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PARLIAMENTARY DEBATES
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HOUSE OF LORDS

OFFICIAL REPORT

ORDER OF BUSINESS

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The following abbreviations are used to show a Member's 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

Monday 11 January 2021

The House met in a hybrid proceeding.

1 pm

Prayers—read by the Lord Bishop of Birmingham.

Arrangement of Business

Announcement

1.06 pm

The Lord Speaker (Lord Fowler): My Lords, Oral Questions will now commence. Please can those asking supplementary questions keep them short and confined to two points. I ask that Ministers' answers are also brief.

Agreement on Climate Change, Trade and Sustainability

Question

1.07 pm

Asked by ***Baroness Bennett of Manor Castle***

To ask Her Majesty's Government what plans they have to support the initiative for an Agreement on Climate Change, Trade and Sustainability.

The Minister of State, Department for Business, Energy and Industrial Strategy and Department for International Trade (Lord Grimstone of Boscobel) (Con): My Lords, sustainable trade is a priority for the UK as an independent trading nation. We have already liberated more than 100 environmental goods in the UK global tariff and co-sponsored the new plurilateral structured discussions on trade and environmental sustainability in the WTO. We are considering further policy options, including the three policy areas which comprise the Agreement on Climate Change, Trade and Sustainability: environmental goods and services liberalisation, eco labelling, and fossil fuel subsidies.

Baroness Bennett of Manor Castle (GP) [V]: I thank the Minister for his Answer. I understand that he will not be able to comment on the outcome, but can he assure me that the UK will seek to have those three measures—ending barriers to trade in environmental goods and services, ending fossil fuel subsidies, and a global eco-labelling scheme—in all future trade deals? Will the UK use its seat on the WTO to get them built into the WTO rules?

Lord Grimstone of Boscobel (Con): My Lords, I am happy to confirm to the noble Baroness that that is the case. We consider these subjects to be very important and we always seek to cover them in our negotiations on future free trade agreements.

The Earl of Caithness (Con) [V]: My Lords, my noble friend welcomed this agreement in the Trade Bill debate last week. Can he expand on his welcome? Can it be taken as a statement of intent to join, and what steps is the department taking to help businesses trade in a way that lowers their emissions and environmental footprint?

Lord Grimstone of Boscobel (Con): My Lords, we are considering seriously the policy areas which underline the agreement; we attach great importance to them. We support further moves in this area and are carefully considering whether we should move forward with this.

Baroness Boycott (CB) [V]: My Lords, according to Eurostat figures, our Government spend approximately £10 billion a year subsidising fossil fuels. Do they agree that this is both outdated and extremely damaging, and should be phased out? Can the Minister update me on the Government's plans in this direction?

Lord Grimstone of Boscobel (Con): My Lords, the UK has been a long-standing supporter of multilateral efforts to promote fossil fuel subsidy reform. There is some technical disagreement as to exactly what comprises a fossil fuel subsidy. For example, we would not want the £200 winter fuel payment that we make to pensioners to be included as a subsidy. Some debate is still going on about the coverage of this matter.

Lord Reid of Cardowan (Lab) [V]: My Lords, on 1 September, the Minister for Trade Policy claimed:

"Having left the EU, the UK has a unique opportunity to design a set of policies to tackle climate change."

He added that the Government were actively exploring trade policy options to support ambitious action in this direction. What is the nature of this exploration and what contact have we had with any of the parties to the agreement?

Lord Grimstone of Boscobel (Con): My Lords, as I said earlier, we consider this subject to be very important. At the March 2020 WTO General Council, the Secretary of State for International Trade announced that the environment, including climate, was one of the three key priorities for UK ambition and leadership in its position as an independent member of the WTO.

Lord Purvis of Tweed (LD): My Lords, I welcome the fact that the Government are considering closely the three policy areas referred to. I am also glad that the Minister keeps me informed of the discussions with New Zealand on a trade agreement. Given this very good proposal from the New Zealand Government, is there not an opportunity in the forthcoming trade agreement with New Zealand that we all hope for to make advances in these three key areas? If global Britain means anything, our trade agreement with New Zealand would be a very good place to start working on these three areas in particular.

Lord Grimstone of Boscobel (Con): My Lords, as always, the noble Lord is correct in these matters. We have a close relationship with New Zealand on trading matters; we tend to think alike. We certainly hope to advance these matters during our negotiations.

Lord Stevenson of Balmacara (Lab) [V]: My Lords, does the Minister agree that if the UK were to accede to the ACCTS, it would go a long way to demonstrating

[Lord Stevenson of Balmacara]
to a doubting world our commitment to honouring the level playing field clauses contained in the EU-UK Trade and Cooperation Agreement?

Lord Grimstone of Boscobel (Con): My Lords, I endorse the noble Lord's point. Obviously, the decision on whether to join these negotiations has some technical aspects. We very much accept the principles underlying this agreement but some of the fine print still needs to be considered and examined.

Lord Vaizey of Didcot (Con): My Lords, I will try not to echo the noble Lord, Lord Reid, by taking a phone call during my question, but I will do so somewhat by saying that, given that three of the signatories to the agreement are European countries that are not members of the EU, does this not provide Brexit Britain with a golden opportunity to lead the non-EU European environmental trade policy response?

Lord Grimstone of Boscobel (Con): My Lords, as this matter is now entirely within our competence, we absolutely intend to use our freedom to be one of the leading countries in the world in this area and, hopefully, set an example that other countries may follow.

Lord Singh of Wimbledon (CB) [V]: My Lords, the initiative on climate change, led by a group of smaller countries, is timely and commendable. Does the Minister agree that the UK is well placed to lead on turning sentiment into reality by pressing for trade and development policies bound tightly to agreed global constraints, in order to protect the environment, which sustains us all?

Lord Grimstone of Boscobel (Con): My Lords, the noble Lord is completely right to make this point. We want our generation to be the first to leave the world in a better state than we found it. Working on agreements such as this is an important component of that.

Baroness Blackstone (Ind Lab): My Lords, do the Government anticipate any problems in complying with the commitment made by the ACCTS countries to abolish tariffs on environmental goods and services?

Lord Grimstone of Boscobel (Con): My Lords, we have already abolished tariffs on, I think, 100 new environmental goods and services. We keep this subject under close review and consult the relevant bodies on it. Where we can do further liberalisation, we would like to do so, of course.

Lord Oates (LD): Can the Minister tell the House what measures the Government intend to take to ensure that the fundamental rights and values of nature that lie at the heart of the Terra Carta, or earth charter—Prince Charles's excellent initiative, launched today—are reflected in the UK's approach to future trade agreements?

Lord Grimstone of Boscobel (Con): My Lords, when I heard reports of this initiative this morning, I thought it was timely, happening as it is on the day of this Question. I very welcome it and we look forward to building on it.

Baroness McIntosh of Pickering (Con) [V]: My Lords, will my noble friend take this opportunity to confirm once again that we will maintain high standards in environmental protection, food safety and animal welfare? It is concerning that the ban on neonicotinoid pesticides—intended to protect bees—has been extended for only a limited period. Can the Minister assure the House that we will hold to the high standards we enjoyed while we were members of the European Union?

Lord Grimstone of Boscobel (Con): My Lords, absolutely; I am happy to give that assurance on these important areas. We certainly did not see that an advantage of leaving the European Union would be that we could lower standards in these areas.

The Lord Speaker (Lord Fowler): My Lords, all supplementary questions have been asked. We now come to the second Oral Question.

National Grid: Capacity

Question

1.16 pm

Asked by ***Viscount Hanworth***

To ask Her Majesty's Government what assessment they have made of the capacity of the National Grid; and what plans they have to commission the construction of small modular reactors to address any capacity issues identified.

Baroness Bloomfield of Hinton Waldrist (Con): Capacity margins for this winter are healthy, and we remain confident that electricity security can be maintained under a wide range of scenarios. Through the capacity market, we have secured our main tool for ensuring security of supply—the capacity needed to meet forecast peak demand—up to 2023-24.

On the second part of the noble Lord's Question, we anticipate that SMRs will be deliverable in the UK by the early 2030s, when we also aim to demonstrate the next generation of AMRs.

Viscount Hanworth (Lab): I thank the Minister for that Answer. According to the climate change committee, a quadrupling of low-carbon power generation will be required if we are to meet the 2050 target for decarbonising the economy, and a very substantial part of the power will come from nuclear. Do Her Majesty's Government still believe that the construction of nuclear power stations can be led and financed by private consortia, or do they now conceive that, as in the case of the first generation of nuclear power stations, they must be financed preponderantly, if not entirely, by public funds? The best native technology for nuclear power generation is the Rolls-Royce project to develop a small modular nuclear reactor. Do Her Majesty's Government have plans to increase their very limited financial support for this enterprise?

Baroness Bloomfield of Hinton Waldrist (Con): There was a number of questions there; I will do my best. Having consulted, we still believe that the regulated asset base model is the best way of financing large-scale

nuclear projects. As we said in the energy White Paper, we are absolutely committed to producing at least one new plan for a large nuclear project. On SMRs, the £385 million allocated to advanced nuclear technologies in the energy White Paper is a significant amount; we are committed to it and we support the Rolls-Royce consortium wholeheartedly.

Lord West of Spithead (Lab): My Lords, I am a strong supporter of the need to develop and deploy small modular nuclear reactors, which should be designed and built in the United Kingdom. However, we also need some large nuclear power stations. Hinkley Point B and Hunterston B will both close in 2022, and time is running out. Nuclear is crucial for the provision of round-the-clock, weather-independent, low-carbon electricity as the demand for electricity soars. The building and commissioning of Sizewell C is now a matter of urgency; we need to proceed, but with minimal and reducing Chinese involvement. How many large nuclear power stations does the current energy policy plan for the UK? Bearing in mind the risks of Chinese involvement, can the Minister confirm that we will not proceed with Bradwell B—the Chinese reactor—but instead revive Japanese options such as Wylfa in Anglesey?

Baroness Bloomfield of Hinton Waldrist (Con): The noble Lord, Lord West of Spithead, is always a great proponent of large nuclear, and I agree that we are likely to need significant, large nuclear capacity in order to meet our carbon reduction commitments at the least cost. We will continue to engage with all viable companies and investors on their proposals for future projects, including all of the Sizewell C and other projects. The UK welcomes foreign investment in our infrastructure. However, all investment involving critical infrastructure, which includes nuclear, is subject to thorough scrutiny and needs to satisfy our robust legal, regulatory and, indeed, national security requirements.

Baroness Bowles of Berkhamsted (LD) [V]: Can I ask the Minister a little more about the timings for when small modular reactors, advanced modular reactors and fusion may come on stream? Is there a sufficient commercial time window for generation III before it gets overtaken by the advanced modular reactors if it is not actually up and running until 2030, which is later than some projections for other countries?

Baroness Bloomfield of Hinton Waldrist (Con): There is only one SMR that is scheduled for production before 2028, which is in Canada, and that may well slip anyway. As set out in the energy White Paper, our aims are operational SMRs by the early 2030s, a demonstrator AMR also by the early 2030s, and a commercially viable fusion plant by 2040. We see these advanced nuclear technologies as complementary, given strong synergies between their supply chains and the multiple roles they could perform in the energy system.

The Lord Speaker (Lord Fowler): The noble Lord, Lord Trefgarne, is next. No? I call the noble Lord, Lord Ravensdale. Is the noble Lord there?

Lord Ravensdale (CB) [V]: My Lords, I declare my interests as in the register. The energy White Paper commits to opening the generic design assessment to SMR technologies this year. Can the Minister say how many GDA slots will be available—by that I mean how many SMR designs will be able to be supported through GDA—and at what point in the year will SMR GDA open?

