and savvy and healthily sceptical about what was put in front of them. However, they need and deserve effective regulation and, furthermore, they know that they do. The contributions from the right reverend Prelate and the noble Baroness, Lady Kidron, made these points very effectively, more effectively than I can.

Given this reality and given the world, it must surely be the case that effective regulation would not just be nice to have: it is absolutely essential. It is fairly clear that self-regulation, which has been depended on up till now, is inadequate; and that the nature of regulation itself has to be rethought, which was the point made at the very outset of this debate by the noble Lord, Lord Gilbert. It has to be rethought with far greater emphasis on working collaboratively across boundaries and sectors. This is the rationale—which was so expertly analysed by the noble Baroness, Lady Harding, in her contribution—behind the committee's recommendation that a new digital authority be set up.

Like others, I welcome the recent online harms White Paper and I am glad that the Government are broadly sympathetic in their response to the committee's analysis and recommendations. However, I note that their response to this key recommendation is what might be called a bit lukewarm. This recommendation on the digital authority suggests that a single, overarching co-ordinating body, linked to a Joint Committee of Parliament, is potentially the most effective way of ensuring regulatory coherence in the fast-moving world of technological development.

To be fair, the Government's response accepts the need for,

"a coordinated and coherent approach across the various sector regulators and bodies tasked with overseeing digital businesses",

but it then sets out a rather less than coherent way forward:

"As part of this programme of work, we look to the tech sector, businesses and civil society, as well as the regulators themselves, to own these challenges with us, using our convening power to bring them together to find solutions where possible"—

I emphasise "where possible". Later it says:

"The government is carefully considering potential overlaps between new regulatory functions, such as that proposed through the Online Harms White Paper, and the remits of existing regulators.

[Baroness McIntosh of Hudnall]

Consolidation of these functions, or a broader restructuring of the regulatory landscape, could"—

again, I emphasise "could"—

"play an important role in supporting an effective overall approach to the regulation of digital, as well as minimising burdens on businesses … We thank the Committee for their recommendation and will carefully consider this and their other recommendations as we continue to assess the need for further intervention".

In one way there is nothing wrong with that, but I do not detect any great sense of urgency. Speaking just for myself, I think these matters are urgent. Actually, I think the committee thinks so too, and the report says that. I fear that we are in danger of being completely outrun by the speed of change. I realise that the Government are in a difficult place at the moment, and I do not say that disrespectfully, but while they are pausing to sort themselves out our digital world is moving on apace, and it will not wait for us. I hope the Minister can assure us that the necessary momentum will gather before it is too late.

8.45 pm

Lord Vaux of Harrowden (CB): My Lords, digital regulation is an incredibly complex subject, as we have heard, and it covers a wide range of diverse areas, so I am very grateful to the committee and to the noble Lord, Lord Gilbert, for producing this comprehensive report. I will focus tonight on data, and I apologise now to the noble Lord, Lord Inglewood, because I am going to get a little bit into the nuts and bolts. In doing so, I am going to concentrate principally on Google, but some of the issues that I raise apply to a greater or lesser extent to other platforms.

Google is the world's largest digital advertising company but it also provides the world's leading browser, Chrome; the leading mobile phone operating platform, Android; and the dominant search engine. Its Chromebook operating system, while smaller, is growing fast, and it offers myriad other services to the consumer, such as Gmail, YouTube, Google+, Maps, Google Home and so on. These services are mostly provided to the consumer for free, and in return Google uses them to collect detailed information about people's online and real-world behaviour, which it then uses to target them with paid advertising.

It collects data in two principal ways. First, active collection is where you are communicating directly with Google —for example, when you sign in to a Google account and use its applications. When you are signed in, the data collected is connected to your account, in your name. Secondly, Google applies a passive-collection approach. This happens when you are not signed in to a Google service but the data is collected through the use of the Google search engine, and through various advertising and publishing tools that use cookies and other techniques to track you wherever you go on the net—or indeed physically. It can still track your device location even if you are not an Android user. Do not think that avoiding all Google software will help; most websites have Google tools embedded in them and will place Google cookies on your device regardless.

The sheer quantity of data that Google collects every day is staggering. A recent study by Professor Douglas Schmidt of Vanderbilt University simulated the typical use of an Android phone and found that the phone communicated 11.6 megabytes of user data to Google per day—that is just one device in one day. As an aside, the phone is using your data allowance; you are paying for it to send all this data back to Google. The experiment further showed that even if a user does not interact with any key Google applications, Google is still able to collect considerable data through its tools and by using less visible tracking techniques.

The greatest safeguard over the collection and use of data has to be transparency. As users, we need to understand what is being collected, by whom and what for, and we need the ability to stop it and delete it if we wish. The GDPR and the Data Protection Act represent a step forward but it is already becoming clear that they may not be sufficient for the fast-moving digital world. How many people really understand what Google or indeed any other platform is collecting about them? This is going to become even more important as 5G and the internet of things take off.

As part of the right to be informed under the GDPR, websites now need to ask consent to use cookies. However, as we have all seen, the consent pop-ups usually say something general such as, "Cookies are used to improve and personalise our services". It remains very difficult to find out precisely what data is being transferred, to whom and why. This is then complicated further by the fact that accepting cookies on a site usually means accepting not only the cookies for the site concerned, but also third-party cookies, including Google. Amazon, for example, lists 46 third parties that may set cookies when you use Amazon services, with no clear explanation of what each is doing, or what the relationship is. This is not transparent. Remember, cookies are only one way to collect the data. Others are less visible, such as browser fingerprinting. Blocking cookies does not stop data being collected.

GDPR also gives us the right to obtain the data that is held on us, but there are a number of problems. First, it is hard to know who has your data, because of the many third parties I have spoken about, with which you have no direct relationship but are collecting data on you. Secondly, only data deemed personally identifiable will be provided. In Google's case, this includes only the data that it has collected using the active process I described earlier when you are logged into a Google service. However, as Professor Schmidt's study showed, the majority of the data Google collects comes from the passive collection method. This data is described as user-anonymous, being linked to different identifiers, such as your device or browser ID; but if you log into a Google service from the same device or browser, either before or afterwards, Google is able to link it to your account.

Thirdly, as the committee's report points out, the data that must be provided in response to a request does not include the behavioural information that derives from your data. I strongly agree with the committee's conclusion that this behavioural information should be made available to the subject. I further urge the ICO to look more closely at whether cookie consent requests really meet the right to be informed, and to consider whether data that the platforms describe as user-anonymous are really anything of the sort. There should also be a requirement to provide details of any

data that has been provided to third parties, and to provide details of third parties that have been allowed to collect data through one's website. Does the Minister agree with these suggestions?

The second issue that arises from the way data is collected is one of conflict of interest and market power. I have described the volume of data collected by Google. This is hugely facilitated when the operating system and browser of your phone or computer is provided by Google. In effect, this means that your device is not working for you or protecting your interests; it is working for Google, helping it to obtain your data. Google's dominance in both browser and phone operating systems strengthens a network effect that has assisted its rise as one of the data monopolies, making it hard for others to break into the market and compete. There has been talk of splitting up these data monopolies, and there must be an argument for somehow separating the activities of providing operating systems and browsers from those of data collection and advertising. At the very least, we should insist on mandatory standards of user protection and transparency to be built into such operating systems and browsers. Doing this would ensure that the software works to protect the interests of the user, not the interests of the advertiser. This would be a strong step towards,

"data protection by design and by default".

I continue to agree that the CMA should look into the digital advertising market, as repeated in the report, and urge that this structural conflict I have just described is considered as a part of that. I am very sorry that the noble Lord, Lord Tyrie, has had to pull out of this debate. It would have been very good to have heard what he had to say on the subject. I urge the Minister to encourage the CMA to take a look.

In conclusion, I have suggested that the ICO should look into one element and that the CMA should review another—both elements are related. I think this emphasises the need for an expert digital authority, as the committee recommends, if only to act as gatekeeper and make sure that issues do not fall between the cracks.

8.54 pm

Lord McNally (LD): My Lords, the noble Lord, Lord Vaux, need not apologise. This is one of the few assemblies in the world where one would get as deep and thorough an analysis of the subject from one of its Members. I still remember the American Senate talking to Mark Zuckerberg and the chasm of understanding between the legislators and the techie was cruel to behold. So stay with us.

I want to refer to a comment by the noble Lord, Lord Inglewood. He talked about his chairmanship of the Communications Committee. I have never served on that committee or been its chairman, but for nine years I was leader of the Liberal Democrats here in the Lords and in that capacity I was on all the committees that looked at the structures of committees, et cetera. I can say that during that time there were one or two very severe attempts to get rid of the Communications Committee, usually by offering even more interesting things to members. It was something I seriously resisted, because I believe that its ambit covers such an important future agenda that it is important that it continue as a permanent committee of this House. Its importance is underlined by the report before us tonight and I congratulate the noble Lord, Lord Gilbert, both on the way he introduced it and on the way he herded the cats on the committee, as we were told. He had my noble friends Lady Benjamin and Lady Bonham-Carter as members, so I know exactly what he was talking about.

The committee has already had its impact: the Government have acknowledged that their online harms White Paper was influenced by some of the committee's recommendations. Some 16 years ago I served on the Puttnam committee, the pre-legislative scrutiny committee for what became the Communications Act 2004. That Act created Ofcom, which has developed into a feared and respected regulator with public interest responsibilities. That committee took the conscious decision 16 years ago not to look into the idea of regulating the internet. The world wide web was seen as a free good and a boon to mankind. Ten years later, in addition to that libertarian approach, was the argument that the internet titans, the likes of Facebook, Amazon, Netflix and Google, were now so global and powerful as to be beyond the reach of any national jurisdiction—what I would describe as the Maxton approach.

Now the public mood has changed. As the noble Lord, Lord Gordon, said, that sense of wonder and awe has worn thin. In the United States, in Europe and here in the United Kingdom there is now a feeling that we have got to come to grips with the power of the internet. The chair of this committee, the noble Lord, Lord Gilbert, when launching this report said:

"A comprehensive new approach to regulation is needed to address the diverse range of challenges that the internet presents".

Tonight, he called for urgent and compelling action. Tim Berners-Lee, the father of the world wide web, has said:

"While the web has created opportunity, given marginalised groups a voice, and made our daily lives easier, it has also created opportunity for scammers, given a voice to those who spread hatred, and made all kinds of crime easier to commit".

The noble Baroness, Lady Kidron, quoted Mark Zuckerberg and other tech leaders as saying that they would now welcome some regulation, but I give a warning: do not underestimate the power of the lobbyists. The so-called FANGs have immense resources. I saw in the *New York Times* this week that even the Senate was backing off from too urgent action against them. In some ways, the story of the National Rifle Association should always be kept in mind if you are really challenging vested interests in a big way and, boy, that is what we are proposing to do.

The great debate is now about how and when we regulate. Both the committee report and the Government's White Paper, along with many contributions to today's debate, listed the harms and abuses that the internet has spawned—although I acknowledge along with the noble Lord, Lord Maxton, the many benefits that the internet has spawned as well. A few weeks ago the Health Minister was answering questions about the mental health damage to young people on the internet. She made the point in response, which I thought was very valid, "Yes, but also on the internet is found some of the help and advice that young people were often searching for, which they would not be able to find as easily elsewhere".