Baroness Bloomfield of Hinton Waldrist (Con): I cannot give a specific answer on how many designs will be expected to be announced, but we are currently finalising arrangements to open the generic design assessment. We will provide more information in due course. Our aim is to invite applications to BEIS in quarter 2 of this year. In the meantime, the Government have announced £40 million for developing regulatory frameworks and supporting the supply chains for SMRs in the United Kingdom.

Lord Grantchester (Lab) [V]: SMRs have the potential to help reach the UK's net zero targets. How many SMRs are typically needed to be operational by 2050 to make a meaningful contribution to net zero? What are the cost savings, as well as UK job creations, of SMRs and current nuclear reactors?

Baroness Bloomfield of Hinton Waldrist (Con): Analysis in BEIS released alongside the energy White Paper demonstrates that in a low-cost system, the UK could need between 5 and 15 gigawatts of nuclear capacity. However, it is for the market to determine the best solutions for very low emissions, and reliable supply at the lowest cost to consumers. On job creation, the Rolls-Royce consortium believes that a UK SMR programme could support up to 40,000 jobs, and that each SMR would be capable of providing power for 750,000 homes.

Baroness Scott of Needham Market (LD) [V]: My Lords, the energy White Paper detailed many areas that will require legislation in order for them to go ahead. For example, to ensure that the grid has adequate capacity for the 40 gigawatts of wind power that the Prime Minister has promised by 2030, work needs to begin soon. Can the Minister say when an energy Bill will be before us?

Baroness Bloomfield of Hinton Waldrist (Con): The noble Baroness asks, on the surface of it, a perfectly straightforward question, to which I would love to be able to give an equally straightforward answer. The most I can say is that following the long-awaited but much-welcomed energy White Paper, an energy Bill will be introduced as soon as parliamentary time allows. The measures will intend to realise the ambitions and policy commitments set out in the White Paper, as well as to drive forward the transition to net zero.

Lord Wigley (PC) [V]: Will the Minister confirm that the Government are standing by their earlier commitment—of central relevance to these issues—namely, to locate the proposed national thermal hydraulics facility in Anglesey?

Baroness Bloomfield of Hinton Waldrist (Con): The noble Lord is absolutely correct; the commitment to build the national thermal hydraulics facility was made

[Baroness Bloomfield of Hinton Waldrist]
when we launched the nuclear sector deal in November 2018. It remains the Government's ambition to do so. The issues recently identified, which have resulted in conversations about this, relate to the need of the Rolls-Royce-led UK SMR consortium to have a slightly larger facility delivered sooner than had been proposed in Ynys Môn. The UK and Welsh Governments are in discussion about how to resolve the planning and timing issues quickly, and they may be able to start the construction of just the facility needed for the Rolls-Royce machine before they proceed with the rest of the site.

Lord Duncan of Springbank (Con): I draw the House's attention to my register of interests. The UK Government are committed to a gigawatt-scale nuclear future, but there are now some 72 SMRs in 18 countries. What can we learn from the work that is being done elsewhere, and how can we facilitate the exchange to ensure that we are benefiting from the pace of the fastest in the moving camel train?

Baroness Bloomfield of Hinton Waldrist (Con): My noble friend is absolutely right that the UK is still one of the front-runners of the development of SMRs, because we acknowledge that SMRs and, indeed, advanced modular reactors will also play an important role as a low-carbon source. The Government announced a £385 million advanced nuclear fund in the energy White Paper, which will support the research and development of both SMRs and AMRs. Of course, we watch with interest the development of other research projects abroad.

The Lord Speaker (Lord Fowler): We will continue for a further 60 seconds because of the earlier problem.

Lord Craig of Radley (CB) [V]: My Lords, will increased electricity demand require a national grid to place greater reliance on existing submarine power supplies from France, Belgium, the Netherlands and/or southern Ireland? What impact on cost arises following the UK's departure from the European Union? Will this lead to reconsideration of the future interconnector links planned with Norway and Denmark?

Baroness Bloomfield of Hinton Waldrist (Con): Interconnection remains an important part of the UK's energy strategy, delivering lower costs, increased energy security and better integrated low-carbon generation. The UK-EU Trade and Cooperation Agreement provides for new, efficient electricity trading arrangements over these interconnectors, making electricity more affordable for consumers. Future projects to Norway and Denmark are under construction, with the North Sea link due to complete in autumn this year, and the Viking link due for completion in late 2023.

The Lord Speaker (Lord Fowler): My Lords, the time allowed for this Question has now elapsed. We come to the third Oral Question.

Grassroots Sporting Fixtures and Facilities

Question

1.28 pm

Asked by ***Baroness Morgan of Cotes***

To ask Her Majesty's Government what steps they are taking to permit (1) the resumption of grassroots sporting fixtures, and (2) the re-opening of sports facilities.

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Baroness Barran) (Con): My Lords, sports and physical activity are vital for our physical and mental health, and important weapons in our fight against coronavirus. However, we have now had to take decisive action to enter a national lockdown, to save lives and to protect the NHS. We will make the return of grassroots sports and the reopening of facilities an immediate priority as soon as it is safe to do so.

Baroness Morgan of Cotes (Con) [V]: I thank my noble friend for her Answer; we understand the public health crisis that is upon us. Research for Sport England demonstrates the many positives of community sport and a more active lifestyle. As my noble friend said, we need people to be able to build resilience to Covid, and to tackle longer-term challenges relating to obesity and mental health. Sport and an active lifestyle do that. Can the Minister say when, in England, sports such as golf and tennis, which enable social distancing, as well as outdoor activities for children under 12 —still allowed in Scotland—will be prioritised for reopening?

Baroness Barran (Con): As my noble friend knows, I cannot give her an exact date on which those sports will reopen, but in recognition of the importance of physical activity, outdoor exercise within households, or with one other person from another household or your support bubble, is still permitted once a day in your local area. That obviously includes things such as walking, running, swimming and cycling.

Lord Hunt of Kings Heath (Lab) [V]: My Lords, picking up the theme of the Question from the noble Baroness, Lady Morgan, before the pandemic, 20% of children aged between 10 and 11 were obese, with a further 14% overweight, and only 46% of children and young people were meeting the recommended level of physical activity. The CEO of ukactive has reported that during the previous lockdowns physical activity levels fell sharply and significantly. The Minister has said today that it is a priority to get these sports facilities open when they can, but is there also a concerted plan, with resources, to boost and increase physical activity among young people?

Baroness Barran (Con): The noble Lord is right to highlight the importance of physical activity among young people. We are grateful for all the action of Sport England and others to encourage that, both at the moment and, I am sure, well into the future. The noble Lord may be pleased to hear that, last week, specific clarification was made about the status of

youth workers, many of whom will be carrying out sporting activities with particularly vulnerable young people; they have been confirmed as key workers.

Lord O'Shaughnessy (Con): My Lords, I want to carry on the theme of grass-roots sport for schoolchildren. I live in London and when we were in tier 4, before the national lockdown, guidance went out from the department about what sort of activities could continue, but it caused great confusion at the local level. One local rugby club was open and another was not, and the football club was not sure what to do. Given that this patchwork of provision cannot be sustained if we are to get young people exercising after the lockdown, I encourage my noble friend's department to give much more direct guidance about what can be done, so that we see that provision come back at the earliest possible opportunity.

Baroness Barran (Con): I thank my noble friend for highlighting those specific examples. If he can share more such examples with me and with officials, we can make every effort to ensure that there is clarity, so that when we do bring back grass-roots sport, the maximum number of children and adults can benefit.

Lord Addington (LD): My Lords, does the Minister agree that it is not only children but young adults and middle-aged people who are the backbone of amateur sport? We must ensure that these people are given some encouragement and we must assist the governing bodies in ensuring that they know that they can get back to training to play that sport. Habits have been broken by people not being able to take that up and other habits have come in their place. There must be a coherent effort to keep a sufficient core to allow these activities to continue.

Baroness Barran (Con): The noble Lord is right. My honourable friend the Minister for Sport has been very clear in his statements about valuing the role of just the people who the noble Lord refers to.

Lord Hayward (Con) [V]: My Lords, following on from my noble friend Lady Morgan's Question, given the need for social distancing, minimising sporting physical effort and protecting mental health, can my noble friend clarify why angling and cycling are acceptable as outdoor pastimes but golf is not?

Baroness Barran (Con): The noble Lord is not alone in his concerns about golf. He will be aware that a petition on that subject will be debated in the other place shortly. However, the answer is that, in the interests of public safety, we are allowing those activities which take place on public rather than private land.

Baroness Grey-Thompson (CB) [V]: My Lords, I declare an interest as chair of ukactive. While grass-roots sport and fixtures are vitally important, what provisions have Her Majesty's Government made for opening up other leisure provisions which are so important for the long-term health of our nation?

Baroness Barran (Con): As the noble Baroness knows, my colleagues within the department are constantly in conversation with other parts of the sport and leisure sector. We announced a £100 million support package for local authority leisure centres and continue to work on plans in that area.

Lord Bassam of Brighton (Lab) [V]: My Lords, competitive sport below the elite level faces continued disruption due to the current lockdown, so given the evidence that other noble Lords have referred to—that earlier lockdowns led to a falling off of participation in sports—what plans have the Government got to develop a national sports recovery plan? Will the Minister commit to ensuring early consultation with all the relevant sports organisations in developing a recovery plan, so that we can get our nation playing again? Will the Government look at financial support, further to the winter survival package which was announced prior to Christmas, covering sports affected by the ban on spectators?

Baroness Barran (Con): I can only agree with the noble Lord about the importance of keeping our nation active and those involved in sport having a chance to continue to do so. That is why we have kept those restricted options open, as I referred to already, on public land, which has not been the case in some other areas. Obviously, there are initiatives such as Join the Movement from Sport England. I reassure the noble Lord that we are in constant consultation with the key governing bodies about the future of sport and the funding required.

Baroness Uddin (Non-Afl): My Lords, sport is a lifeline of physical activities and mental well-being in areas where there is endemic housing overcrowding. I am therefore delighted that the Government are recognising youth workers as essential workers, because they have a vital role. I commend to the Minister and the House the work of London Tigers, under the leadership of Mesba Ahmed and Polly Islam, who have played an outstanding role in Tower Hamlets and elsewhere. Will the Minister look at their work and see the outstanding example they have set and perhaps consider it applicable elsewhere in grass-roots level community sports?

Baroness Barran (Con): I would be delighted to look at their work. We are keen that everyone in this country has an opportunity to play and to enjoy sport.

Lord Jones of Cheltenham (LD) [V]: Are the Government aware of the impact that the pandemic has had on grass-roots cricket? I declare an interest as president of Overbury Cricket Club, which has followed all the rules and, as a result, lost considerable income from cancelled fundraising events. To conserve this delightful and historic tradition, will the Minister look at ways of providing financial support to help local cricket clubs survive, particularly those in villages, where they are often one of the focal points of the local community?

Baroness Barran (Con): We share the noble Lord's concern about local grass-roots organisations such as cricket clubs, but we have already provided considerable support across the economy and to those with charitable status.

The Lord Speaker (Lord Fowler): My Lords, the time allowed for this Question has elapsed. We now come to the fourth Oral Question.

Northern Ireland: Defamation Act 2013

Question

1.39 pm

Asked by ***Lord Lexden***

To ask Her Majesty's Government what recent discussions they have had with the Northern Ireland Executive about extending the Defamation Act 2013 to Northern Ireland.

The Advocate-General for Scotland (Lord Stewart of Dirleton) (Con): My Lords, no recent discussions have taken place on this issue. The civil law of defamation is a devolved issue and the development of the law in this area is a matter for the Northern Ireland Executive. I understand that the Northern Ireland Minister of Finance recently updated the Assembly on this matter. He noted that work is under way to review defamation law, and this will inform legislative change under the next mandate of the Assembly.

Lord Lexden (Con): During a debate on this subject which I initiated in 2013, I asked a question sent to me by a leading Belfast solicitor. More than seven years on, I will ask the question again. Why should the citizens and journalists of Northern Ireland not be afforded the same protection as those in the rest of the United Kingdom, whether they are expressing opinions online or holding government to account? Secondly, will the Government extract from the Northern Ireland Executive clear reasons—cogent and convincing reasons, I hope—for the long delay in extending the benefits of this landmark human rights legislation to our fellow countrymen and countrywomen in Northern Ireland, who have been given no explanation by the Executive?

Lord Stewart of Dirleton (Con): My Lords, I respectfully echo my noble friend's views on the benefits flowing from the legislation to which he refers. I remind the House that, under the Sewel convention, Parliament remains sovereign. However, the United Kingdom Government will not normally pass primary legislation relating to areas in which a devolved legislature has legislative competence, except with the agreement of that devolved legislature. The Northern Ireland Executive must have the scope to set their own priorities for legislation, but I can reassure my noble friend that the work on the law of defamation in Northern Ireland put in place by the Assembly recommenced in February 2020.

Baroness Ritchie of Downpatrick (Non-Afl) [V]: My Lords, what work has been done by the Northern Ireland Executive on updating the defamation laws in view of the fact that the Northern Ireland Law Commission has indicated that there are six times as many claims for defamation in Northern Ireland as in other regions in the UK, thereby highlighting the need to update our defamation laws?

Lord Stewart of Dirleton (Con): My Lords, the noble Baroness has, to a certain extent, been answered by my answer to my noble friend Lord Lexden. Work on the matter recommenced as of February 2020. As to the statistic which the noble Baroness puts forward on the comparative number of defamation actions, I put the question to officials and am satisfied with the answer that, despite concern that a libel tourism industry might arise in the law of Northern Ireland, this has not taken place.

Lord Garnier (Con): I declare my interest as a media law practitioner at the Bar of England and Wales and the Bar of Northern Ireland but not, as my noble and learned friend will be glad to hear, as a member of the Scottish Bar. That said, will he accept that, although the 2013 Act confuses the difference between a defamatory statement and one that is actionable, among other positive things it enacted the serious harm rule, the public interest defence, the website operators defence and the single publication rule adjusting the limitation period, and it widened the ambit of reporting provision? Will he further agree that, so long as the Act does not apply to Northern Ireland, freedom of expression and freedom to criticise those in positions of power and influence are curtailed in what is, and I trust will remain, an integral part of the United Kingdom?

Lord Stewart of Dirleton (Con): My Lords, in relation to the matters raised by my noble and learned friend, although extension of the provisions of the Defamation Act 2013 might be desirable, existing common law and statute law in Northern Ireland, informed as it is by human rights considerations, is not so deficient as to curtail freedom of expression and the legitimate criticism of those in authority and in positions of power and influence. I note my noble and learned friend's membership of the Bar of England and Wales and the Bar of Northern Ireland but not that of Scotland, and I hope that at some point in the not-too-distant future the opportunity may arise for him to complete a much-deserved triple crown.

Lord Loomba (CB) [V]: My Lords, it is now eight years since the defamation law was changed in England and Wales to bring about a fairer system, and it is nearly five years since the Stormont Executive commissioned a report recommending bringing Northern Ireland into line. Does the Minister agree that making the Northern Ireland legislation consistent is long overdue, and that not applying the serious harm test there is benefiting claimants over respondents and breaching the rule of law?

Lord Stewart of Dirleton (Con): My Lords, the noble Lord makes useful points in relation to the benefits flowing from this statute. I repeat my previous answer that the law of defamation is a devolved matter for the Northern Ireland Assembly. I am aware that work relating to a Bill of the sort that applies in England and Wales may shortly restart. Indeed, I can advise the noble Lord that similar provisions are currently under contemplation by the Scottish Parliament.

Lord Browne of Ladyton (Lab) [V]: My Lords, the Society of Editors has made clear that meaningful reform of libel laws in Northern Ireland is part of a

broader package of issues that threaten press freedom and freedom of speech there. There are the issues of media plurality, the use of private injunctions to try to stifle legislation and, more worryingly, continuous online abuse and paramilitary threats to journalists. Surely this is a shared responsibility between the UK Government and the devolved Administration. I understand that the Government are not discussing libel laws with the Northern Ireland Executive, but what are they discussing with them to try to resolve these problems?

Lord Stewart of Dirleton (Con): My Lords, as I say, the matter is a priority for the Northern Ireland Assembly. There are discussions between it and the UK Government, albeit that I am not aware of their specific focus regarding defamation. It is a pleasure to reply to the noble Lord; I followed him in this place as I followed him at the Scots Bar, and it seems not too long ago that he and I were sweating over our books in Parliament Hall in preparation for our exams.

Lord McNally (LD) [V]: My Lords, I declare the interest that I was the Minister who carried through the 2013 legislation as Minister of State at the Ministry of Justice. I am pleased to have heard how well it has worked, and I pay tribute to Simon Singh and the late Lord Lester of Herne Hill in helping me to get that legislation through. I want to put a thought to the Minister. As he rightly says, this is a devolved matter but, remembering that it was the DUP that blocked the legislation last time, does he not think those who are most committed to the union would have a really vested interest in demonstrating that Northern Ireland was in step with the rest of the United Kingdom in important legislation such as this?

Lord Stewart of Dirleton (Con): In my view, my Lords, commitment to the union is not best expressed by railroading the devolved Assembly into a particular course of action.

Lord Caine (Con): My Lords, does the fact that, uniquely in these islands, Northern Ireland has a Government but currently no Official Opposition not place an even greater burden on journalists to scrutinise Ministers and hold them to account? To do that effectively, they need the same legal framework and protections as those in the rest of the United Kingdom. Would not the quickest route to achieving that be for the Northern Ireland Assembly to get behind the Private Member's Bill on this matter that is shortly to be introduced by my Ulster Unionist colleague Mike Nesbitt?

Lord Stewart of Dirleton (Con): My Lords, freedom of expression and the ability to hold Ministers to account on matters of public interest are of course of the greatest importance, and I am sure that the Northern Ireland Assembly will wish to consider the position carefully in considering that Private Member's Bill and any measures that the Northern Ireland Executive may themselves bring forward.

The Lord Speaker (Lord Fowler): My Lords, the time allowed for this Question has elapsed, and that brings Question Time to an end.

1.50 pm

Sitting suspended.

Arrangement of Business

Announcement

2 pm

The Deputy Speaker (Lord Lexden) (Con): My Lords, the Hybrid Sitting of the House will now resume. I ask Members to respect social distancing. For the Private Notice Question on the national lockdown and homelessness, 15 minutes will be available and I call the noble Baroness, Lady Grender.

Covid-19: "Everybody In" Scheme

Private Notice Question

2.01 pm

Asked by ***Baroness Grender***

To ask Her Majesty's Government, further to the restrictions in place to address the COVID-19 pandemic, whether they plan to reinstate the "Everybody In" scheme in England to provide shelter for homeless people; and if not, why not.

The Minister of State, Home Office and Ministry of Housing, Communities and Local Government (Lord Greenhalgh) (Con): On 8 January, the Government set out further support for people who sleep rough as part of our ongoing, world-leading work to protect rough sleepers. In the light of the new strain, we are asking all local authorities to redouble their efforts to accommodate rough sleepers, backed by £10 million. We are also asking areas to use this opportunity to make sure that all rough sleepers are registered with a GP and factored into local area vaccination plans, in line with the JCVI prioritisation for vaccinations.

Baroness Grender (LD) [V]: Everyone In was a success, with great leadership from the noble Baroness, Lady Casey, refusal to resort to the dangers of night shelters and all sectors working together. Should not that success be repeated? What guarantee can the Minister give that this time, with increased transmissibility and local authorities going broke, no one will be refused a safe room and a roof? Does he agree that it is no longer "Everyone In" if rough sleepers are refused emergency help in this lockdown?

Lord Greenhalgh (Con): My Lords, Everyone In was a tremendous programme, which is why it continues to be in place. I would point to the fact that 33,000 people had been helped and supported to the end of November. We continue with this programme in place to build on the success that has saved many lives in the course of the pandemic.

Lord Boateng (Lab) [V]: My Lords, many destitute asylum seekers, particularly those whose appeals have been refused and who have no recourse to public funds, find themselves homeless and turned away by local authorities. The Jesuit Refugee Service, the West London Mission and others are doing a great job, but

[LORD BOATENG]
the public health danger is real. Will the Government commit to ensuring funding for accommodation for everyone who needs it throughout the pandemic, irrespective of their immigration status? If not, why not, if we are all in this together?

Lord Greenhalgh (Con): My Lords, I would point to the Statement I made on local government finance, where we saw core spending power increasing by 4.5%. The derogation to London around no recourse to public funds has been widened to the rest of the country, so that local authorities can show the local leadership required to safeguard communities, including rough sleepers with no recourse to public funds.

Lord Bird (CB) [V]: I commend the Government on their last efforts, which I was involved in. It was a wonderful opportunity to be told about the policy and the work that was going on. Unfortunately, in spite of what the Minister has said, there is no sense of policy, in the sense of all things being joined up and co-ordinated. I have received no information in the same way that I was kept up to speed on the last occasion. There is a sense that "We did it last time but we're not doing it again this time." The Government really need to be selling this and pushing it forward, so that we can understand when it is working and when it is not.

Lord Greenhalgh (Con): My Lords, there is no greater salesman than the noble Lord, Lord Bird, but I would point out that we are backing up a commitment to end rough sleeping and to tackle homelessness with more cash. The total amount set in the current financial year is a little over £700 million; next year, we have committed £750 million towards wider homelessness duties and to end rough sleeping. That commitment is an increasing amount of money for this endeavour.

Lord Marks of Henley-on-Thames (LD) [V]: My Lords, last week's SI number 15 will permit evictions for six months' rent arrears. That is a harsh change from the present rules, which require nine months' arrears and, importantly, disregard arrears accrued since the start of the first lockdown, which the new rules will not. Robert Jenrick promised last March that

"no one should lose their home as a result of the coronavirus epidemic".

Will not this change clearly break that pledge and increase homelessness at this very dangerous time?

Lord Greenhalgh (Con): My Lords, I think we would all accept that a full six months still amounts to egregious rent arrears, so we do not agree with the noble Lord on that point. It is important to get a fair balance between the interests of those who are tenants and those who are landlords. We believe that that fair balance will be achieved by this change with regard to rent arrears.

Lord Lancaster of Kimbolton (Con): My Lords, one particularly impressive aspect of the Everyone In programme was the opportunity it gave local authorities to deliver a wraparound programme for homeless people. What assessment has my noble friend made of the number of people who have been transitioned into a home of their own, and what opportunity might this give for the future?

Lord Greenhalgh (Con): I thank my noble friend for highlighting the importance of the wraparound care required to get people into settled accommodation. I would point to the budget of £433 million over three years to enable people to move from temporary accommodation into more settled accommodation. We are talking about having supported around 33,000 people, with nearly 10,000 in emergency accommodation. Those are substantial numbers and there is no doubt that this programme has saved lives.