[Lord McNally]

We are talking about a balance, but the grooming and abuse of vulnerable groups, particularly children, is nevertheless one of the key things, and I pay tribute to the campaign that the noble Baroness, Lady Kidron, has led on this. As far as the kids' code is concerned, all I can say is that we will be with her every step of the way, so she should keep going. There is of course use by terrorists, organised crime and, indeed, state agencies. There are also the undermining of democratic processes and the promotion of hate language towards race, sexual orientation and mental or physical handicap. The noble Viscount, Lord Colville, mentioned other health and social consequences, particularly with gaming addiction. The examples go on and on, and such a charge list creates a public and political demand that something must be done. The White Paper captures this sense of urgency when it says that things,

"have not gone far or fast enough".

Our task is made easier by the committee's recommendation of 10 principles to guide the development of regulation online. On the other hand, the recommendation that a new digital authority be created sets alarm bells ringing at the idea of yet another regulator in this sphere. We need to think carefully about what is needed. Such an authority will need a certain heft and clout to gain the respect of some pretty big beasts.

I remember that when the Puttnam committee was discussing the establishment of Ofcom we were told that Murdoch's lawyers would eat this new regulator for breakfast. Well, it was not so. Now, 15 years on, we have reached a stage where "give it to Ofcom" seems to be the answer to every problem. That may be the answer, but let us weigh up the options. Whatever becomes this digital regulator will have to work closely with the ICO, the CMA and other bodies such as the Centre for Data Ethics and Innovation, as well as self-regulators such as the ASA and trade bodies such as the Internet Association. But Parliament will then have to decide where the buck stops and who makes the key decisions.

There will also need to be early work on data literacy. Here I agree with the noble Lord, Lord Maxton, that the long-delayed recommendation of the Puttnam committee for a clear policy of data literacy education is important, parallel with these developments. In addition, the CMA and the DCMS are going to need extra resources to take on their new responsibilities. I hope that I am not treading on too many toes in Whitehall if I say that there will be greater public confidence as we move forward if the DCMS is seen as the lead department, although of course the Home Office has a clear role in criminal, terrorism and intelligence matters.

I disagree with the statement that the DCMS cannot be the poacher and gamekeeper. The digital authority will have to have a parent department, but Parliament will need to be able to look at some detailed and specific proposals if we are to avoid a plethora of codes and regulators and a balkanisation of the system, a warning made by the noble Baroness, Lady Harding. I thought at one point that she was going to suggest that the whole lot be given to the Home Office, but she steered away from that nightmare. That is why it is not nostalgic for me to urge that, before we move to specific legislation, a draft Bill is submitted to a joint pre-legislative scrutiny committee of both Houses. The great benefit of the Puttnam committee process was its transparency and its open door to allow all interest groups to have their day in court. The outcome was a piece of legislation which was better and more robust because of that pre-legislative scrutiny. I am very interested to see that growing into a permanent Joint Committee of both Houses.

The noble Baroness, Lady McIntosh, mentioned democracy. One of the criticisms of the White Paper and the report is that they did not deal with the threat to our democracy posed by internet abuse. I am delighted to see on today's Order Paper that a Committee of this House has been established to report on democracy and digital technologies. I was even more delighted when I saw that the noble Lord, Lord Puttnam, had been appointed chairman. I hope the Minister will assure us of his department's full co-operation with the work of that committee.

My final appeal is that we remain major players in international discussions on these matters. Between 2010 and 2013, I was the Minister involved in the early stages of GDPR negotiations. The GDPR may have its weaknesses, but it is an example of how international agreements can be reached on these matters. In the ICO and its commissioner, we have a real asset to be deployed in seeking international co-operation. I agree with the noble Lord, Lord Inglewood: I see no reason why we should not have the ambition to create a kind of Geneva convention on rules of behaviour for the world wide web.

Nor for the first time, the Communications Committee has produced a report which brings credit to this House and positive and useful advice to the Government, while providing clear advice for the next steps for all of us in this complex and fast-moving world. In that respect, we are all in its debt.

9.07 pm

Lord Stevenson of Balmacara (Lab): My Lords, I declare that I was once very briefly a member of the Communications Committee, I think before the noble Lord, Lord Inglewood, took the Chair, although there was a point where he did appear in the Chair. I am not quite sure why that was, but it sticks in my memory. I therefore speak personally of the skills and expertise that have often gathered around that group.

We all owe a debt to the noble Lord, Lord Gilbert, for introducing this report. To say that it is a powerful and useful report is to repeat what a lot of people have said. However, the test is whether the members of the committee rally round and support it, and we have had a brilliant demonstration of that today. It is clearly a well-functioning and powerful group, but it has picked a topic of considerable importance and brought forward something which has made the whole House think again. The excellent speeches and the good debate we have had tonight are only part of the process. The report itself is a very good read. It may be abstract, but it certainly hits home.

The Government's response was unusually prompt, but DCMS has a good record on this—certainly better than a lot of other departments. However, I felt, like

others, that it was a bit defensive. It claims that the committee's recommendations are closely aligned with what the Government are doing, although, as we have heard, the committee feels that it goes much further. It argues that the issues are covered in the online harms White Paper, but if they were not, they would be picked up by Centre for Data Ethics and Innovation—talk about having it both ways. We will see how that goes. Is it true that the centre is not yet established as a statutory body? If so, will the Minister explain how it will provide independent expert advice on the measures needed if it remains an NDPB within his department?

I shall argue tonight that if, as the Government say in their response, it is clear that they must lead the way in tackling these challenges and there really is firm commitment to do what is needed, they need to be prepared to take on vested interests so that they can shift expectations of behaviour, agree new standards and update our laws, which is what they say they want to do.

Several members of the committee, perhaps reflecting their own contexts, have expressed concern about the Government's commitment here, but I put it to the Minister that the Government should use this excellent report as a spur to further action. I suggest that the best way forward, as the noble Lord, Lord McNally, said, is to publish a draft Bill and allow it to be subject to pre-legislative scrutiny. That way, we can see what is happening, get the transparency we need and pick up the comments and expertise required.

We have a White Paper, which in common parlance means that a Bill is in prospect or might be in preparation—perhaps the Minister will confirm where we are on that. The Government and the committee certainly agree that the centrepiece of the new approach should be, as the Government propose, tripartite. It is a significant and welcome decision of the Government to legislate to establish a new statutory duty of care to make companies take more responsibility for the safety of their users online and tackle the harm caused by content or activity on their services, combined with legislation to ensure compliance with this duty by establishing an independent regulator with powers to implement, oversee and enforce any regulatory framework. Most importantly, the third leg of the stool is to create a new form of regulatory intervention which will help companies to thrive, while ensuring the safety of users promoting innovation, guaranteeing freedom of expression and establishing other norms that underpin our democratic society—the democracy element is very important.

The reason that is so interesting is that it is a tripartite and interlocking approach. Like the committee, I broadly agree with what the Government are trying to do in ensuring that digital technology and the internet work for everyone—citizens, businesses and society as a whole. But there is far too little in the response to the committee to back up the Government's assertion that the new system will answer the committee's concerns that new technology will be deployed ethically as well as safely and securely, or that consumers will have the powers they need to ensure that their rights and views are not ignored, as they are at present, which is why the committee's report is so important.

We all owe the committee a debt of gratitude for its work in setting out so comprehensively the challenges that the new regulatory environment will face, and the comments made by speakers today have been most useful in fleshing out the issues. How could it be otherwise, given that the skills, knowledge and experience represented on the committee are so incredibly useful?

I join several previous speakers in suggesting more action from the Government. I shall mention three of the committee's recommendations which seem to me to have real merit, but which the Government seem to have downplayed. Like my noble friend Lady McIntosh—who is wearing three hats today—I felt that the Government's response did not quite convince the neutral witness that they have the momentum, as I think she put it, to see this job through to the end. As I said, there is a test, which is the publication of a draft Bill.

First, on the smarter regulation proposal—the centrepiece of the speech of the noble Lord, Lord Gilbert, and the first point raised by him—the committee said that we need not more but different regulation for the internet. I agree with that. In paragraph 240, it comes up with a very interesting idea which fleshes out that concept. As the noble Lord said, the Government should establish another body with additional powers to ensure that digital regulation, wherever it happens, is kept up to date and in step. It has called it the digital authority and has listed the powers that it might have, aimed at co-ordinating regulation and regulators in the digital world.

There are very few new ideas in public policy, but I wonder whether this is one. There is the germ of a very good idea here, and I hope that the Government will take seriously the case for creating a body with powers to instruct other regulators to address specific problems or areas in the digital space. In cases where that is impossible because the problems are not within the remit of any one regulator, the digital authority should be well placed to advise the Government and Parliament of new or strengthened legal powers which are needed. The suggestion of combining this with a standing Joint Committee of Parliament is a very good one; that seems to square that circle very well.

Turning to the principles underlying regulation, the committee makes a very good point, which is that there should be a much more explicit set of principles underwriting the way in which any regulation applying to the internet should work. This may answer some of the points made by my noble friend Lord Maxton and others about the need for universal appeal for this, because if the principles are well constructed, they will be beyond any particular national boundary; they will be strong enough to go across them.

The 10 principles which the committee says should guide the development of the regulation have already been discussed by both the noble Baronesses, Lady Harding and Lady Kidron, but they bear repeating: parity, accountability, transparency, openness, privacy, ethical design, recognition of childhood, respect for human rights and equality, education and awareness raising and democratic accountability. This is a very powerful group of principles, which, if they are taken properly and put into words which apply to those who

[Lord Stevenson of Balmacara]

have to operate in this space, will bite. The Government say that the six principles they have specified in their White Paper, are,

"closely aligned with those set out in this report".

As the noble Baroness, Lady Harding, said, they are not exactly similar, and there are three important gaps. There is no mention of accountability: the processes that need to be in place to ensure individuals and organisations are held to account for their policies and actions. Nor is there mention of transparency: how we will see into the businesses and organisations operating in the digital world so that they are open to scrutiny—this very strongly picks up the point about algorithms. The other gaps are democratic accountability, which was picked up by the noble Lord, Lord McNally, and proportionality and evidence-based approaches. There may be ways in which these words appear in the Government's list, but the fact that they have been drawn out in the committee report is important, and we should not lose that.

Market concentration was raised by a number of speakers. The report makes two important points that the Government have not picked up on well. The first is on the way in which the internet operates specifically against the public interest, with large companies becoming data monopolies, mainly through mergers and acquisitions. The committee recommends that, in their review of competition law in the context of digital markets, the Government consider implementing a public interest test for data-driven mergers and acquisitions, so that the CMA can intervene, as it currently does in cases relevant to media plurality or national security. I agree with this. Secondly, the internet is characterised by a concentration of market power in a small number of companies that operate online platforms and values brands, platforms and other issues that are not well recognised within the physical world. The Committee make the point that these aspects of digital markets challenge traditional competition law and it suggests that Government broaden the consumer welfare standard to ensure that it takes adequate account of long-term innovation and strengthens the power of the CMA to bring the process of imposing interim measures up to date and make it more effective. I think this is something that the noble Lord, Lord Tyrie, has already proposed, so the Government may be able to respond to.

Other speakers have picked up that the government response here is rather weak:

"We continue to consider policy options across the range of measures proposed".

But the independent Digital Competition Expert Panel led by Professor Jason Furman published its recommendations for government on 13 March 2019, so there has clearly been plenty of time to pick this up and bring forward proposals. There needs to be legislative change here, so why not put this in a draft Bill since we already have the proposals?

I do not think anybody has picked up on the elephant in the room: the e-commerce directive. I think that is partly because it is complicated and made more difficult by Brexit. The point made by the committee is important: online communication platforms are utilities, in the sense that users feel they cannot do without them. As the report points out, the providers of these services have a safe harbour at the moment under the e-commerce directive. What are the Government going to do about that? I ask the Minister to pick up this point in particular. If we are staying in the single market, this would have to be done conjointly with the EU, and there are measures afoot to try to do something here. If we leave, we will have some flexibility. Can the Government share its thinking on this issue?

Finally, on my list of actions for the Government: content moderation. Again, this has not been picked up very strongly, but perhaps we have just become so used to it that we are unable to think again about this. One of the greatest frustrations of the internet is that the powers to remove content that is either illegal or causes harm are so ineffective—in paragraph 224 the Committee adjures for this. One problem is that major platforms have failed to invest in their moderation systems, leaving human moderators overstretched and inadequately trained. AI is also not proving effective. There is little clarity about the expected standard of behaviour, and little recourse for a user to seek to reverse a moderator's decision. I worry that relying on a new duty of care is not enough. What we also need is a much stronger consumer right, backed by a regulator who has the power to require action when users have genuine concerns. Will these new powers be considered?

I end with three smaller points, but which are still important. Two or three speakers in the debate were concerned about data acquisition and the need for the publication of an annual data transparency statement. I absolutely agree with that. There is something here that we are not picking up. The Government do not do credit to this important recommendation and it is surely not sufficient to rely on the fact that this information should be set out clearly in a privacy notice.

The noble Viscount, Lord Colville of Culross, picked up the issue of addiction and made a very strong case. There are clear worries about how people become addicted to the internet in a way that has not yet been picked up well, although there are now some changes from medical authorities on this. We need to learn from the failure so far to deal with gambling addiction and gaming addiction. What is suggested in the paragraph is not going to solve this crisis, but it is a start. Voluntary efforts by the companies responsible for the problem is not the way forward. Will the Government look at this again?

Finally in this group, I turn to the matter of algorithms, which have already been touched on. How do you discover which algorithms are being used, what they are doing to your data and how is that going to work? We spent a lot of time on this when considering the Data Protection Bill. Had the noble Lord, Lord Clement-Jones, been here for the debate, I suspect that we would still be talking about it, but I am sure that the Minister is well rehearsed in the arguments. I look forward to a positive response. Something needs to be done here, but the Government are ducking the issue and are not doing well.

The Government are fond of saying that their White Paper is world-leading in terms of laying down statutory rules for the internet, but this report and our excellent debate tonight show that a bit of a gap is emerging between the rhetoric and the likely reality. I hope that I

am wrong and I hope that the Minister can reassure us. Backing the kids' code would be a start, but accepting the idea of bringing forward a draft Bill for consideration would be the way forward.

9.21 pm

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde) (Con): My Lords, I am grateful to my noble friend Lord Gilbert for introducing the debate and to the entire Communications Committee for its report. I think that it is clear and well thought through. I also thank all other noble Lords who were not on the committee but who have given us their views. This is an interesting area and the thought that has gone into the report is a tribute to noble Lords. However, plenty more needs to be done. As the report notes, the digital world plays an ever-increasing role in all aspects of life. The noble Lord, Lord Maxton, referred to that. As well as benefits and opportunities, this development has brought with it new challenges and risks. The noble Lord, Lord McNally, quoted Tim Berners-Lee in that respect. I think that the committee's report is closely aligned with, although absolutely not identical to, the Government's approach. I will explain some of the areas that we are considering and some where we do disagree.

The recently updated digital charter, which was also described as a digital work plan—it is that as well—is our response to the opportunities and challenges arising from new technologies. The committee's report sets out 10 principles to shape and frame the regulation of the internet which resonate with the six principles that we set out in the charter. I will come back to those principles later. At this point I have to say that I do not agree with some of what the noble Lord, Lord Maxton, said. I believe that it is possible to regulate as long as it is sensible and proportionate. Indeed, Sir Nick Clegg has asked for reasonable regulation, as has been reported today in the newspapers. My Secretary of State has been to discuss this with Facebook and other tech companies in California. Where I do agree with the noble Lord and with my noble friend Lord Inglewood is that co-operation with international bodies is eminently desirable and will be useful. I personally have spoken about this at the G7, the D9, the OECD and the EU Council, and that was just me, let alone the Secretary of State and the Minister for Digital and the Creative Industries. We want to work with our like-minded international partners to determine how we can make the internet a safer place while protecting the fundamental rights and values on which our democracy is based. I can say that other countries are interested in our work in this area. I agree in a way with the noble Lord, Lord Stevenson, that we should not say too often that the work is world-leading; we ought to let other people tell us that.

The principles of the digital charter underpin an ambitious programme of work to ensure that the internet and digital technologies are safe and secure, are developed and used responsibly—with users' interests at their heart—and deliver the best outcomes for consumers through well-functioning markets.

I will now set out in more detail some of the key areas of work that correspond to the committee's recommendations. My department and the Home Office recently published the online harms White Paper—which virtually every noble Lord mentioned—setting out our plans to make the UK the safest place in the world to be online. I believe that the suggestions in that White Paper satisfy the committee's 10 principles.

Illegal and unacceptable content and activity are widespread online, and UK users are concerned about what they see and experience on the internet. The balance that needs to be struck—this conundrum, if you like—was outlined by my noble friend Lady Harding. We agree with the committee that a duty of care is an effective response to tackle this problem. We intend to establish in law a new duty of care on companies towards their users, overseen by an independent regulator, on which we are consulting. As a result of that, as the right reverend Prelate said, tech companies will have to have responsibility. It will leave them in no doubt that internet companies have a responsibility in scope. We believe that this can lead towards a new, global approach to online safety that supports our values, as I said, but also promotes a free, open and secure internet. Speaking of democratic values, I also look forward to the ideas of the House of Lords special inquiry committee on democracy and digital technologies—chaired by the noble Lord, Lord Puttnam—which the noble Lord, Lord McNally, mentioned. I can confirm that, as always, DCMS will give it its utmost co-operation.

As the report identifies, organisations increasingly collect and use individuals' personal data online. The noble Lord, Lord Vaux, gave us helpful detail on that. New technologies must be deployed ethically, as well as safely and securely. The Government take both the protection of personal data and the right to privacy extremely seriously. The GDPR and the Data Protection Act provide increased regulatory powers for the Information Commissioner's Office, which strengthen our data protection laws to make them fit for the digital age.

However, the increased use of personal data with artificial intelligence is giving rise to complex, fast-moving and far-reaching ethical and economic issues that cannot be addressed by data protection legislation alone. In answer to the questions from the noble Lord, Lord Vaux, relating to Google in particular, I will look at those details again. It is fair to say that people can contact the Information Commissioner's Office if they are worried about the use of their personal data by tech companies that may or may not be in compliance with the GDPR.

The Government have also set up the Centre for Data Ethics and Innovation to provide independent, impartial and expert advice on the ethical and innovative deployment of data, algorithms and artificial intelligence. In answer to the noble Lord, Lord Stevenson, this has not yet been set up on a statutory basis—as I think he well knows—but it will be. It is a question of legislative time, but it is our intention and plan to do that. In the meantime, as he knows, the Chancellor has made money available for it to act. It will work closely with regulators, including the ICO, to ensure that the law, regulation and guidance keep pace with developments in data-driven and AI-based technologies. The issue of the forward-looking aspects of the digital authority

[Lord Ashton of Hyde]
will partly be addressed by the Centre for Data Ethics and Innovation, but I will come back to the digital authority in a minute.

As set out in the online harms White Paper, creating a safe user environment online requires online services and products to be designed and built with user safety as a priority. We will work with industry and civil society to develop a safety by design framework.

The noble Lord, Lord Stevenson, and other noble Lords talked about market concentration, and the report recommends how the Government should approach mergers and acquisitions in this unique online environment. The Government's *Modernising Consumer Markets* Green Paper sought views on how well equipped the UK's competition regime is to manage emerging challenges, including the growth of fast-moving digital markets. We continue to consider the options across the range of measures proposed in the Green Paper, including for digital markets, and are due to report in summer 2019. This will be informed by the work of the independent Digital Competition Expert Panel, led by Professor Jason Furman, which published its recommendations for Government on 13 March. The Prime Minister announced yesterday that Jason Furman has agreed to advise on the next steps on how we can implement his recommendation to create a digital market unit. We are considering his other recommendations, and will respond later this year.

On the digital authority, which was one of the key recommendations of the report, to, among other things, co-ordinate regulators in the digital world, we support the committee's view that effective regulation of digital technology requires a co-ordinated and coherent approach across the various sector regulators and bodies tasked with overseeing digital businesses. They need clarity and stability, and the Government should lead the way in providing oversight and co-ordination of digital regulation, and ensuring consistency and coherence. We are carefully considering how existing and new regulatory functions, such as that proposed through the online harms White Paper, will fit together to create an effective and coherent landscape that protects citizens and consumers. However, we are also conscious of the calls for speed, which have been made by many noble Lords and stakeholders, not all tonight. On the one hand, we have to carefully consider the implications of new regulation, as the noble Lord, Lord Gordon, told us; on the other hand, there are serious harms that need addressing now.

When I say we are carefully considering it, we are carefully considering it. The noble Lord, Lord Stevenson, is looking as if he is not taking me seriously, but we are.

Lord Stevenson of Balmacara: I apologise to the Minister. It was just that he said that he was considering it, and that he is considering it. It did not seem to advance the argument very much.

Lord Ashton of Hyde: I was considering it, we are considering it, and we will consider it further. The worry we have is about speed, and setting up a completely new regulator, and co-ordinating the existing regulators, is what we have to worry about. The consultation is still going on, and that is something we can address.

The other main issue that several noble Lords have mentioned is about the 10 principles in the report, and the six principles in the charter, which I mentioned before. We have a set of principles that underpin the digital charter, and the online harms White Paper is part of the charter's programme of work. The committee's principles of regulation correspond with the White Paper approach. For example, on parity, what is unacceptable offline should be unacceptable online. However, the online harms White Paper does set out our intention to consult widely as we develop our proposals, so we will further consider the proposals as part of this, ahead of finalising new legislation.

The noble Lords, Lord McNally and Lord Stevenson, also mentioned pre-legislative scrutiny. We would like to consult thoroughly—we have had a Green Paper and a White Paper, both of which have had consultations that, we hope, will ensure that we get our proposals right. However, as I said before, there is a need for urgent action—that is increasingly evident—and we will take those factors into account when reaching a decision on whether to engage in pre-legislative scrutiny. We are not against it in principle—in fact, there are many ways in which it would be useful—but, having had two consultations already, we may decide in the long run that speed is more important and that we need to get things done.

As to the momentum to which the noble Lord, Lord Stevenson, referred, a Bill is definitely planned. It needs to be drafted after the consultation—which ends on 1 July—but it will not be easy legislation to frame if we are to capture all the areas that noble Lords have talked about. We have momentum and are keen to do it, as is the Home Office, which wishes to address particular issues such as child exploitation.