The Lord Bishop of Manchester [V]: I thank the Minister for his replies to date and for his personal commitment to tackling homelessness in this country. He has already referred to the fact that many homeless people are at high risk of respiratory disease, including coronavirus. Will he encourage Her Majesty's Government to prioritise the vaccination of all homeless people as a cohort, including those who do not fall neatly into one of the existing priority groups?

Lord Greenhalgh (Con): My Lords, the most important thing is to define terms. Certainly "rough sleepers" are very much considered to be a priority category. The right reverend Prelate makes a case for whether we should consider the broader category of those with a statutory duty to be housed, who may be in accommodation but not settled accommodation. I will take this forward and see how we can make sure that the vaccination goes to the most needed groups, which I am sure is the point behind the question.

Lord Kennedy of Southwark (Lab Co-op): My Lords, I refer the House to my relevant interests as set out in the register. On the Minister's responses, the solutions are by no means world-class, world-beating or world-leading; they are extremely disappointing. We had people sleeping rough on our streets last week and last night, and we will have them again tonight. If the Minister goes to Waterloo Station, he will see a whole group of tents there, with people sleeping under the bridge between the station and Waterloo Road. The Prime Minister and members of the Government tell us that this pandemic is serious; it is deadly serious, and lives will be lost. There is no justification for not getting every single homeless person off the street today. They have particular vulnerabilities and we must do this, because we are not doing what we did last time.

Lord Greenhalgh (Con): The noble Lord has reminded me to declare my residential and commercial property interests as set out in the register. I thank him for that. I understand where he is coming from. As a Government we have a moral mission to end rough sleeping. That is not an easy task, as the noble Lord knows, but we will do our utmost. The first thing is to prioritise the cash, with escalating amounts of money to do precisely that. We will need the support of local government. He points to Waterloo, and I know that is in the noble Lord's "patch", if you like, so we need the support of the London Borough of Southwark to show the leadership required to deal with this issue.

Lord Crisp (CB) [V]: My Lords, I too congratulate the Government on the progress made with this scheme and campaign, but like others I am disappointed it is not being followed through as wholeheartedly as it might be. I will ask two questions relating to health. The first is: what evidence is there of homeless people and rough sleepers unwittingly transmitting the virus? Secondly, have the Government assessed how many homeless people have had the virus or have been admitted to hospital?

Lord Greenhalgh (Con): Those are very detailed questions and the noble Lord deserves a proper written answer with the information, such as I can find it. I met the vaccine tsar Nadhim Zahawi last week and rough sleepers are very much a priority cohort to ensure that they get timely vaccinations.

Baroness Bakewell of Hardington Mandeville (LD) [V]: My Lords, local authorities did an amazing job during the last lockdown, with many rough sleepers saying they felt valued for the first time. We are now in the depths of winter and many rough sleepers are extremely vulnerable to Covid-19. I welcome the Everybody In funding, but will this cover those who are suffering with addictions—sometimes more than one addiction—and are very vulnerable, especially in rural areas?

Lord Greenhalgh (Con): Vulnerability is incredibly important to understand. That is why the Government have put £10 million on the table for local authorities, which know their communities best, to come up with plans to target those rough sleepers and give them the wraparound care needed. That is how we will proceed: in partnership with local leaders at a local level.

Lord Young of Cookham (Con): My Lords, like others, I welcome the Government's instruction on Friday to local authorities to redouble their efforts to accommodate those sleeping rough. This will help achieve the target by 2024. Might I ask my noble friend about numbers? In 2019 the Government estimated the number of rough sleepers to be 4,000. As a result of Everybody In, we now know that, of the 15,000 people supported, 7,000 people had been sleeping rough. Does this not underline the need for a better measurement of rough sleepers if we are going to hit our target?

Lord Greenhalgh (Con): My Lords, I thank my noble friend because I agree that, through this pandemic, we have got much more of a grip of the quantum involved if we want to end rough sleeping. We also know there are people who may not be rough sleeping in the truest sense of the word—but they are sofa surfers on the edge of being rough sleepers. Understanding more about the cohort and what it will take to resource this is the only way to deliver on the Government's moral mission to end rough sleeping for good.

Baroness Armstrong of Hill Top (Lab) [V]: My Lords, I am sure the Minister will agree that Housing Justice has done a fantastic job in providing winter night shelters, with the rolling church model being central—particularly for those with no access to public funding. However, while the people involved should be commended and thanked, this model is not adequate during a pandemic. There is likely to be only one or two toilets and inadequate washing facilities, and people must move on each day. Can the Government guarantee there will be sufficient safe accommodation to close the night shelters and ensure that every rough sleeper is housed safely? We managed to do it the first time around. Will the Government show the leadership necessary to ensure it this time around?

Lord Greenhalgh (Con): My Lords, I thank the front-line workers in those night shelters. It is important that we recognise that, in the current pandemic, they are putting themselves at risk. They need to be prioritised in the same way that we prioritise those working in the National Health Service and other care workers. There is a real commitment to getting people off the streets, into a Covid-secure and safe setting, and then to finding them the right accommodation. That is backed up by more cash than ever to ensure that we do, in time, end rough sleeping.

Lord Harries of Pentregarth (CB) [V]: The city of Manchester has been remarkably successful in rehousing rough sleepers. There were 356 long-term rough sleepers three years ago. Of those, 79% are now in housing and a percentage of them are receiving appropriate help for mental health and drug- or alcohol-related problems. What lessons can the Government learn from the policy of the city of Manchester to pass on to other local authorities?

Lord Greenhalgh (Con): I am delighted that the noble and right reverend Lord raised the excellence of the city of Manchester. That is an example of fantastic local leadership—fantastic. Sir Richard Leese, a long-time leader of the city of Manchester, is a fantastic local leader. Sir Howard Bernstein is a fantastic chief executive. What the city of Manchester does today is what other local authorities should do tomorrow. That is the message of the city of Manchester.

Lord Bourne of Aberystwyth (Con) [V]: My Lords, I congratulate the Government on the success of the first rollout of the Everybody In scheme. It was highly successful and I hope that we are able to replicate that in the second rollout of the scheme. I would like to ask the Minister about vaccination, which he has referenced. What percentage of those accommodated through Everybody In in the first phase have registered with GPs so that we can ensure the vaccine rollout for this essential group? Unless we ensure that these people are registered, they will, I regret, slip through the system. I am sure the Government are on to it, but I would welcome some stats to back that up.

Lord Greenhalgh (Con): I thank my noble friend for testing my statistical knowledge. Rather than plucking a number out if the air in my current disposition—where I cannot see particularly well—I would prefer to write to my noble friend on that matter. He is right; we do understand this, we have gripped the problem and we will provide the numbers to back that up.

Arrangement of Business

Announcement

2.17 pm

The Deputy Speaker (Lord Lexden) (Con): My Lords, we now move to the next item of business. I will call Members to speak in the order listed in the annexe to today's list. Interventions during speeches or "before the noble Lord sits down" are not permitted, and uncalled speakers will not be heard. Other than the mover of an amendment or the Minister, Members may speak only once on each group. Short questions of elucidation after the Minister's response are permitted but discouraged. A Member wishing to ask such a question, including Members in the Chamber, must email the clerk. The groupings are binding and it is not possible to de-group an amendment for separate debate. A participant who might wish to press an amendment other than the lead amendment in a group to a Division must give notice, either in the debate or by emailing the clerk. Leave should be given to withdraw amendments. When putting the question, I will collect voices in the Chamber only. If a Member taking part remotely wants their voice accounted for if the question is put, they must make this clear when speaking on the group. We will now begin.

Covert Human Intelligence Sources (Criminal Conduct) Bill

Report (1st Day)

2.19 pm

Clause 1: Authorisation of criminal conduct

Amendment 1

Moved by ***Baroness Chakrabarti***

1: Clause 1, page 1, leave out line 17

Member's explanatory statement

This amendment is linked to the amendment in name of Baroness Chakrabarti at page 1, line 19.

Baroness Chakrabarti (Lab) [V]: My Lords, I shall be speaking to Amendments 1 and 2, which are linked. For the avoidance of doubt, I shall be pressing Amendment 1 and, if necessary, Amendment 2, but they are linked. They are for the purposes of removing the total criminal and civil immunity for undercover agents authorised under this measure and would replace that with public interest defences and public interest consideration.

This seems to me, first, to better reflect in the new statute the status quo in our law and practice, which was originally advanced publicly as the motivation for this legislation. Secondly, therefore, it seems to me to create a better, safer balance between, on the one hand, empowering undercover agents to protect their cover when engaging in very important life-saving undercover operations of a kind that we have heard about at length during the passage of the Bill—and, on the other, protecting all of us, especially wholly innocent citizens, from potentially grave crimes and abuses of power by undercover agents for many years into the future. I remind noble Lords that we are not just talking about intelligence and police officers; we are talking about a much larger number of agents of the state who are members of the community, including the criminal community, whose co-operation is, of course, sometimes rightly sought by state agencies.

At this point in the proceedings, I thank the Minister, the new Advocate-General for Scotland, who is not due to speak in this debate, for his wholly courteous engagement with these amendments, both publicly and privately. By doing so, I emphasise the importance of our ability to disagree well and in good faith with each other, in this Chamber at least.

I have been a student of constitutional law all my adult life, and, in particular, I am an admirer of attempts at embedding the rule of law in great old democracies such as the United Kingdom and the United States. I am sure that I am not alone in still feeling quite shaken by the scenes from the American Capitol last week. They demonstrate, to me, at least, that this is no time for complacency when it comes to democracy and the rule of law; it is no time for any complacency on either side of the Atlantic, even on the part of those public commentators who have said that no such scenes and grave abuses of executive power could ever transpire here. That is not a sensible position.

While I have greatly benefited from the wisdom of all sides of your Lordships' House during the passage of the Bill, I have just occasionally found some speeches a little complacent when noble Lords have discussed abuses of undercover agents in our own country in the past—for example, in the context of the "spy cops" inquiry, which is still pending and yet to be concluded or to fully investigate the true extent of abuses by undercover police and police agents over many decades.

Some noble Lords have been very crisp, clear and, sometimes, short in expressing their view that that was the past—such abuses by undercover agents are all in the past and should not be raised as a concern for the future. I know that that is well meant and comes from a place of understandable commitment to aspirations such as public and national security, but these are not times for such complacency—certainly not in the context of legislative scrutiny. As such, I disagree with some of those arguments, but I will be clear that I do not for a moment impugn the good faith or the intentions of those who have advocated the Bill in this precise form, however mistaken I may think them to be.

I regret the "shadowy sources" who chose to impugn my own motives and good faith in pressing these amendments in the *Guardian* this morning. Frankly, I say to those sources, who were sadly reported as being on my own side: they should grow up. Reasonable dissent reasonably put is not disloyalty in a great old democracy such as ours—far from it. With respect, I address opponents of my argument and these amendments, which I do not believe to be wrecking amendments or catastrophic to the principal purpose of the Bill, which is to put criminal authorisations for the purposes of keeping cover on a statutory footing. I say to those who disagree with me: please play the ball—or the argument—and not the woman, or at least put your name, publicly and honestly, to your

briefing to journalists and so on because, as we saw last week, rather shockingly, democracy and the rule of law are all-too-fragile treasures.

I followed this kind of legislation in the realm of home affairs for about a quarter of a century, which makes me very junior in my experience and expertise in your Lordships' House. For my part, at least, as a former government lawyer, a human rights lawyer and campaigner and, much more recently, a legislator, I believe that the Bill, unamended, is one of the most dangerous that I have ever seen presented to your Lordships' House.

The problem is that this is about a very long list of agents—not just officers—of the state, including some from the community and criminal community and some very vulnerable and volatile people. They will now be capable of being authorised by other agents of the state to commit unlimited crimes—with no limit to the types of crime included—and they will be authorised in advance with total impunity from any second-guessing or civil or criminal consequence after the fact. Forgive me, but I find that proposition quite breathtaking in the United Kingdom.

This is why the cross-party, all-party group Justice—I declare an interest as a member of it, and I know that there are other members from across your Lordships' Benches—have advised that the Bill, unamended, contains a number of violations of fundamental human rights, including under the European Convention on Human Rights. The Bill has also drawn heavy criticism from Amnesty International and other advocacy groups for human rights, the rule of law and victims—as well as from a number of former police officers, not least the noble Lord, Lord Paddick, who will speak in a moment, after many decades of police service. It has also drawn heavy criticism from former undercover police officers and agents who have spoken of their own practical experience and why the Bill, unamended, is so dangerous.

That is not to say that the Bill does not have some very good intentions behind it, but we know about the road paved with good intentions. The good intentions are, no doubt, to put a practice that has been implicit on a firmer statutory footing, not least because it has been challenged.

If people are to be put under cover and sometimes even advised to perpetrate crimes to keep their cover—for example, as a member of a proscribed organisation, handling stolen goods or drugs, or committing speeding offences; things that they must necessarily do to keep their cover—and if they are to be authorised to do that by their superiors and handlers, perhaps that should be put on to a firmer statutory footing. That is ultimately the good intention behind this legislation. However, as we have discussed before, the legislation goes much further and creates this total advanced immunity.

2.30 pm

Why is that of particular concern? It is certainly not the status quo whereby people are administratively authorised to keep their cover and the fact that they were authorised would be taken into account by any police officer, prosecutor or court looking at this conduct after the fact. Why does the advance and total immunity go so much further and create such a danger? Well, it is because it will make such a difference to the ethical behaviour of the agent of the state in the heat of the moment. The difference between knowing that you are doing your best, doing right, doing it in the community interest and in an authorised fashion but none the less knowing that you will be held to account, or at least that your actions will be examined after the fact, is a very important ethical constraint on all of us, whether ordinary citizens or uniformed police officers, who, by the way, enjoy no such blanket immunity from the criminal law as is proposed here. It is a very important ethical constraint, and ultimately it is incredibly important, because most undercover agents and their criminal conduct will never see the light of day.

This is not just about criminal immunity, as others have described very eloquently. Civil immunity could deprive victims of criminal activity by these undercover agents. Under the legislation as I read it, something as simple as high-speed driving above and beyond the speed limit, causing death or serious injury to a completely innocent third party, would now lead to no civil liability whatever, which means no recompense for someone who was the victim of authorised conduct under this law. That is unnecessary collateral damage; it is collateral damage too far. Under current arrangements, that would be the case.

The Government, Ministers and noble Lords have yet to point to a single example under the current public interest-type approach of an authorised agent being prosecuted for just doing their job in the public interest. Not a single example has been presented in many hours of debate on this Bill, which begs the question as to why such a breath-taking advance immunity from civil liability or criminal sanction should be in place.

As I have said, Amendment 1 would remove the lawful-for-all-purposes total criminal and civil immunity from the measures in this Bill, and Amendment 2 would replace that blanket immunity with, in effect, a public interest defence, so that any police officer or prosecutor looking at the conduct of an authorised agent would see a de facto public interest presumption against prosecution if the person had clearly acted as authorised, necessarily and proportionately.

Under my amendments, if a rogue prosecutor ploughed on in any event, those public interest considerations would then be open to any court that found itself dealing with such dilemmas. As I have said, these cases just have not been brought. The Government are going too far in addressing a problem that simply does not exist. The only answers that I have ever heard as to why they need to go so far is for the purposes of certainty for these undercover agents committing crimes. But a little bit of uncertainty is a very important incentive to ethical conduct when dealing with what are potentially very serious crimes.

This Bill is very dangerous in its current form. It could be improved today, on Report, without doing harm to its overall scheme or to the underlying intention that Ministers have explained time and again. Amendments 1 and 2 are a very easy and simple way in which to improve the Bill. If we allow it to pass unamended today, with this total advance impunity for agents of the state, a great many of them from all sorts of agencies listed in the Bill, we will open the door to countless abuses of power and scandals in

[Baroness Chakrabarti]
relation to criminality, and abuses of human rights, potentially for many years into the future. That is not something that your Lordships' House ever wants to do lightly.

Lord Dubs (Lab) [V]: My Lords, before I speak to the details of Amendment 3 in my name, I will comment briefly on the speech made by my noble friend Lady Chakrabarti. I am totally with her in saying that there are dangers in this Bill, and some of the amendments are very crucial indeed. I also agree with her that we must always be vigilant to protect the rule of law, human rights and civil liberties. Indeed, she has done that all her life, since the time she ran the organisation Liberty in such an effective manner. I have listened hard to what she has said, and I believe that the most effective safeguards would be some kind of prior oversight to check an organisation before it went ahead. I believe that is probably the most important safeguard. I look forward to debating the amendment to that effect in the next group.

In the meantime, I turn to Amendment 3. Its purpose is to amend the Bill so that victims of criminal conduct carried out under a CCA can access compensation. I speak as a member of the Joint Committee on Human Rights, and I am very much influenced in my contributions to this debate by the conclusions of the committee's report, which has been widely praised across the House. The report noted that the Bill as introduced was potentially incompatible with human rights legislation, specifying:

"Article 1 ECHR requires the UK to secure the rights of all those within its jurisdiction, including the rights of victims of crime. Where a crime also amounts to a human rights violation, the victim has a right to an effective remedy under Article 13 ECHR. A victim also has an Article 6 right "to have any claim relating to his or her civil rights and obligations brought before a court or tribunal.'"

People may ask at that point about the criminal injuries compensation scheme. I put it this way: since the Bill would authorise criminal conduct lawful for all purposes, it would prevent a victim of authorised crime vindicating their rights by bringing a civil claim for compensation. Seemingly, this would also prevent a claim for compensation under the criminal injuries compensation scheme. This is not a novel proposal. The amendment is very close to the regime in Australia, which provides

"indemnification for any participant who incurs civil liability in the course of an undercover operation".

The most usual and commonly quoted example, which my noble friend Lady Chakrabarti mentioned, is when a CHIS is driving a getaway car for a gang at high speed and has an accident. Under the Australian regime, the system would provide indemnification in the course of an undercover operation. In other words, in Australia, a civil claim can be brought against the perpetrator by the victim and compensation secured, but the state will then step in to indemnify the perpetrator against his or her losses. The amendment would ensure that the person authorised to carry out criminal conduct would not suffer the consequences of civil liability. It would also ensure that the victim of that conduct would obtain civil redress, while allowing secrecy to be maintained.

This amendment is fully in keeping with the overall intentions of the Bill, but it would provide an important safeguard. Otherwise, individuals will lose out badly through personal injury or by having their car damaged. At present, they are unable to obtain civil redress, and my amendment would put that right. It is an important but straightforward amendment. The principle is easy and I hope that the Government will find their way to accepting it. I beg to move.

Lord Anderson of Ipswich (CB) [V]: My Lords, I shall speak to my Amendments 21 and 22, which are intended to elucidate and, if necessary, reinforce the provision for criminal responsibility and civil recourse that already exists under the scheme in the Bill. I will start with criminal responsibility, which is the subject of sub-paragraphs (a) and (b) of Amendment 21.

Sub-paragraph (a) seeks confirmation that if a public officer who authorises a criminal conduct authorisation wilfully neglects to perform his duty, or wilfully misconducts himself to such a degree as to amount to an abuse of the public's trust, he should be open to prosecution for misconduct in public office. The Bill team has kindly confirmed to me in correspondence that nothing in the statute rules out the prosecution of an authorising officer for, for example, misconduct in public office if the authorisation was corruptly granted. I hope the Minister can confirm this when she responds. The concept of corruption is not as narrow as it may sound. It was elucidated last month by the Law Commission, in its report on misconduct in public office, as applying to the circumstances

"where a public office holder knowingly uses or fails to use their public position or power for the purpose of achieving a benefit or detriment, where that behaviour would be considered seriously improper by a 'reasonable person.'"

There is another purpose to sub-paragraph (a): to clarify that a prosecution for misconduct in public office can be brought without the considerable inconvenience of first needing the CCA that was authorised to be declared a nullity. I believe that this follows from the existing text of RIPA and from the Bill. Section 27 of RIPA states that conduct will be lawful if it is authorised and if it is in accordance with the authorisation, but it does not create an immunity for the authorisation of such conduct. Nor is such an immunity created by the new Section 29B(8), which by its own terms is limited to conduct

"authorised by a criminal conduct authorisation",

not conduct authorising a criminal conduct authorisation. I hope very much that the Minister will be able to offer me this second assurance as well.

Moving on to sub-paragraph (b), I accept that it may be more problematic to prosecute an authorising officer for the inchoate offences of encouragement, assistance or conspiracy. If the conduct of the CHIS is rendered lawful by Section 27, it is certainly arguable that there is no crime capable of being incited or being the object of a conspiracy. I believe, however, that the Government agree with me that the immunity falls away altogether, with the result that the CHIS can be prosecuted for the authorised crime and the authorising officer prosecuted for the associated inchoate offences if the CCA has first been declared to be a nullity by a competent court. Depending on the circumstances,

that court may be the Investigatory Powers Tribunal, the High Court or indeed a criminal court. The Minister and the Bill team have been extremely helpful in explaining—[*Inaudible*]— and I believe there is nothing between us on this. I should be grateful if the Minister could confirm, thirdly, that this is the Government's understanding.

Of course, the paper possibility of a prosecution means little if the CPS, Crown Office or PPS are not made aware of the circumstances that may make a prosecution appropriate. Important in this respect, it seems to me, are the powers vested in judicial commissioners under the Investigatory Powers Act. [*Inaudible.*]

Lord Parkinson of Whitley Bay (Con): My Lords, I am sorry to interrupt the noble Lord, but there is a little bit of interference.

Lord Anderson of Ipswich (CB) [V]: [*Inaudible*]—in relation to matters for which a judicial commissioner is responsible. Could the Minister confirm, fourthly, that this is the Government's understanding also?

I move on now, more briefly, as noble Lords may be relieved to hear, to civil recourse for the innocent victim of an authorised crime—[*Inaudible.*]

Lord Parkinson of Whitley Bay (Con): My Lords, I do not know if the noble Lord, Lord Anderson, can hear me in the Chamber. I am afraid that we have some interference on the line, so we might need a short adjournment for five minutes while we sort it out.

2.45 pm

Sitting suspended.

2.50 pm

The Deputy Speaker (Lord Lexden) (Con): My Lords, I ask the noble Lord, Lord Anderson of Ipswich, not just to resume his speech—we look forward greatly to the rest of it—but, if he would be so kind, to repeat the last few statements he made, because sadly they were inaudible.

Lord Anderson of Ipswich (CB) [V]: I am grateful, and apologise for what seems to have been something of a crossed line.

I dealt with proposed new paragraph (a) in Amendment 21, so will move on to proposed new paragraph (b). I accept that it may be more problematic to prosecute an authorising officer for the inchoate offences of encouragement, assistance or conspiracy than for misconduct in public office, but that is because, if the conduct of the CHIS is rendered lawful by Section 27, it is certainly arguable that there is no crime capable of being incited or being the object of a conspiracy.