The noble Lord, Lord Stevenson, the right reverend Prelate and the noble Baronesses, Lady Harding and Lady Kidron, talked about age-appropriate design. The right reverend Prelate was concerned that we would row back from this. Age-appropriate design, or the kids' charter—or, as I call it, the Kidron charter—is a part of the wider approach to tackling online harms and will play a key role in delivering robust protections for children online. We discussed it at length on the Bill. The ICO has been consulted formally on the code and will continue to engage with industry. We are aware that the industry has raised concerns—the noble Baroness, Lady Kidron, mentioned some of them—but it is not beyond the wit of such an innovative industry to deal with those technical concerns. It is important that the ICO continues to work with the industry to make sure that the measures are workable and deliver the robust protection that children deserve. The ICO has a reputation as a proportionate regulator and we will stand behind it.

The noble Lord, Lord Gilbert, asked about a classification framework akin to that of the British Board of Film Classification. We have said in the online harms White Paper that companies will be required to take robust action, particularly where there is evidence that children are accessing inappropriate content, and that we expect the codes of practice issued by the regulators to make it clear that companies must ensure that their terms of service state what behaviour and what activity is tolerated on the service,

as well as the measures that are in place to prevent children accessing inappropriate content. The regulator will assess how effectively these terms are enforced. The classification framework is an interesting idea. We are consulting on developing our proposals and we will certainly include that.

The noble Lord, Lord Gilbert, also asked for important assurances that the press are outside the scope of the duty of care and how the Government intended to balance journalistic freedom with the regulation of online harms. The Secretary of State has been clear that this is not intended to include journalistic content. We do not interfere with what the press does or does not publish as long as it abides by the law of the land. A free press is an essential part of our democracy, so journalistic or editorial content will not be affected by the regulatory framework we are putting in place.

The noble Viscount, Lord Colville, and the noble Lord, Lord Stevenson, mentioned gaming addiction. I have written to the noble Viscount, who reminded me that a whole six weeks had passed and he wondered what we had done about it. I do not think he has been in government or he would know that that is asking a bit much, especially as the consultation is still going on and does not finish until 1 July. We do not want to duplicate what is regulated by other gambling and gaming regulators. We are clearly looking at that important issue, but it is not within the scope of this White Paper.

The noble Viscount mentioned the GDPR loophole. I will have to look at that. I always thought that data subjects had the ability to ask for decisions made by algorithms to be explained, whether or not it was with a person. I will have to check the legal position and get back to him on that.

As far as the e-commerce directive and liability is concerned, the new regulatory framework will increase the responsibility of online services, but a focus on liability for the presence of illegal content does not incentivise the systematic, proactive responses we are looking to achieve. We think the way we are doing it—with the duty of care—gives them the responsibility to be more proactive, and that the monitoring they have to do is within the scope of the e-commerce directive.

I once again thank the noble Lord and his committee for their report. I think we are aligned on some of the fundamental issues. The contributions this evening have shown that there is a depth of interest in this subject. If we get this right, we have an opportunity to lead the way and work with others globally. We will protect citizens, increase public trust in new technologies and create the best possible basis on which the digital economy and society can thrive.

9.41 pm

Lord Gilbert of Panteg: I thank all noble Lords for their contributions to an excellent debate. I thank the noble Lords, Lord McNally and Lord Stevenson, for engaging in detail with the recommendations in our report, as well as the Minister, who answered all our questions at this late hour. He now has the unenviable task of grappling with the detail and bringing forward positive proposals to deal with these complex issues. He and his colleagues have engaged enthusiastically with the committee; I really thank them for that.

I agree with the noble Lord, Lord Maxton, who rightly highlighted all that is good with the internet and the danger of overregulation. That is why I think that the digital authority, with its forward-looking function of identifying risks before they emerge, will enable us to reach for not only regulatory solutions but, for example, public education campaigns to deal with those issues.

As we conducted this inquiry, I was struck by the amount of evidence we received, not just from industry and regulators but from great civic society organisations, academics, journalists and individual citizens who took time to write to us and send submissions, which the committee read with huge interest. In this day, where public service is not recognised, I thank them. We heard from some frankly heroic people who are using technology and the internet to improve the lives of others and to do good.

Finally, we heard some disturbing evidence from some of our witnesses about child sexual exploitation and other ugly aspects of our society, from organisations such as the Internet Watch Foundation, the National Police Chiefs' Council and the National Crime Agency. They work in some very dark areas of society and must endure much personal anguish, but they displayed great humanity when they came and spoke to us. They do amazing work. In them, we saw the best of our society.

Motion agreed.

House adjourned at 9.43 pm.

Second Reading Committee

Wednesday 12 June 2019

Arrangement of Business

Announcement

3.45 pm

The Deputy Chairman of Committees (Viscount Ullswater) (Con): My Lords, before the Minister moves that the Bill be considered, I remind the Committee that the Motion before it will be that the Committee do consider the Bill. I should perhaps make it clear that the Motion to give the Bill a Second Reading will be moved in the Chamber in the usual way, with the expectation that it will be taken formally.

Sentencing (Pre-consolidation Amendments) Bill [HL]

Motion to Consider

Moved by ***Lord Keen of Elie***

That the Committee do consider the Bill.

3.45 pm

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, this Bill makes mainly technical changes to existing legislation which will facilitate the enactment and operation of the Law Commission's sentencing code—a consolidation of legislation governing sentencing procedure in England and Wales. I emphasise that it is concerned with sentencing procedure; it is not concerned with sentencing policy.

It is not a controversial proposition, I suggest, that one pillar of the rule of law is that the law should be intelligible, accessible, clear and predictable. It is equally uncontroversial to say that, in our criminal law, the law governing sentencing procedure has grown incredibly complex and disparate. We have seen numerous examples of even the most experienced legal minds in the country spending too much time trying to disentangle which law applies to particular offenders. This is exacerbated by the need to deal with multiple changes to the statute book, which may determine what sorts of disposals are available in a particular case. As a result, too much time is taken up by the Court of Appeal in appeals against unlawful sentences. That is not good for the victims of crime, who want closure on their cases, and certainly not good for confidence in our justice system.

Against this background, it was agreed in 2014 that the Law Commission should undertake a project designed to consolidate the law relating to sentencing procedure. The resulting sentencing code brings together the procedural provisions which a sentencing court would need to rely upon during the sentencing process into one Act, and structures them in an order which follows the chronology of a sentencing hearing. The aim of these improvements is to assist legal professionals in identifying and applying the law, thereby reducing the risk of error, appeals and delay in the sentencing process. The sentencing code will also enhance the transparency of the process for the general public.

The Law Commission consulted extensively over the four years of the project and published a concluding report in November last year. The sentencing code project has received a broad consensus of support from across the judiciary and the wider legal profession. Alongside the report, the Law Commission also published a draft version of this Bill and a draft sentencing code Bill. The enactment of both pieces of legislation is the core recommendation of the report. This Bill has therefore been deemed suitable to be considered by your Lordships under the special procedure for Law Commission-recommended Bills. Before the sentencing code can be taken forward, changes to existing legislation are needed to facilitate the consolidation of sentencing procedural law in the code. This is a common feature where consolidations take place, and this Bill will make those necessary changes.

One of the reasons behind the complexity of current sentencing law is the layering of changes to sentencing legislation over time. We are concerned, among other statutory enactments, with the Justices of the Peace Act 1361. Different provisions apply to different offences and offenders, depending on when the offence was committed. Sentencing courts often have to refer to historic versions of sentencing law to ensure that the sentence passed is in accordance with the applicable law at the time of the offence. Identifying and applying historic versions of sentencing law can be difficult and, indeed, time-consuming. When an offence has occurred several years ago—which is not uncommon—and new disposals have been introduced, others have been updated and some discontinued, it is not always clear what types of disposals are available in the case before the courts. On top of that, the precise details of how those changes to the law have been commenced or saved may be scattered across the statute book.

Let me give some examples. In one recent case, the offender was sentenced to a community order with a three-year supervision requirement, following a conviction for an offence committed between March 1981 and March 1983. The Court of Appeal substituted a sentence of 24 months' imprisonment, suspended for 12 months, following an application by the Attorney-General. However, as the offence had been committed before 4 April 2005, a suspended sentence was not available to the court under the Criminal Justice Act 2003. Instead, the court could only impose a suspended sentence in line with historical sentencing provisions under the Powers of Criminal Courts (Sentencing) Act 2000. That meant that the court had to follow a different test concerning the availability of a suspended sentence, and no community requirements could be imposed as part of it.

Difficulties in identifying the applicable disposals available to the court can also lead to significant injustice. In another case, the offender was sentenced in August 2006 to a sentence of imprisonment for public protection under Section 225 of the Criminal Justice Act 2003 with a minimum term of six years, following a conviction for an offence committed between August 2004 and January 2005. However, Section 225 of the 2003 Act had been commenced prospectively, and only applied to offences committed on or after 4 April 2005. As a result, a sentence of imprisonment for public protection was not available for the offender.

[Lord Keen of Elie]

The sentence imposed was therefore unlawful. Perhaps incredibly, it was only two and a half years after the expiry of the minimum term that the offender appealed against the sentence and the imprisonment for public protection sentence was quashed and replaced with a sentence of 12 years' imprisonment, with an extended licence of 10 years. This resulted in the offender's immediate release.

Clause 1 seeks to remedy this sort of issue by giving effect to what the Law Commission calls a "clean sweep" of sentencing legislation. That will remove the need for sentencing courts to identify and apply historic versions of sentencing law. It does this by extending provisions which have been partially commenced and completely repealing provisions that have previously been repealed but partially saved. It deems that "transition time"—the point at which a given provision was commenced, repealed or amended—to have occurred at a notional point in time before what we might term a "trigger event". The "trigger event" is the event which governs what sentencing procedure applies in a given case. The obvious example of that is the point when the offence was committed.

For example, let us say that an old rule about sentencing currently applies to offences committed before 1 January 2010. The Bill will deem that provision to have been repealed completely at a point in time before any pre-2010 offence was committed. Likewise, any successor provision will be deemed to have commenced before the offence was committed. As a result, the current law as enacted in the sentencing code will apply to all sentencing decisions when an offender is convicted after its commencement, irrespective of the date the offence was committed. The two important terms here, I suggest, are "transition time" and "trigger event".

Importantly, the clean sweep is subject to exceptions to ensure that no offender is subject to a greater maximum penalty than was available, or to a minimum or mandatory sentence that did not apply at the time the offence was committed. Those exceptions ensure that the clean sweep does not contravene the general common law presumption against retroactivity, and accords with human rights protections against retroactive criminalisation and retroactive punishment, as provided for by Article 7 of the European Convention on Human Rights. That is an important step, and a very neatly designed legal tool, which will help to minimise the risk of error caused by having to look through various historic layers of sentencing legislation, and one which the Law Commission considered very carefully during its considered and lengthy consultation.

Since a consolidation must operate on the current law, Clause 2 refers to the amendments and modifications of sentencing legislation contained in Schedule 2. Making changes to facilitate consolidation in this way is a standard measure that precedes consolidation Bills. These pre-consolidation amendments are generally limited to correcting minor errors and streamlining sentencing procedural law—for example, changing language to avoid inconsistency or updating existing statutory references, such as omitting references to local probation boards, which were abolished by Section 11 of the Offender Management Act 2007, or where there are amendments replacing references to the education and library boards, which were abolished by the Education Act (Northern Ireland) 2014, with references to their replacement, the Education Authority.