However, I believe that the Government agree with me that the immunity falls away altogether, with the result that the CHIS can be prosecuted for the authorised crime and the authorising officer prosecuted for the associated inchoate offences, if the CCA has first been declared a nullity by a competent court. Depending on the circumstances, that court may be the Investigatory Powers Tribunal, the High Court or a criminal court. The Minister and the Bill team have been extremely helpful in explaining their thinking on this; I believe that there is nothing between us on this point. I would be most grateful if she could confirm—this is the third confirmation I am asking for—that this is the Government's understanding of the law.

Of course, the paper possibility of a prosecution means little if the CPS, Crown Office or PPS in Northern Ireland are not made aware of the circumstances that may make a prosecution appropriate. Important in this respect are the powers vested in judicial commissioners under the Investigatory Powers Act. Section 231 provides for serious error reports, and Section 232(2) provides for the Investigatory Powers Commissioner to

"provide advice or information to any public authority or other person in relation to matters for which a Judicial Commissioner is responsible",

presumably including the CPS. Could the Minister confirm, fourthly, that this is also the Government's understanding?

I move on, more briefly, to civil recourse for the innocent victim of an authorised crime. I start from the position that some means of compensation should exist for injury or loss caused by a crime committed pursuant to a criminal conduct authorisation, not from the person who was authorised to commit the crime but from the authority which authorised it or from the state more generally. Proposed new paragraph (c) in Amendment 21 seeks confirmation of what I do not believe to be in dispute: that compensation may be obtained from the Investigatory Powers Tribunal in a case brought by an innocent victim. That is the fifth thing I ask the Minister to confirm.

That may, however, not be the most practical of remedies. Judicial commissioners have the power to tip someone off that they may have a remedy in the IPT when they consider that to be in the public interest but, as the noble and learned Lord, Lord Falconer, and I suggested in Committee, there may be very limited circumstances in which that will be possible; there might well be risks to the operation and to the CHIS if unconnected persons were informed that their injuries were attributable to an undercover operative. The judicial commissioners are likely to have that well in mind, hence the importance of Amendment 22, which in the case of injury to an innocent victim would ensure that an application could be made in the normal way to the criminal injuries compensation scheme. That would have the great advantage of affording compensation to the innocent victim without it being necessary to disclose to the victim the status of the person—the CHIS—who inflicted the injury.

In their response last week to the Joint Committee on Human Rights, which was published by the Joint Committee at 11 this morning, the Government state that, having considered the question in detail, they have concluded that

"nothing in this Bill would frustrate a victim's ability to recover compensation for injury or loss through that scheme."

That is certainly encouraging, but I am afraid that the mouth of this particular gift horse needs a little more inspection. If actions committed pursuant to a valid criminal conduct authorisation are, in the words of Section 27(1), "lawful for all purposes", can the Minister explain how injuries caused by such acts can be criminal

[Lord Anderson of Ipswich]
injuries for the purposes of the compensation scheme? That is the sixth and final assurance I request from the Minister.

There is often an argument for making things clear in statute, even if satisfactory assurances can be given. Accordingly, if the Government accept the thrust of these amendments but have difficulties with the drafting, I shall certainly look constructively on any commitment to come back at Third Reading with revised drafts. I shall listen carefully to what the Minister says in response. Depending on the content of that response, and if no commitment is given to accept these amendments or come back to them at Third Reading, on Wednesday I may test the opinion of the House on either or both of Amendments 21 and 22.

The Deputy Speaker (Lord Lexden) (Con): My Lords, the noble and learned Lord, Lord Falconer of Thoroton, who is next on the list, has been replaced by the noble Lord, Lord Rosser.

Lord Rosser (Lab) [V]: My Lords, speaking for the Opposition, we support the essence of this Bill. As noble Lords from all sides of the House have said in earlier debates, this Bill addresses a necessary—if at times uncomfortable—reality, which prevents crime and keeps us safe. We pay tribute to those in our security services and elsewhere for the work they do on our behalf.

There has been much discussion in this House on the detail of what is before us. I very much respect the strongly felt concerns raised by my noble friend Lady Chakrabarti. I take what she said, as I do all her contributions, in the constructive spirit in which I know it was intended. However, we have reservations about the effect of the amendments she has tabled. The current status quo is that criminal conduct authorisations are given without formal accountability, and prosecutorial discretion becomes a factor only if a CHIS is caught and arrested for the offence. For the overwhelming majority of cases, prosecutorial discretion never becomes relevant. In the circumstances that a CHIS, having been authorised, is caught carrying out that criminal act, the CPS will be made aware of the authorisation and will not prosecute, on the basis of overriding public interest. The CHIS does not now, and will not under this Bill, have immunity for committing an unauthorised offence.

We therefore believe that the Bill reflects the status quo in practice. We feel that putting this on a statutory footing, with authorisation conferring immunity—with appropriate safeguards—is the best way. We seek to add provisions into the Bill on immunity plus safeguards, including on the function of the Investigatory Powers Commissioner, looking at every authorisation and possible prior judicial authorisation—to which my noble friend Lord Dubs referred—which will preserve the use of CHIS criminal conduct authorisations in the national interest while ensuring that there are safeguards for every authorisation.

3 pm

I am grateful to the noble Lord, Lord Anderson, for tabling Amendment 21, to which my noble and learned friend Lord Falconer of Thoroton added his name. This amendment allows us to seek assurances on what is surely a critical matter: that an authorising officer cannot grant a malicious, corrupt or improper authorisation, and that should they do so, the authorisation is challengeable and they are liable for their actions.

Amendment 22, also in the name of the noble Lord, Lord Anderson of Ipswich, which has our support, would provide that the criminal injuries compensation scheme would still be an available route for a victim who suffers an injury under authorised conduct. It seems a very sensible and straightforward way to proceed. Like the noble Lord, Lord Anderson of Ipswich, I hope to hear a detailed contribution from the Minister in reply on the right to redress that will be open to an innocent person—[*Inaudible*.] I appreciate the meetings that we have had with Ministers and officials to discuss this vital issue.

Finally, Amendment 32 in the names of the noble Lord, Lord Paddick, and the noble Baroness, Lady Hamwee, would make it explicit in RIPA that a person harmed by conduct under an authorisation—I believe the word used in RIPA is "aggrieved"—would have the right to seek redress from the Investigatory Powers Tribunal. We first raised the issue of victims having redress through the tribunal in the House of Commons and we will support the amendment if it is taken to a vote. I await with interest the Minister's response, not least to the assurances that the noble Lord, Lord Anderson of Ipswich, seeks.

Lord Paddick (LD) [V]: My Lords, it is a pleasure to follow the noble Lord, Lord Rosser, and to hear him speak in positive terms about his noble friend, the noble Baroness, Lady Chakrabarti. Before I address the main issues raised by Amendments 1 and 2, let me will clear the decks. My noble friend Lady Hamwee and I have Amendment 32 in this group, as the noble Lord, Lord Rosser, mentioned, and my noble friend will deal that amendment later in the group. I have put my name to Amendments 1, 2, 21, and 22.

The noble Lord, Lord Anderson of Ipswich, proposes Amendments 21 and 22, which seek to clarify the legal extent of immunity that the Bill confers, because, despite debates in Second Reading and Committee, and numerous meetings and email exchanges between Members of your Lordships' House, the Minister and the Bill team, it is still not clear to me and to the noble Lord, Lord Anderson, exactly what the Bill seeks to achieve in terms of immunity. At the very least it shows how complex the Government's proposals are. We support the noble Lord's amendments.

Amendments 3 and 4 seek to limit the legal immunity provided by the Bill. The noble Lord, Lord Dubs, seeks to limit it to criminal liability. The noble Baroness, Lady Jones of Moulsecoomb, wants to ensure that criminals do not profit from the crimes they are asked to commit. We will support these amendments if the House divides on them, but they are both about damage limitation and will, I hope, be pre-empted by Amendments 1 and 2.

All these amendments, and those in the following groups, simply highlight the can of worms that the Government are opening by going way beyond the status quo by giving public authorities the power to

grant legal immunity. As the noble Baroness, Lady Chakrabarti, said, Amendments 1 and 2 would remove the ability of public authorities to grant legal immunity to covert human intelligence sources prior to the criminal activity they are being asked to participate in. This would maintain the status quo, where the actions of agents or informants who are properly tasked by public authorities to commit crime are referred to the relevant prosecuting authority, which invariably rules that it is not in the public interest to prosecute them.

We on these Benches accept that that it is undesirable but necessary to use covert human intelligence sources and that, on occasion, these agents or informants need to be tasked to commit crime. We accept that, because of a legal challenge, it is necessary to put the tasking of covert human intelligence sources to commit crime on a statutory footing.

The noble Baroness, Lady Chakrabarti, set out the dangers of the changes the Government propose. I will take a slightly different angle. A reason often used by Governments for not accepting attempts to change existing law is that they are not necessary. We suggest that the Government have been unable to provide any evidence that a change in the law to provide covert human intelligence sources with legal immunity prior to their being tasked to commit crime is necessary.

In Committee, the noble and learned Lord the Advocate-General for Scotland said that

"noble Lords have accepted—and they have not needed to be persuaded—our position is that it is grossly unfair and unreasonable for the state to ask an individual to engage in difficult and dangerous work to frustrate serious crimes while leaving open the possibility of the state prosecuting them for that very same conduct".

Will the Minister today admit from the Dispatch Box that her noble and learned friend was wrong to say what he did? I, along with many other noble Lords, have said explicitly and openly before the Minister made those remarks that we do not accept the Government's position that this it is "grossly unfair and unreasonable" to leave open the possibility of prosecuting covert human intelligence sources in such circumstances.

The noble and learned Lord went on to say that covert human intelligence sources operate "in the public interest". Many police informants act out of self-interest and for financial gain. I have, as a senior police officer, reluctantly handed brown envelopes stuffed full of £20 notes to criminals to pay them for acting as covert human intelligence sources. They were paid an amount agreed in advance for acting on police instructions. What these informants did undoubtedly was in the public interest, but that was not their primary motivation, as the Minister has suggested.

The noble and learned Lord went on to say that

"we must accept that we have lost intelligence and failed to recruit undercover operatives because we have not been able hitherto to give them confidence that the state will not prosecute them for the things that the state has asked them to do."—[*Official Report*, 24/11/20; col. 171.]

Why must we accept this? Because the Minister said so? Because he has been told by operational partners who have a vested interested that this is the case? Parliament set a very useful precedent on 9 November 2005 when operational partners, backed by the then Labour Government, said that they needed to detain terrorist suspects for up to 90 days without charge. Large numbers of Labour MPs rebelled and joined a united opposition to reject what operational partners, backed by the Labour Government, were asking for. We should do the same today.

We have asked the Government for evidence of how much intelligence has been lost, as the Minister claims; we are told that they cannot produce any evidence. We have asked how many times operational partners have failed to recruit undercover operatives as a result of the status quo; we are told that the Government cannot produce any evidence. We have asked how many times a properly authorised agent or informant has been prosecuted for doing exactly what they were asked to do; we are told they cannot produce such evidence. We have said, "Okay then, just give us one example of where a properly authorised CHIS has been prosecuted for doing exactly what they were asked to do. If it is sensitive, redact the sensitive detail and show us in private if necessary." They cannot even do that.

I suggest that, if we are to make such a monumental legal change, we should have evidence to support that decision. So, what evidence is there to support the Government's case for so dramatically changing the law, so that a police officer can tell an informant to commit a crime, and for that criminal activity to no longer even be a crime—for that informant not to have legally done anything wrong at all, even if innocent people are hurt in the process? The Government's case is simply their assertion, "It's not fair." Seriously? Do the Government think we should so radically change the law because it's "not fair"?

I will quote the Minister again, who said that

"my respectful conclusion is to say that the continuation of the status quo is not desirable."—[*Official Report,* 24/11/20; col. 173.]

Not desirable? Police officers have to secure the prior authority of both an Investigatory Powers Commissioner and a Secretary of State before they can listen to someone's telephone conversation—and then only if the target is suspected of the most serious criminality. This Bill allows police officers to give an informant total legal immunity to commit any type of crime, with no prior independent authority or oversight, to combat even minor offences. That is the definition of "undesirable".

Parliament rejected the unsubstantiated claims of operational partners in November 2005 and we should reject them now. We support Amendments 1 and 2.

Baroness Jones of Moulsecoomb (GP): What a pleasure it is to follow the noble Lord, Lord Paddick, who has demolished the Government's case for handing out immunity like sweeties to criminals. I hope that noble Lords will forgive me if I do not call these people covert human intelligence sources; they are police spies, and we have to be clear about that when we use this language, so that people outside your Lordships' Chamber can understand what we are talking about.

I shall speak in support of Amendments 1 and 2, which I have signed, but quite honestly, as the noble Lord, Lord Paddick, has said, all the amendments here are simply damage limitation. I am staggered that the government lawyers have actually allowed this

[Baroness Jones of Moulsecoomb]
legislation to be presented to your Lordships' House. It is appalling. I liked the comments from the noble Lord, Lord Rosser, about the noble Baroness, Lady Chakrabarti. Her stance on this is not factionalism; it is a principled stance by a lawyer who understands civil liberties and human rights, and we could all learn from that.

I will focus specifically on my Amendment 4. It might seem a little less powerful or important than the other amendments that we are coming to today and on Wednesday, but I think it is quite important. We will be authorising criminals—or officers, or police spies, or whoever they are—to make money by criminal activities and then keep that money. I would like those profits to be recoverable through the Proceeds of Crime Act 2002. I would like a proper, clear answer from the Minister on this. I have asked multiple times since Second Reading but have not yet had an answer on how the Government will recover the profits made by a police spy under a criminal conduct authorisation, or CCA.

3.15 pm

For example, a drugs informant could be authorised to sell drugs as part of an investigation of those higher up the chain. Can the informant keep the money that they make from selling those drugs? What if somebody involved in a criminal enterprise of slavery and trafficking is authorised to continue their role in order to catch the organisers? Can the informant keep the money that they make from people trafficking—the money that they are paid as a result of what would be criminal activity but for the fact that they have a criminal conduct authorisation? In effect, this Bill would create a back-door, off-the-books way for police, intelligence services and other agencies to fund their spies.

The only answer that I have had from the Government—which is a bit shabby, considering that I asked this question directly several times—was in an all-Peers letter dated 3 December, where the Minister said that criminal conduct which takes place outside of the scope of a criminal conduct authorisation, where as a result a police spy may accrue benefits by continuing to make illicit profits alongside their work as a spy, would still be criminal conduct for the purposes of the confiscation regime in the Proceeds of Crime Act, and unlawful conduct for the purposes of the civil recovery regime, and such benefits could be liable to be recovered under either of those regimes.

That actually does not answer my question: it is quite long but it does not answer my question. I need to know how conduct within a criminal conduct authorisation—or CCA—and any resulting profits will interact with the Proceeds of Crime Act. I need to know whether and how the Government will recover those profits. So far, my question has been totally ignored and the response—because it was not an answer—discussed only conduct that is outside a criminal conduct authorisation. This suggests to me that the Government are happy to allow criminals to benefit; therefore, this issue has to be probed further. Criminals will be allowed to keep any proceeds of a crime if the handler has authorised the crime—surely that is a complete anomaly. I would like to know exactly what the Government are thinking. I would be grateful if the Minister could answer my question about how profits made within a criminal conduct authorisation, which would otherwise be illegal, will be recovered. Otherwise, something quite corrupt is happening here; a handler can authorise a spy who could be an officer or a criminal already to keep money, and profits, from a crime. This has to be exposed and I really want an answer to my question.

Baroness Ritchie of Downpatrick (Non-Afl) [V]: My Lords, it is a pleasure yet again to follow the noble Baroness, Lady Jones of Moulsecoomb. I support Amendments 1 and 2 in the names of the noble Baronesses, Lady Chakrabarti and Lady Moulsecoomb, the noble Lord, Lord Paddick; and I too am a signatory to Amendment 1. Amendment 2 seeks to preserve the current legal status quo, whereby those authorised to engage in criminal activity are not rendered immune from either civil or criminal liability. Instead, compliance with an authorisation will be relevant to any public interest consideration to prosecute, any existing legal defences and any court considerations as to civil liability and/or damages.

I feel that the existing legislation that we are debating seeks on the one hand to regulate in statute the use of covert human intelligence sources and, on the other hand, gives CHIS and their handlers a licence to kill. The recruitment of agents is undeniably necessary as part of intelligence-led policing; any such recruit should be a fit person, properly recruited, with free and informed consent and operating to human rights standards in police-led operations.

I listened very carefully to the words of the noble Baroness, Lady Chakrabarti. I recall saying in Committee that Northern Ireland has a particular experience to note in this whole area of using handlers and agents—not police officers but agents—and some of them were linked to criminal and paramilitary activities. We are a living example of what happens when the state, or the state through its agents, commits serious crimes, including murder. For that reason, I make a special plea to the Minister to consider these amendments and the Bill as currently drafted and to ensure that all protections are put in place to prevent any nefarious activity and any misuse of activity by handlers.

One example is the continuing investigation into the agent known as Stakeknife. Probably dozens were murdered on the instructions of those in command and control of the IRA with the knowledge and approval of those in command and control of a British security agent. Another example is Ken Barrett, a British agent involved in the murder of the lawyer Pat Finucane, which a former British Prime Minister, David Cameron, conceded had involved shocking levels of collusion—a fact reiterated at the end of November by Brandon Lewis, the current Secretary of State for Northern Ireland. There is also the example of Mark Haddock, an RUC Special Branch agent believed to have been involved in more than 20 murders.

I say to the Minister that Northern Ireland is a lesson from history, which the Government should take heed of in respect of the Bill. Serious crimes and murder committed by state agencies, or the agents of the state, lead first to a generation of victims and survivors, secondly to alienation, and thirdly to conflict.

Yet this legislation, as drafted, would allow agents to commit serious crimes with extravagant powers given to handlers and a severe deficit in relation to authorisation and post-operational accountability. Hence the need for Amendments 1 and 2 to curb such illegal activity and to ensure that those who commit crimes are not immune from prosecution.

It is worth remembering that one of the 175 recommendations on new policing arrangements in Northern Ireland back in 1999—accepted but not addressed—was:

"There should be a commissioner for covert law enforcement in Northern Ireland."

Maybe it is time to give this consideration now if the Government insist on pressing ahead with the Bill unamended. The noble Lords, Lord Dubs and Lord Rosser, referred to the need for prior oversight; this is one avenue that would facilitate prior oversight, albeit in the Northern Ireland context. As a result, there is no dedicated Northern Ireland covert oversight agency, and the UK arrangements to interrogate phone tapping or search authorisations should be more extensive.

I believe—I say this rather advisedly—that this legislation compounds the problem, with even less oversight of the authorisations that would arise under its provisions than is the case currently. The Bill is deeply problematic, and it could work against the need to tackle criminality and paramilitarism. Hence the need to ensure that those authorised to engage in activities are not rendered immune from prosecution, and hence the need for both amendments, calmly presented by the noble Baroness, Lady Chakrabarti, which I urge the Minister to accept. I hope that the Minister can respond in favourable and positive terms. I support both amendments and, if pressed to a vote, I will support them.

Baroness Massey of Darwen (Lab) [V]: My Lords, I shall speak to Amendment 3, which seeks to ensure that victims of criminal conduct carried out under CCAs can access compensation. My noble friend Lord Dubs has covered this amendment comprehensively, so I will simply add a few words of support. Like my noble friend Lord Dubs, I speak as a member of the Joint Committee on Human Rights, whose legislative scrutiny report on the Bill was published last November. I am pleased that the Government have published their response to that report today. We shall no doubt refer to it during our deliberations on the Bill.

This amendment relates to paragraphs 104, 107, 108 and 110 of the Joint Committee on Human Rights report. Its purpose relates to rights under the European Convention on Human Rights, and it mirrors the system in Australia which

"provides indemnification for any participant who incurs civil liability in the course of an undercover operation",

as described in paragraph 110 of the Joint Committee on Human Rights report. It states:

"The effect of this provision would be to ensure that the participant (i.e. the CHIS) would not suffer the consequences of civil liability, but it would also ensure that the victim of the conduct would obtain civil redress while secrecy is maintained."

I think the amendment is clear and I look forward to the Minister's response.

Lord Cormack (Con) [V]: My Lords, I also think the amendment is clear, which is why I was glad to add my name to it. I would like to begin, however, by referring to the noble Baroness, Lady Chakrabarti. Anyone who knows anything of her work would not begin to challenge or dispute her integrity or motives. I am very glad that the noble Lord, Lord Rosser, made that plain even though he found items within her amendments with which he could not agree. That is a very honourable position to take.

The noble Baroness, Lady Chakrabarti, was very right to remind us at the beginning that we cannot take democracy or the rule of law for granted. She pointed to some of the events on the other side of the Atlantic, in the greatest of all democracies, that have disturbed us all. When you can have a position where the President of a country disputes the right of his successor to succeed him, and seeks to rabble rouse, we all have to take stock and realise that that could happen here. I do not think that it will, but we have to be very careful indeed. But, of course, it could not quite happen here—three cheers for a constitutional monarchy, where the head of state is totally removed from party-political considerations.

It is wrong that someone who suffers as a result of the actions of a CHIS—a horrible phrase—should not be properly compensated. It need not be a deliberately inflicted injury or wound; it could be the result of a car chase. We have all read in the last two or three years several accounts of people out innocently about their Sunday afternoon's business of a walk in or to the park who have been killed or mutilated by someone driving a vehicle recklessly. Of course, it could happen even if the vehicle is not driven recklessly. I very much hope that my noble friend the Minister, when she replies, will be able to give us a good answer on this one.

Perhaps the answer lies in the acceptance, if not of this amendment, of Amendment 22, so clearly spoken to by the noble Lord, Lord Anderson of Ipswich. It would be quite wrong if the Bill goes on to the statute book without something in it to make it absolutely clear that people who suffer innocently are to be adequately compensated. Whether it is by means of the criminal injuries compensation board, as the noble Lord, Lord Anderson, suggested, or some other way does not matter so much. I favour his way, but it must be clear beyond any peradventure.

3.30 pm

I referred in Committee to our swimming in murky waters on this Bill. Nothing brought that home more clearly this afternoon than the impassioned speech of the noble Lord, Lord Paddick, who talked about his personal experience of handing out brown envelopes stuffed with cash to members of the criminal fraternity for what they had done to help solve a greater crime. However, while we accept that, we must also accept—I say this very gently to the noble Baroness, Lady Jones of Moulsecoomb, for whom I have high regard—that we are not just dealing with police spies. We are also dealing, in the very deep waters of international relations, with those whom in an earlier debate the noble Baroness, Lady Manningham-Buller, reminded us are among the bravest of the brave. I do not particularly like the

[LORD CORMACK]
Bill but I utterly accept the necessity for it. I hope we can improve it on Report and that, in the context of these amendments, we can make it abundantly plain that anyone who suffers as the result of an action of a CHIS, deliberate or otherwise, will be adequately and properly compensated.

Lord Thomas of Cwmgiedd (CB) [V]: It is a privilege to follow the noble Lord, Lord Cormack, and I associate myself with his remarks about the noble Baroness, Lady Chakrabarti, and her desire to clarify and improve the Bill. In no way should her motives or actions be impugned.