Other amendments come about as the process of consolidation itself creates the potential for anomalies that otherwise might not matter. For example, there are amendments in Schedule 2 that repeal provisions of the Powers of Criminal Courts (Sentencing) Act 2000 and the Crime and Disorder Act 1998, which provide express powers of appeal against restitution orders and parenting orders. These orders may be appealed anyway under the general powers available in Section 108 of the Magistrates' Courts Act 1980 and Section 9 of the Criminal Appeal Act 1968. So removing the specific appeal rights provided for does not alter the legal position, but keeping them in the consolidation could put appeal rights against other sorts of disposal in some doubt.

Other amendments resolve unnecessary ambiguity. For example, Section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 governs the minimum sentences for repeat drug trafficking offences, but in defining what is an "appropriate sentence" for those aged 18 to 20 the provision does not currently refer to the power of the courts to impose a sentence of custody for life. It is clearly not the intention that, where a minimum sentence applies to an offender aged 18 to 20, the courts cannot impose a sentence of custody for life where they consider that the seriousness of the offence and the danger the offender poses to the public justify it. The Bill therefore amends the 2000 Act so that it is clear that the court may impose a sentence of custody for life where the minimum sentence applies, the offender is aged 18 to 20 and the offence carries a maximum penalty of life imprisonment. All this applies already in current law, but the Bill simply makes the statute book clearer and, we hope, easier to use.

Finally, some amendments look to continue to give effect to the clean sweep approach relating to future amendments to the law. These amendments alter the Secretary of State's power to amend things such as the maximum period of a conditional discharge, the limits for unpaid work requirements and alcohol abstinence and monitoring requirements, or the list of offences considered to have a terrorist connection for purposes of sentencing. The changes in the Bill mean that, if changes are made by order in the future, those can apply to any offender convicted after the change comes into force, not only for any offender whose offence was committed after that time. It should be emphasised that none of the amendments in the Bill makes changes to existing offences or penalties, nor do they introduce any new substantive law or sentencing disposals.

In summary, the Bill has two main objectives: first, to remove historic layers of legislation; and, secondly, to make changes to the existing law of sentencing procedure to facilitate the consolidation in the sentencing code. The sentencing code will be introduced to Parliament at a later date under the special procedure reserved for Law Commission consolidation Bills. I finish by acknowledging that the Government are very grateful indeed to the Law Commission, in particular the Law Commissioner for criminal law, Professor David Ormerod,

and his staff for the work they have undertaken over the last few years. Indeed, I express my personal appreciation for the work he has done more recently to try to inform me as to the details of this proposed legislation. I beg to move.

3.59 pm

Baroness Mallalieu (Lab): My Lords, I welcome the Bill as the first legislative step towards the creation of a much-needed sentencing code. In doing so, I declare interests both past and present, including 40 years at the criminal Bar—some of that was as a recorder, although I am now retired—and a present interest in a daughter who, against all my personal advice, has gone to work as a criminal barrister down on the western circuit.

The Council of Her Majesty's Circuit Judges did not exaggerate when it described the present state of sentencing law as a "disgrace to our jurisprudence". As a barrister, the words I dreaded hearing from a judge in court were, "What are my powers in this case?". Sometimes, indeed quite often, extensive research involving complexity, uncertainty and multiple pieces of legislation with multiple amendments was needed to give a reply of any sort, or at least our best guess. As a result, mistakes by both advocates and the judiciary are not uncommon—the figures for them are startling—requiring further court time and expense to correct them. As the noble and learned Lord, Lord Keen, indicated, that sometimes goes on long after the sentence has been delivered and the case has had to go to the Court of Appeal.

A single code for most criminal law, updated regularly and kept in one place, is essential and long overdue, as is the clean sweep to be introduced so that the law on the day of sentencing will be applied after the code is enforced. For the Bar, there will be no more looking back, particularly in the all-too-frequent historical sex abuse cases that currently fill our courts to try to find out what the sentence was for indecent assault 20 years ago when the offence was committed. This legislation is urgently needed. I am therefore particularly pleased that the Law Commission and others have found time to consider the Bill and its consequences; I am very grateful. Too often, when a much-needed Law Commission Bill has been prepared after a vast amount of work it sits and waits, sometimes almost indefinitely, for some legislative time to be made available.

I also strongly support the way in which this House has chosen to scrutinise this legislation with the pre-consolidation amendments. Having sat for some years on the Joint Committee on Consolidation Bills, where the legal subject matter is almost invariably highly technical and, on occasion, very obscure—as in this case—I have no doubt that the effective scrutiny of detail that Bills receive there would clear the Floor of the House in minutes. It would take a very long time if dealt with in that way. In this case, the special Public Bill Committee proposed will provide an excellent opportunity for that detail to be examined and for evidence to be given, if necessary. I therefore welcome the procedure.

A sentencing code will be a boon not just to lawyers and judges but to members of the public—not just those who are convicted—who deserve certainty and transparency. Additionally, the estimated net financial benefit over 10 years is a staggering £255.57 million, made up from freed-up court resources and reductions in delay. I express my hope that some of that money might be devoted to other aspects of our criminal justice system, which are in dire need. I almost wish I was back at the Bar.

4.03 pm

Lord Hope of Craighead (CB): My Lords, it is a pleasure to follow the noble Baroness, Lady Mallalieu, and to acknowledge the fact that she has been much closer to the day-to-day problems of the sentencing process than I have. I spent my judicial career in the appellate courts, in various places; we encountered these problems from time to time but to nowhere near the same degree she has told us about, based on her substantial experience.

I have no hesitation in welcoming the Bill. I am delighted that it is being sponsored by the Government. As chairmen of the Law Commission know very well, and as the noble Baroness said, it has not been easy for Law Commission Bills to make progress in Parliament as parliamentary time is often at a premium. Without government sponsorship it would be difficult for any progress to be made at all, so we must be grateful to the Government for being willing not only to sponsor the Bill but to find time for it, as they have done today.

As it happens, it has not been all that difficult at this juncture, given the present state of politics in this country, to find time for this Bill. It is obvious to everyone in this House that it is being starved of legislation that we can really get our teeth into. The Kew Gardens (Leases) (No. 3) Bill and the Wild Animals in Circuses (No. 2) Bill are really quite lightweight in comparison with what we are normally used to. There is a bit more in the Courts and Tribunals (Online Procedure) Bill, as anyone who listened to the spirited debate in Committee on Monday will have noticed, but even in that case the Committee stage lasted only for two hours and 40 minutes. So, based on my own experience of dealing with the usual channels as I do, it was not too difficult to persuade them that this Bill should make rapid progress as soon as possible.

As the short title of the Bill indicates and as the Minister made clear in his opening, this is doing no more than laying the sound basis for the enactment of the sentencing code, which has been the subject of so much hard work by the Law Commission. As a rider to what I was saying about the speed at which this Bill has been brought before the House, one must wish that that rapid progress will be extended to the next stage of the process, when the sentencing code itself comes forward for enactment. Of course, at Second Reading we are concerned with only the issues of principle, not the details. The meat of the Bill really is in the two schedules, to which the Minister has referred, and there will be an opportunity for detailed examination of them in Committee with the advantage of the special procedure, to which reference has been made.

As for the issues of principle, perhaps I might make one or two points. The first is that there is no doubt whatever that the current law relating to sentencing has become less and less acceptable, and more and more confused, as it is scattered about various statutes which

[Lord Hope of Craighead]
themselves have been subject to frequent amendment. It is one of the requirements of the rule of law that the law which the magistrates and judges have to apply in the sentencing process should be clear and accessible. As matters stand today, and for the reasons which have already been made, the law relating to sentencing is at serious risk of failing to meet that requirement. The purpose of the sentencing code is to address that problem, in a way that gets over the hurdle of piecemeal attempts to keep the law up to date. For that reason, one must applaud the work that has been done and the presence of this Bill before the Committee today.

There is, however, one aspect which deserves to be carefully noted. It is the approach to dealing with the changes in the law, which has been described as a clean sweep. The Minister referred to this in his opening. As I understand it, that is what subsections (3) and (4) of Clause 1 are about, being designed to ensure that those convicted after the code comes into force will be dealt with according to the most up-to-date law. But there is a corollary to that requirement: that the convicted person must not be dealt with by the imposition of a penalty of any kind which is more onerous than that which he would have faced when the offence was committed. This is the rule against retrospective penalties to which the Minister referred. I hope that particular care will be taken in Committee to see that the protections described in Clause 1(4) as needing to be in place before the Bill is enacted will be adequate in all circumstances. I have no doubt careful consideration will be given to that.

Although I said that we are concerned with principles and not with details I would like to draw attention to one other matter, bearing in mind that the jurisdiction from which I come is north of the border. I draw attention to paragraphs 90(1) and 90(2) and paragraphs 92(1) and 92(2) of Schedule 2. These provisions deal with the transfers of community orders and suspended sentences imposed in courts in England and Wales to Scotland under the Powers of Criminal Courts (Sentencing) Act 2000. The effect of Clause 5(6), which deals with the extent of the Bill, is that these provisions extend to the whole of the United Kingdom and not just to England and Wales. The effect is that to some degree, although not very much, the law of Scotland will be altered by the provisions to which I have referred. Have the Scottish Government been consulted about these provisions? If so, have they indicated whether they are content? I would not imagine there would be too much difficulty about that, but I would hope that the protocols were observed.

I draw attention to the power to make further amendments by regulation under Clause 2(2), which is also extended to Scotland by the provisions of Clause 5(6). In that connection, can the Minister assure the Committee that the usual conventions will apply in that case as well, if the power is exercised in a way that affects the law of Scotland? All that having been said, I am very happy to offer my full support to the Bill.

4.11 pm

Lord Garnier (Con): My Lords, it is a pleasure to follow the noble and learned Lord, Lord Hope, and the noble Baroness, Lady Mallalieu. I think that all of us in the Room will support this measure. The Law Commission has told us that there are three good reasons for codifying the law on sentencing: it would make the law simpler and easier to use; it would increase the public's confidence in the criminal justice system; and it would increase the efficiency of the sentencing process.

I do not intend to say anything other than a few remarks about making the law simpler and easier to use. I say it from the point of view of someone who was a recorder, like the noble Baroness. Unlike her, I was not a criminal practitioner. I learned such criminal law as I did learn at the feet of someone who was then called Lord Justice Judge, who used to chair the recorders' training weekends in Cheltenham. In the mid-1990s, when I was there, it dawned on me just how complicated criminal law was and, in particular, how complicated criminal law to do with sentencing was. As a civil practitioner, I had rather a grand idea about criminal law and thought that it must be terribly easy. Well, it is not and was not. Since I became a recorder in 1998, it has just got more and more complicated, so anything that can be done to make it simpler and easier to use is to be applauded.

I say that not only because it would have helped me—it became so complicated that I had to stop in 2015 as my brain was beginning to ache—but because most criminal cases, certainly in England and Wales are tried by amateurs, the magistracy, the lay Bench, which deals with about 90% of criminal cases, possibly more, and recorders, who are part-time judges who sit as Crown Court judges for perhaps three or four weeks during the course of the year. Many of them will be non-criminal, civil practitioners: solicitors and barristers whose specialism is in areas of the law outside crime.

Like the noble Baroness, I would frequently ask the advocates in front of me, "What can I do in this case?", expecting that those experienced barristers—some were less experienced—would be able to tell me. Often, we had to adjourn for 20 or 30 minutes while everyone went and looked up the answer to the question. I confess that it was not always the case that we got it right, which led to the expense and delays to which the noble Baroness has already referred.

The problem is also accentuated because the amateur judges, be they magistrates or recorders, tend to do the cases "of less importance". The irony, though, is that High Court judges and senior Crown Court judges frequently sit in murder cases, or cases where the only available penalty is life imprisonment. The biggest question that they have to decide as a matter of sentencing law concerns the tariff—that is, what is the minimum amount of time that the defendant will have to serve as part of that life sentence? But for the Crown Court recorder dealing with a case of burglary, domestic abuse or death by dangerous driving, with all its complicated aspects—or, sometimes, a historical sex case—a judge might on occasion be looking at the law prior to 1956 and applying it to a sentencing exercise in 2007 or 2015. That adds to the complications to which my noble and learned friend has already drawn our attention. For that reason alone, if we can introduce this sentencing code as quickly as we sensibly can, I suggest that the Bill is to be much welcomed.

I will give one further illustration of the complicated nature of our current sentencing system. In the first decade of the century, after the passing of the Criminal Justice Act 2003, one of the little games I used to play was to put down a Written Question at the beginning of every Session, asking the then Labour Government how much of that Act had been implemented, how much of it had been repealed before being implemented and how much of it had been repealed after implementation. Broadly, between about 2004 and 2010, the answer, "One-third, one-third and one-third", used to come back. That is not a good way to run a criminal justice system. Although I appreciate that it is but the overture to the main work, if the Bill and this collection of measures can reduce that sort of stupidity and illogicality in our sentencing system, so much the better.

I heartily support the sentiments behind the Bill. I look forward to its speedy, but properly scrutinised, progress through this House and the other place. In finishing, I add my personal thanks to Professor David Ormerod. He first began discussing this matter with me more than five years ago, probably longer. I honestly did not think that I would live to see the codification of our sentencing system, but he and others at the Law Commission, under the chairmanships of both Lord Justice Bean and Lord Justice Green, have performed quite spectacularly to get this highly complicated subject reduced into something that even I can understand. I look forward to seeing it get on to the statute book.

4.18 pm

Lord Judge (CB): My Lords, I shall mentioned just a few facts. When I retired as Lord Chief Justice, it was already a matter of urgent necessity that we should have a sentencing code. The various difficulties have already been analysed, but I want to add one: that, from time to time, men and women were detained in custody in prison for longer than they should have been because, just as judges found difficulty understanding the criminal justice system, so indeed did the Prison Service. What does this sentence mean? Does this mean that he or she can be given a date of release for x, y or z? From time to time individuals were detained for longer than they should have been.

I have personal experience of a case—it still troubles me hugely—of a young man who was 17 when he committed a relatively minor indecent assault and was put on probation. It seemed a very sensible decision. He broke the probation order and then ran into difficulties, so he was more or less in and out of the courts for some time. By November 2004, he was arrested because by then he had not notified his change of address on a number of occasions. The issue before the court was whether he complied with the notification provisions. This is not major stuff, but there is a provision which requires sex offenders to notify their changes of address. It is a perfectly sensible piece of legislation. When he was hauled before the Crown Court on an indictment alleging this failure, the poor judge who had to decide the case reserved his judgment and decided that the man was guilty of the offence. He sentenced him to three months' imprisonment.

There was an appeal, because the issue was obviously arguable, and it came before a court on which I presided. Slocombe was the case. What did we have to look at to decide whether he should have notified a change of address? There was the Sex Offenders Act 1997 and the Criminal Justice and Public Order Act 1994—I put them that way round, apparently strangely, because the relevant provisions had come into force in March 1998; that is, after the Sex Offenders Act had come into force. Before the judge it was assumed that there was nothing in the Sex Offenders Act 1997 which had any relevance to the issue, but then it emerged that there had been an amendment to Section 4(1)(a) of the 1997 Act in paragraph 144 of Schedule 8 to a 1998 Act. That came into force on 1 April 2000 and—would you believe it?—four months later the provision was repealed, but the time mattered because May 2000 was when the young man was being sentenced.

After the relevant provisions had been in force for four months, they were repealed when the Powers of Criminal Courts (Sentencing) Act was introduced. My recollection is that we could not find the four months in which those particular powers applied when we looked on a computer. I was not looking on a computer, but people who could use one were looking for them. Eventually, we found the text by ploughing through the old library. No one at the Crown Court could be blamed because, in the end, we had to look at Section 81 of the Sexual Offences Act 2003. That resolved the difficulty, and we decided that the man had not been obliged to notify his change of address. He had pleaded guilty on the basis of a misruling by the judge and had served a three-month sentence for something that he had not committed. That was shocking.

May I add that the account I have given the Committee does not tell your Lordships what notification requirements mean? They involved us looking at these differences in definition: you had to decide between words such as "imprisonment for a term for more than six months but less than 30 months" and "a person sentenced to imprisonment for a term of six months or less", or, in the case of a young offender "the equivalent sentence of imprisonment". We had to look at the difference between a period that a person is "liable to serve under a secure training order"—notice "liable to serve"—with the phrase "shall be subject to a period of detention in a secure training centre", all as part of the legislation which bore on the question of when this young man had finally cleared himself of his notification obligations.

As to where the current law stands on sentencing, in 2015 there was a total of 1,300 typed pages. That was only the current sentencing law because it did not cover the older cases: for example, death by dangerous driving. When I started at the Bar, the sentence for that was two years; then it went to five years, then to 10 years and then to 14 years. There were 14 major pieces of primary legislation, starting with the Criminal Justice Act 1991, followed by—if you want to hear it—the Criminal Justice Act 1993, the Crime (Sentences) Act 1997, and then other Acts in 1998, 2000, 2002, 2003, 2005, 2007, 2008, 2009, 2012, 2014 and 2015, ending, as at this time, with the Assaults on Emergency Workers (Offences) Act 2018. Lord Chief Justices do not beg, but as Lord Chief Justice, I pointed out to the then Government that a significant reduction in sentencing

[LORD JUDGE]
laws would be a good idea. I failed. I ask noble Lords to look at the facts and decide whether this is a well-justified Bill.

4.24 pm

Lord Davies of Stamford (Lab): My Lords, the noble and learned Lord, Lord Judge, has made a very strong case for simplification, and I agree with it. I had two major reservations when I heard about the Bill. One was about the clean sweep, because I thought that it would introduce an element of retrospectivity. The Minister has assured the Committee that there will be adequate protections against that danger and that no individual will be disadvantaged by the clean sweep—in other words, by being judged on the basis of the sentencing rules that apply at the time of the judgment rather than those that applied at the time of the original offence. If I am satisfied by the protections when I see them in black and white, I will not pursue that objection to the Bill.

My second reservation was that I understood that the Bill would apparently provide for new regulations to come forward through the route of other secondary legislation, such as statutory instruments. That is pretty dangerous in the context of changing the principles of the law. We should see the Government's cards before we embark on the Bill; I think it quite reasonable to ask about their intentions in advance. I have some reservations about using statutory instruments to add to the Bill's provisions; I cannot see why it is necessary, from a pragmatic point of view.

It has been said that the Law Commission does not get very much chance to modernise and bring our laws up to date because we do not give its legislative proposals enough time in this House and perhaps in the Commons as well. There may be something in that, but keeping the law under review is a fundamental responsibility of Parliament. If the executive branch does not allow us time to do that, it is right that Parliament should make its disappointment and concern known. The House of Commons succeeded recently in seizing control, rather spectacularly, of its own agenda in the Brexit context; perhaps we should consider a similarly dramatic measure if it proves necessary. We certainly ought to make it clear to the Executive that the low priority given up to now to modernising the law should not go on.

In a pure common law situation, the judge is supreme in sentencing. There is a lot to be said for that pristine model. After all, the judge has seen and heard the accused, heard the evidence from all parties and been in the position to take into account testimonials that may favour the accused. The judge alone has all the facts at their disposal, which is attractive in many ways. I am probably not the only person in the room to feel a certain intellectual nostalgia for that model, but as was predicted 100 years ago by Max Weber, we live in an age of bureaucracy and standardisation. The public insist on uniform standards in healthcare and education throughout the country; one understands why that is. There is an understandable desire to make sure that we have uniform standards in the principles of sentencing throughout the country as well, which is the basis of the Bill, and I accept that. That model is certainly a great deal better than the third model: the American model, under which demagogic politicians stand for office, promising to introduce minimum sentences for all kinds of offences—building considerable emotional campaigns in favour of doing so—so that the law is completely blocked by endless, political minimum sentences. That is one reason why the American prison population is so alarmingly high, I think, so I do not want to go down that route. Of the three particular models, the one to go for is the one in which judges have guidance and some constraints on sentencing, which is the present situation.

There is a great deal wrong with the law at present. Since the Law Commission may read the debate in *Hansard* for once, I want to take this opportunity to say a few words about where I think some of the real shortcomings are. One of them I have to mention is divorce law, because sitting next to me is my friend the noble Baroness, Lady Deech, who has attempted to improve it. Divorce law is in the most appalling mess. Jurisprudence has moved a very long way indeed from the Matrimonial Causes Act, which dates from the 1960s, in different, contradictory directions. How any lawyer can give coherent advice to a client about what is likely to happen in a divorce settlement I really do not know. This is the most unfortunate situation. Unfortunately, the noble Baroness's divorce reform Bill failed to get through, but I hope she will be encouraged to try again, because it seems a crying anomaly in the legal system. I hope the Law Commission is listening, because it should read the Matrimonial Causes Act, and then proceed to read the major judgments that have been made and the jurisprudence that has appeared over the past 50 years. It will see what an enormous, king-sized problem there is, which no one is presently doing anything about at all, which is very worrying.

Another area that is particularly unsatisfactory is the law on assisted dying. The DPP took it into his head—very rightly, for noble and humane reasons that I totally support—to say that he would not prosecute, under certain circumstances, offences under the present law for assisting suicide. That was the right moral reaction, but it was completely the wrong legal procedure. It is strikingly scandalous that the law should be changed by a decision of the DPP, who is not there to change the law. The law should be changed by either jurisprudence or Parliament if there is a legal principle at stake, which there obviously manifestly is. Parliament has not been doing its job by allowing these anomalies to arise. I was particularly shocked by a statement by no less than Lord Sumption the other day, who said on assisted dying legislation, which has failed in the Commons, that the position ought to remain that the present law should be retained but the law should be broken from time to time. I thought that a deeply scandalous statement to be made by any citizen, let alone a member of the Supreme Court. After all, the law that exists should be enforced equally—that is the point of having it—across the country. The law is, in fact, unjust. It must be changed and got rid of very quickly. Either a law is necessary and just—those are the two criteria—in which case it should remain, or it is unnecessary or unjust, in which case it should go. We should take action on these matters very quickly, not waiting for decades as is happening.

My final point, which I again hope the Law Commission will read in *Hansard*, because it is urgent that we take this opportunity to do something about it, is on suspended sentences. If we sentence someone to prison and then suspend the sentence, there is no punishment at all. There was a very nasty case just a couple of days ago of animal cruelty. We have provided for custodial sentences in certain egregious cases of animal cruelty. This was certainly a particularly egregious case and clearly one where there was premeditation and deliberate acts of cruelty on the part of the perpetrator. He was sentenced to prison, but the sentence was suspended. In other words, he did not get any punishment whatsoever. I think that he had to pay £100 or £200 in court fees or something like that. This is a complete mockery. I am very worried that judges are being influenced perhaps by the Treasury, which is worried about the size of the prison population, into suspending sentences that should not be suspended. As a result of that, injustices are being created and a considerable degree of scepticism will be produced in the country as a whole about the robustness of our criminal law if that sort of sentencing carries on. I can see very few examples of justified suspension of a prison sentence. If a prison sentence is deserved, it should be served; if it is not, there should not be a prison sentence, and some other form of punishment should be used.

I draw the Law Commission's attention to these points as well, on which urgent reform is necessary and, if the Law Commission does not take action, we should take action from the Back Benches of this House. We should make a lot of fuss about it and bring it to the attention, so far as we can, of the general public and make sure that these matters cannot be simply buried or brushed under the carpet, as they have been for far too long.

4.34 pm

Baroness Deech (CB): My Lords, I declare an interest as a non-executive member of the board of the Law Commission, the place where I had my first job in 1966. With that caveat, I nevertheless think it is appropriate to pay tribute to the work of the Law Commission, now 54 years old, not just for this Bill but for all it has done to keep our law up to date, thereby earning it worldwide recognition for its distinction.

This Bill is a stepping stone to what will be a far longer Bill—558 pages in the draft proposal when I last counted. It is estimated that in the end it will reduce 1,300 pages of sentencing law to around 450 pages. The project started in 2014 and, when one realises its vast scope, it is remarkable that it has been completed within five years. It therefore behoves Parliament to act as quickly and to progress to the code, which has been universally welcomed by the Bar Council, the Director of Public Prosecutions and the Head of Criminal Justice. It is the result of years of detailed and collaborative research by the Law Commission, including close working with practitioners in criminal law. There have been four consultations. It has been calculated, as the noble Baroness, Lady Mallalieu, noted, that it will save £256 million in terms of time and avoidance of mistakes over the next 10 years.

Sentencing errors, when they occur, are particularly regrettable in human terms to the person affected and also a drain on the judicial system. It is confidently expected that errors will be reduced as a result of consolidating the law on sentencing. Sentencing might also become more visibly rational and accessible to the lay man, which would give support to the rule of law. The consolidation exercise has been mindful of the need to avoid retrospective legislation and not to increase sentences over and above what would have been applicable at the time of the offence. All those involved urge its enactment without further delay.

Given that both Houses have enacted a special procedure for Law Commission Bills in order to ensure a swifter and more specialised passage to the statute book, it is to be welcomed that it is being used now, but one wonders why it is not used more often. The successful enactment of Law Commission recommendations ought to be speeded up, given the record of the commissioners. In recent years, many recommendations have been accepted but not implemented due to a lack of parliamentary time. This ought not to be an excuse. Indeed, we see no particular pressure on time in this House right now. It seems that this Bill is the first to be put through the special procedure since 2017. In total, seven have followed this procedure.

There are three more projects completed by the Law Commission which would seem to be suitable for this procedure, and I would be grateful if the Minister would indicate that he is giving serious consideration to this. The projects are: making land work; technical issues in charity law; and updating the Land Registration Act 2002. They each concern highly technical areas of law which are non-party-political. The Law Commission's recommendations were reached following detailed examination and consultation with the interested parties. There is strong support for those reforms, which would have significant practical benefits for large numbers of individuals, businesses and the third sector.

Noting the amount of money that this code that we are discussing is likely to save, I think it is clear that money invested in the running of the Law Commission is a good investment with a hefty return, and it ought to be increased rather than reduced. I trust that the Minister will say that more of the Law Commission's work should be supported.

Finally, I note that in our discussion this afternoon we are joining with the rest of the country in adopting a new philosophy which is very popular. A Japanese author, Marie Kondo, has written a book called *The Life-Changing Magic of Tidying*. Her philosophy is decluttering. She says that one proper clear-out is all you need for the rest of your life. Once you have your house in order, you will find that your whole life will change. Her mantra is: keep only that which sparks joy. Let this be our guide in consolidating the law.

4.39 pm

Lord Brown of Eaton-under-Heywood (CB): My Lords, it is a great pleasure to follow my noble friend Lady Deech, although even more than most, she makes one wonder why one is bothering.

[Lord Brown of Eaton-under-Heywood]

Perhaps unusually for a Second Reading debate, the imperative, I suggest, for all speakers today has been to say nothing of any great interest, let alone originality—a precept that I am proposing to follow. I am sure that all of us have our own views on various aspects of sentencing policy, our own pet proposals about how it could be improved. I have canvassed some in the past about IPP prisoners still in custody. Today's Bill, though, as has been explained fully already, has absolutely nothing to do with sentencing policy. As part of what is purely a consolidation process, it does nothing—indeed, must do nothing—whatever to change sentencing policy. The one critical change that the Bill brings about is the rationalisation, the better understanding, of existing sentencing law, which is currently found strewn all over our statute book. That is truly a worthy objective in its own right. I hope that this will put an end to the astonishing number of unlawful sentences that have been passed over recent years. More generally, it will streamline the sentencing process to the benefit of all.

As others have said, the Law Commissioner principally responsible for this project, Professor David Ormerod QC, who came to see me too—although rather more recently than he did the noble and learned Lord, Lord Garnier—is to be warmly congratulated upon what is, in truth, a remarkable achievement. He has worked upon it tirelessly for years and brings to the task huge expertise, ingenuity and analytical skills. Nothing whatever must be done during the Bill's passage to delay or deflect it into other paths. Comparatively few Bills do indisputable good and cause no conceivable harm. This is one of them, and the case for its smooth and speedy passage into law is compelling. If one thing has emerged from the speeches today, it is surely this: the truly desperate and urgent need for this legislation.

I promised that I would say nothing original or of interest and I have kept my promise. I put myself down to speak in the debate with the sole object of adding my name, for the little it may be worth, to the other, more illustrious, names who are rightly giving their unqualified support to this admirable Bill.

4.42 pm

Lord Marks of Henley-on-Thames (LD): My Lords, it is a particular pleasure to speak because I have rarely attended any debate where there has been quite such unanimity. We of course also welcome the Bill and the intention to introduce the proposed code. The Bill is an essential pre-consolidation measure—or, more accurately, set of measures. I join the noble Baroness, Lady Deech, the noble and learned Lord, Lord Brown, and others in praising the work of the Law Commission and of Professor Ormerod in particular. I only wish that the Government and other Governments would take more notice of other Law Commission reports that have been shelved rather than enacted over the years.

The Bill loyally applies a number of important legal principles which our sentencing law has spectacularly lost sight of in recent decades. The first is that legislation should be accessible: easy to find, in one place, and possible to develop as one body of readable law. In sentencing in particular, where the liberty of the subject is at stake, there should be an end to the draftsmen's nasty habit of defining words and phrases by reference to other legislation—where, for instance, such and such a phrase "shall have the meaning ascribed to it" in another piece of hardly or only vaguely linked legislation using the same phrase. This means that the reader, who may not necessarily be a lawyer but a lay member of the public trying to find out what the law actually is, has to go scrabbling around in other pieces of legislation to find the meaning he seeks. In some legislation double cross-referencing is not uncommon. I agree with every word that the noble and learned Lord, Lord Hope of Craighead, said on this subject.

Consolidation is generally to be welcomed because it makes legislation more accessible. It is important not only that lawyers and judges can find the law on a topic in one place—the noble and learned Lord, Lord Garnier, illustrated this when he spoke of how often adjournments of the Crown Court are required while everyone rushes around trying to check the legal powers of criminal courts; having seen that many times, I know it is an extraordinarily undignified and unedifying sight—but that members of the public can understand sentencing, not least to enable them to know the actual and potential consequences of illegal behaviour. It is also important that the press can access the law and write about it accurately. The fact that the press so frequently gets the law on sentencing wrong is just as much a reflection on overcomplicated law as it is on careless reporting. The production of a sentencing code will address these issues.

The second principle that this legislation embodies is that legislation should be as simple as possible. The elimination of anomalies and redundant legislation of the kind mentioned by the Minister in opening and by other noble and learned Lords, particularly the noble and learned Lord, Lord Judge, will remove the cause of many of the mistakes made in sentencing and reduce the number of appeals where the sentencing process has gone wrong. The law in this area has become ridiculously complex, as the example given by the noble and learned Lord, Lord Judge, made very clear. It is extraordinary that the Law Commission found that no less than 36% of sample criminal cases randomly selected from the Court of Appeal workload involved sentences that the court below should not have passed as a matter of law. The Law Commission also commented on the delays in sentencing and in sentencing appeals caused by complexity in the law. The noble Baroness, Lady Mallalieu, referred to the huge estimated savings of more than £0.25 billion over 10 years as a result of the proposed implementation of the code. I echo her hope that these savings may be applied to making improvements elsewhere in the criminal justice system.

The third principle, mentioned by the noble Lord, Lord Davies, is that legislation should not be retroactive. While it is sensible and welcome that, by virtue of the clean sweep, when the code comes into force all offenders will be sentenced in accordance with the code whenever their offences were committed, it is right that the Bill provides for an exception to this principle to ensure that an offender will not be liable to a greater penalty under the code than was applicable to his offence when it was committed. That is made clear in the Explanatory Notes and was mentioned by the Minister in opening. I understand that that is the effect of

Clause 1(4), but it is an important guarantee and it is essential that it is watertight. The noble and learned Lord, Lord Hope, also made this point.

The code will not, of course, make new substantive sentencing law. That is not the function of a consolidating statute. The noble and learned Lord, Lord Brown, made that point clearly, and I thought almost with strictures for following speakers. However, future sentencing reforms will, one hopes, be made by amendment of the code, which can then be kept up to date and developed as a single and accessible but dynamic body of law.

While discussing sentencing, I mention that we want to see a more wide-ranging reform of sentencing policy incorporated in the code in due course. In its welcome briefing, the Prison Reform Trust calls for a review of the sentencing framework as a whole, which we would support. Our aim throughout is to increase the life chances of offenders by achieving their rehabilitation, thus turning lives around, reducing reoffending rates and cutting the cost to society of crime, not only financially but in terms of disruption and human misery. We hope that the code develops in that direction as time goes on.

As is well known, we want to see an end to short prison sentences of less than 12 months. The evidence suggests that they are very damaging. Apart from that, we also need to end sentence inflation occurring through statutes permitting incremental increases in maximum sentences or new offences with ever greater sentences. Public and media pressure on courts is another source of sentence inflation. Indeed, the present Lord Chief Justice has spoken in the past about the dangers of sentence inflation. I very much hope that the presence of a comprehensive code will help to reduce that danger. In passing, we want to see sentencing judges much more involved in how both their custodial and community sentences for particular offenders will be implemented.

We welcome the Bill and the proposed introduction of a comprehensive and more accessible sentencing code, but we see this as an important step on the way to reforming our entire system of sentencing, punishment and rehabilitation so as genuinely to put rehabilitation first.

4.51 pm

Lord Bassam of Brighton (Lab): My Lords, it has been a pleasure to listen to the debate. I think that I am probably the only lay person to take part in it so I feel privileged to be among such fine legal minds. I am grateful to the Minister for his cogent and coherent introduction. Following the strictures of the noble and learned Lord, Lord Brown, I intend not to be original in anything I say, but I will make some points for the Official Opposition.

It is good to see parliamentary time being used effectively; that has felt like something of a rarity in recent months. With the dearth of legislation being pursued by this Government, as observed by the noble and learned Lord, Lord Hope, we recommend to the Minister that we would be happy to see more Law Commission Bills come through our House. That may be seen as one bonus of Brexit that we can all share and enjoy.

Our justice system currently faces extreme challenges. The decimation of legal aid has reduced access to justice for those who need it most. Courts are facing budget cuts and are haemorrhaging experienced staff. The Government have recently been pushed by voluntary organisations, campaigners and MPs to review the workings of the family courts, as they are failing survivors of domestic violence. In the face of all that and more, we still have to get sentencing right. I absolutely welcome the Bill in that regard. We believe it to be a good place to start.

As noble Lords have said, the Bill is a "pre-Bill" before the main show arrives in the form of a modern, streamlined sentencing code. As has been explained, the aim of the Bill is to repeal bits of the past sensibly and pave the way for the future, allowing the law to be easily accessed and, we hope, amended in one place. I wish to put on record our thanks to the Law Commission and all the other stakeholders that have contributed to the years of work, research and consultation that have brought the Bill before us and the consolidation Bill that will follow it. The noble Baroness, Lady Deech, testified to the reduced number of pages there will be in the code. That is very welcome because it will make the code much easier to understand.

The legislation has been strongly welcomed by the profession. In its briefing, the Bar Council referred to existing sentencing law as a "patchwork quilt" and urged the introduction of the sentencing code without further delay. That patchwork is derived from three statutes, including the Powers of Criminal Courts (Sentencing) Act 2000 and the Criminal Justice Act 2003. I think that I might have been responsible for one of those pieces of legislation as a Home Office Minister.

The commission estimates that there have been at least 14 major Acts covering sentencing in the past 30 years. I know that I took 19 Home Office Bills through in the two years I was exclusively a Minister in that department. I know that at least one of them repealed legislation that had created sentences only six months before. The point about delayering is well meant and well met.

After all that parliamentary work, making changes across primary and secondary legislation, the commission writes that the law on sentencing procedure is,

"extremely difficult to locate, interpret and apply, even for an experienced lawyer or judge".

What hope, then, for a lay person like me? Apparently very little, we are told, as it can be "practically impossible" for someone to locate and understand parts of the law. That cannot be right.

To illustrate the complexity of the current system, the commission gives two very good examples. At one point, it points to a maximum fine that can be unlimited —you just have to read about it somewhere else. The second example is about the effect of commencement dates recorded separately from the provisions they apply to, concealed in secondary legislation. Noble Lords know only too well the joys of how opaque secondary legislation can be.

The case for change is overwhelming. Noble Lords have spoken about the frankly alarming number of wrongful sentences passed, and the cost of delays and appeals. The complexity of the current layers of law

[Lord Bassam of Brighton]
comes at a high price. Beyond lengthy procedure and the public purse, there is, as other noble Lords have said, a human aspect; I thought that the example from the noble and learned Lord, Lord Judge, was extremely good. The impact on those sentenced, on witnesses and, particularly, on victims and their ability to trust in our justice system is immense. I was drawn in particular to the example from the noble Lord, Lord Marks, of the, I think, 262 Court of Appeal cases sampled from 2012, 36% of which had had a wrongful penalty applied.

As has been said, this is a Bill of two parts. The clean sweep, as it has been called, is the more novel part. We appreciate the detailed work done on the possible human rights implications of the sweep and its retroactive remit, particularly on our rights under Article 7 of the ECHR. I welcome the exemptions that have been identified and included in Schedule 1. Clause 1 includes a regulation-making power to allow the Secretary of State to specify other provisions that the clean sweep will not apply to. It would be helpful if the Minister could outline in what circumstances that power might be used. Is the intention for it to be a back-up in case any exemptions have been missed out of Schedule 1?

The clean sweep we are legislating for is a one-off—a single spring clean as it were—so there are key questions about how we intend to retain the benefits of the exercise and prevent layers of new law once again building up to gather dust. Is it the Government's intention that, where amendments are made to the code, they will also be commenced so that they apply to everyone convicted after that date, regardless of when their offence was committed, thus building in a kind of retroactivity as the norm in our sentencing?

The Bill's second purpose concerns the more traditional pre-consolidation amendments. I express my thanks to the commission and the Ministry of Justice for the detailed examples they provided on the types of amendments included, and the reasoning and logic behind them. I noted that Clause 2 also includes a regulation-making power—this one limited to regulations that, in the Secretary of State's opinion, "facilitate" or are,

"otherwise desirable in connection with",

the consolidation of sentencing law. The Explanatory Notes say that once consolidation has happened, the power will no longer be able to be used. Can the Minister explain whether thought was given to sunsetting either of the regulation-making powers included in the Bill? The Explanatory Notes also say in paragraph 11 that once the sentencing code is commenced, the pre-consolidation Bill,

"will have served its purpose and will largely be repealed".

Can the Minister outline which elements of the Bill they expect to repeal?

I will wind up with a handful more questions. I am sure the Minister will be delighted. In its background to the sentencing code, the Law Commission referred to the possibility of extending the code to the Armed Forces. Do the Government have any plans to make arrangements for the code to apply also to service jurisdiction? Crucially, when are we expecting the sentencing code Bill to be introduced? A number of your Lordships have said that it ought to be expedited, so can the Minister guarantee that there will be no delay between this Bill and its partner Bill. Finally, the Law Commission tells us that the best estimate of the financial benefit the sentencing code will offer is savings of some £250 million over the next 10 years, which other noble Lords have mentioned. I know that Ministers are always very reluctant to hypothecate where money ought to go, but we have talked about the shortages in funding to the justice system and we owe it to the justice system to ensure that it is well resourced. In addition, we should have some good practice in passing legislation, not least because of the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and its adverse effect on justice in our country. Can the Minister tell noble Lords what plans the Government have to put any savings back into the system to fund desperately needed legal aid and improve overall access to justice? Having said that, we, too, very much support this Law Commission Bill.

5.01 pm

Lord Keen of Elie: My Lords, I am pleased that we have been able to find the parliamentary time to progress this Law Commission Bill. As has been acknowledged, the Bill paves the way for the sentencing code legislation which will address the need for clarity and accessibility in sentencing procedure. The noble Baroness, Lady Mallalieu, referred to the requirement for certainty and transparency, and that was echoed by many noble Lords in their contributions to this debate.

I will address how the Law Commission approached the clean sweep and the reasons behind the regulation-making powers in the Bill but before I do that I will pick up on a number of points. The noble and learned Lord, Lord Hope, referred to paragraphs 90 and 92 of Schedule 2 where there is a reference to the law of Scotland in the context of community orders and suspension orders. There is an anomaly in the present law which it is hoped will be addressed by means of the provisions in the Schedule. We have engaged with the officials of the Scottish Government on this matter. Indeed, we have indicated to them that an LCM may be required. We have not had an official response to that as yet, but we do not anticipate there being any difficulty in regard to this matter. If further regulatory powers were used to amend provisions in Scots law, we would, of course, follow the usual convention of engaging with officials of the Scottish Government on that matter.

On the clean sweep, I will attempt to elucidate a little further how it was approached because the noble Lord, Lord Davies, among others, raised whether there should be any concerns surrounding the clean sweep mechanism. The objective is to apply the codified law to all those convicted after the enactment, subject to the important caveat noted by the noble and learned Lord, Lord Hope, that no one can be sentenced to a heavier penalty than could have been imposed on the date of the commission of the offence. In approaching that, the Law Commission had regard to the jurisprudence of the European Court of Human Rights interpreting Article 7 of the convention and to domestic law, as reflected in cases such as Docherty in the Supreme Court,

about non-retroactivity with regard to the imposition of maximum penalties in matters of crime. So how did the Law Commission approach the clean-sweep task? First, it identified the sentencing procedure provision in the present law in its most up-to-date form. Then it asked whether consolidating that most present form of the law into the code and making it apply to anyone convicted after enactment, irrespective of the date of the commission of the offence, would infringe Article 7 of the convention or the common law provisions to which I have referred.

In approaching that matter, the Law Commission asked itself a series of questions. First, will this impose a heavier penalty than could have been imposed at the date of the commission of the offence? In deciding what is a heavier penalty, it had of course regard to the jurisprudence of the European Court of Human Rights, to the domestic law—such as Docherty, which I referred to—and to whether the penalty is heavier than the maximum available at the time, given that that is the relevant test in convention law and domestic law. If there was no risk of a heavier penalty than could have been imposed, it could then consolidate the present law.

The Bill achieves that by deeming the date of commencement for the most up-to-date form of the law being consolidated, and/or the partial repeal of versions of the law that were also applicable for historic cases, to have occurred before the trigger event, which, as I noted earlier, is the commission of the offence. If I may say so, that is a neat means of addressing what is otherwise a potentially quite complex issue on retroactivity. If to impose the current law would risk imposing a heavier penalty, then an exception is created within the Bill to preserve the previous forms of the law by specifying the dates to which they would apply. That is the purpose of what are perhaps, on the face of it, these rather lengthy Schedules.

As the noble Lord, Lord Bassam, observed, a regulatory-making power is there to enable the Secretary of State to address a number of issues that could arise. First, in this complex area of law—I believe everyone acknowledged that it is a somewhat complex, layered area—there may have been some oversight. It is therefore to deal with that issue. Secondly, there may be circumstances in which an exception should have been made to prevent a heavier penalty and was not made; it is to deal with that as well. Thirdly, there may be some change in sentencing policy, between Royal Assent being granted to the present Bill and the introduction of the sentencing code, with regard to a particular offence. That, too, would have to be addressed. It is for those purposes that the regulatory-making power is there.

The noble Lord, Lord Bassam, raised a pertinent point about the Armed Forces. It is intended that the code should extend to the Armed Forces. Work is still ongoing with regard to that; we hope that that work will not hold up the passage of the sentencing code Bill itself. There might, in the course of its passage, be some further amendment to ensure that that is done. One or two complexities about incorporating the Armed Forces are being addressed at present.

As to a guarantee on when the sentencing code Bill will be brought forward, I regret to say that, like the noble Lord, Lord Bassam, when in his ministerial position at the Home Office, I am not in a position to offer guarantees. Clearly, though, we are anxious that once we have laid the groundwork for the sentencing code it should be brought forward as soon as practicable. It is in those circumstances that we will seek to address this.

Noble Lords also referred to the other work of the Law Commission. We commend that work and are conscious of the need to address the Commission's work, and to look at law reform in light of its findings. We engage on a regular basis with the Law Commission and it presents an annual report to Parliament. Parliament has an opportunity to see the work that is ongoing and the work completed by the Law Commission. Again, I cannot give any commitment about particular areas of its work at present. I notice that the noble Lord, Lord Davies, took the window of opportunity to advertise his wares to the Law Commission. No doubt when the commission reads *Hansard*, it will be conscious of his concerns.

With that, I thank all noble Lords for their contributions to this debate and commend the Bill to the Committee.

Motion agreed.

Committee adjourned at 5.09 pm.