Because this will be a long debate, I will speak only briefly about Amendments 21 and 22, to which I have added my name. If we are to legislate and to put this regime on to the statute book, we must have absolute clarity. The amendments establish that degree of clarity in relation to criminal and civil responsibility. I attach particular importance to the issue of criminal responsibility because in such a matter, it is very important that we keep alive elements of deterrence to show that the law can act swiftly and clearly if people corruptly misconduct themselves in public office or go much more seriously into criminality in authorising crimes. The noble Lord, Lord Anderson, set out with admirable clarity the changes that are required. I would not think that assurances given by a Minister would be adequate in this case. A statutory regime must start and end with a statute.

Lord West of Spithead (Lab) [V]: My Lords, the Intelligence and Security Committee, which I sit on, welcomes the introduction of this Bill to Parliament. We strongly support the principle behind the legislation. Covert human intelligence sources, or agents, provide invaluable information to assist the security and intelligence agencies in their investigations. They play a vital role in identifying and disrupting terrorist plots. They save lives. In working undercover, CHIS need to be trusted by those they are reporting on, so that they can gain the information the authorities need. This may require them to act in a certain way. Put simply, if they are to be believed to be a gang member, they need to act like a gang member. If they do not, it is no exaggeration to say that they could be killed. CHIS may therefore need to carry out criminal activity to maintain their cover. Their handlers must be able to authorise them to do so in certain circumstances and subject to specific safeguards. The Bill places the existing powers that certain organisations have to authorise such activity on an explicit statutory basis. We believe that there is a need for such authorisations and we have seen real examples where this has saved lives.

For these reasons, I oppose Amendments 1 and 2. CHIS who have been asked by the state to commit criminal acts should have some certainty that they will be afforded protection from prosecution—now of course on a statutory basis, not the informal basis on which it was done before. When carrying out often dangerous work on behalf of their authorising organisations, they need that certainty.

Having said that, I am reassured that the Bill does not prevent the prosecuting authorities considering a prosecution for any activity outside the specific conduct authorised in the CCA. That properly authorised conduct is now lawful makes it all the more important that these provisions be subject to rigorous safeguards and oversight. In that vein, I strongly support Amendments 21 and 22 in the name of the noble Lord, Lord Anderson.

Lord Naseby (Con) [V]: My Lords, it is a privilege to follow the noble Lord, Lord West. I am not a lawyer but I have had the privilege to serve in both Houses for nearly 50 years now, and prior to that I was in Her Majesty's forces. I specialise globally in south and south-east Asia, where I worked for a number of years. I am essentially a practical man. I have suffered a death threat from the IRA, so I have seen the rough side of political life as well.

We need to understand what it is that we ask the men and women to do who safeguard our communities, our society, our country. That cannot possibly be an easy job. It is a very taxing job and we need it to be done within a framework of surveillance and some control, but not such that they are restricted or confined, as the noble Lord just pointed out. There is a practical side. It would never work if you went too far that way, and frankly, Amendments 1 and 2 do that. I am not reassured by the views of Justice. I am particularly not reassured by the stated views of some of the NGOs and others in what I would call the human rights vehicle. Therefore, I will not support Amendments 1 and 2.

I understand why Amendment 3 has been tabled. As I read it, it seems to weaken the current situation, but I will listen to what my noble friend the Minister has to say. I also understand why Amendment 4 was tabled, but perhaps it would undermine the Bill in a way that is not obvious to me, as a non-lawyer.

Turning to Amendment 21, the noble Lord, Lord Anderson, is a very persuasive and clearly very thorough lawyer, and I am pleased to hear that he has had discussions with my Front Bench. I shall listen with care to what the Minister says on Amendment 21 in particular. However, I urge all of us to reflect on the reality of life today. We live in a very difficult world, and we need to make sure that the honest, genuine people who want to help maintain the security of our country and to keep our people safe can do their job properly, so that our society can flourish.

Lord Rooker (Lab) [V]: My Lords, I am very pleased to follow the noble Lord, Lord Naseby.

I see that the clear intention behind Amendments 1 and 2 is to abandon the concept on which the Bill is based and maintain the current legal status. I have read the briefing from Justice. I am not a lawyer, but it is not clear to me. To describe CHISs as often

"ordinary untrained members of the public"

or even seasoned criminals is undermined by virtually all the case studies in the business case provided to all Peers in the past few days. I have missed one speech this afternoon, but to the best of my knowledge, nobody has referred to any of the case studies. I will not go into detail on this group, but I will probably refer to them in the next group. But referring to CHISs in this way is almost emotive and misleading rather than being clear.

As I understand it, the current procedure to safeguard the covert human intelligence source includes the fact that the CHIS must give informed consent. The criminal conduct authority is specific and must be understood by the CHIS. The authorising officer must assess that the CHIS is capable of carrying out the activity safely. The handler, of whom I understand that there are almost always two per CHIS, is responsible for the CHIS's security and welfare. The handlers in turn are supervised by the controller, and the authorising officer—not the handlers nor the controller—is responsible for granting the CHIS authorisation under RIPA.

I have heard one or two speeches today in which the process has seemed to be that the handlers are doing everything: authorising and in control of everything. This is not the case. Of course, the authorising officers cannot authorise themselves. In addition, a whole range of other people is involved: operational security advisers, looking at the activities planned; legal advisers; and possibly behavioural psychologists. The idea that the CHIS is on their own—which "ordinary untrained" implies—is put to rest in the case studies to which I referred, the fact sheets provided to all Peers and the CHIS code of practice, including the new draft one published this month.

I do not propose to go into any further detail on this, but I can tell your Lordships one thing: I have not the slightest intention of abstaining on Amendments 1 and 2. They should not be in the Bill, and if they are pushed to a vote, I will vote against them. It is as simple as that, as far as I am concerned.

The only other point I want to make on this group is in support of Amendments 21 and 22. I listened to the noble Lord, Lord Anderson, in some detail. It was most unfortunate that we needed that short adjournment, but it gave me a chance to reread proposed new paragraphs (a), (b) and (c) while no speeches were being made, so it was useful to that extent.

Given the chain of authorising and managing a CHIS and the management systems involved in the various organisations concerned, it might be thought that the actions envisaged in Amendment 21 would be impossible. It is therefore absolutely right to challenge the idea that conspiracy or malfeasance could not take place: we know they could. It will be incredibly difficult, given the structure involved in managing the CHIS, but it is important that structures are put in place to deal with such an outcome of the actions listed in Amendment 21.

It is self-evident to me that anyone who is damaged should be able to claim compensation. I think the very last point the noble Lord, Lord Anderson, made to the Minister was very telling: how can you claim under the Criminal Injuries Compensation Act if the original authorisation says it is not criminal? I am sure the Minister has come armed with information to answer that, but I look forward with interest to hearing it.

I repeat that I will not vote for Amendments 1 and 2: they should not be anywhere near the Bill, in my view, and the Official Opposition advice to abstain is not correct in the circumstances. I will not: I will vote against.

3.45 pm

Lord Thomas of Gresford (LD) [V]: My Lords, it is always stimulating to follow the noble Lord, Lord Rooker—although I disagree with him, which is unusual. I add my support to the amendments in this group which seek to ensure that immunity from criminal and civil liability for criminal acts cannot be given by the authoriser or controller of covert agents—including "police spies", as the noble Baroness, Lady Jones, would have them—simply on his own initiative. I adopt all that has been said by previous speakers in favour of these amendments.

I know something of the current status to which the noble Lord, Lord Rooker, referred. I took part in the trial of a covert agent held in camera over many weeks. He was convicted of going beyond his authorisation, and he was not given immunity—nor, in my view, should he have been. I shall focus, however, on Amendment 22, which seeks to ensure that victims of violent crime are not rendered ineligible for criminal injuries compensation by reason of the fact that the crime was the subject of a criminal conduct authorisation.

I had seven years' experience on the Criminal Injuries Compensation Board when it was non-statutory. I supported the scheme because it recognised the duty on the state to compensate victims of crime and did so fairly, having regard to a number of factors, including the degree to which the victim might himself have been culpable in bringing the injuries upon himself.

In 1983, Mrs Thatcher's Government promoted and ratified the European Convention on the Compensation of Victims of Violent Crimes. Article 2 provides that the state shall compensate

"those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence".

It further provides that

"the dependants of persons who have died as a result of such crime"

shall be similarly compensated. The second paragraph of Article 2 states:

"Compensation shall be awarded … even if the offender cannot be prosecuted or punished."

To my mind, that fully covers the position we are discussing in Amendment 22 and helps deal with the doubts expressed by the noble Lord, Lord Dubs. The European convention is made not by an institution of the European Union but by the Council of Europe, which we helped found in 1949 and of which 47 states are members, including Russia.

Of course, the institution of the European Convention on Human Rights is also governed by the Council of Europe, and it has been under attack by the Conservative Government. As I mentioned in my small contribution to the debate on the deal last Friday, the Government face a difficulty if their independent commission recommends that we resile from that convention. Article 136 of Title XII of Part 3 of the UK/EU deal provides that in the event the UK Government "denounced" the European covenant on human rights, all the security provisions—co-operation on the exchange of data, extradition arrangements, and so forth—which are set out in Part 3 would automatically cease to have force. It is not merely giving grounds for the EU to terminate these arrangements: they automatically expire.

[Lord Thomas of Gresford]
But there is nothing in the deal about the European Convention on the Compensation of Victims of Violent Crimes, and I assume that it will still be in full force.

Despite the Government's attitude towards treaties and institutions in Europe, I sincerely hope that they will accept Amendment 22 on the basis that it is essential if the UK is to abide by the terms of the convention and for the compensation of victims of crime that it requires to be paid.

Of course, the criminal injuries scheme is for physical injuries, as it says on the box. It is perfectly possible that the crimes authorised under these provisions would cause financial harm. That is the purpose of Amendment 32: to ensure that the Investigatory Powers Commissioner would be able to award compensation to victims of financial fraud. This is the other side of the coin, and I support it. Perhaps I may join the noble Lord, Lord Anderson, in examining the teeth of the gift horse which the Government offered this morning in their response to the Joint Committee on Human Rights.

Baroness McIntosh of Pickering (Con) [V]: My Lords, I am delighted to follow the noble Lord, who speaks with great authority and experience in these matters. Although I do not always agree with the noble Baroness, Lady Chakrabarti, I will defend her right to say what she thinks and table her amendments to the hilt.

I support the sentiments behind Amendment 22, as expressed so eloquently by the noble Lord, Lord Anderson. I hope that, in summing up, my noble friend the Minister will clarify the Government's position and perhaps come up with some thoughts and words from them. I take this opportunity to thank my noble friend for her letter last week and for the personal briefing that she kindly arranged for me on aspects of the Bill about which I had concerns. I am very grateful for that.

However, my noble friend's letter makes no reference to the question of criminal injuries and compensation for victims of violent crime where the crime has been committed through activity that is the subject of a criminal conduct authorisation. My starting point on this issue was referred to by the noble Lords, Lord Dubs and Lord Anderson: paragraphs 15 and 16 of the original report, the scrutiny undertaken by the Joint Committee on Human Rights in November last year and the Government's response, which I confess I have not had time to digest in full.

The real issue here is that we are granting immunity from prosecution to those who carry out actions and behaviour under the Bill. That leaves the question of the ramifications for victims who suffer in the circumstances outlined by noble Lords, which I do not need to repeat. I will take this opportunity, if I may, to gently nudge my noble friend the Minister to go further—as requested by the noble Lord, Lord Anderson, and others—and explain specifically the position of victims of what is currently considered a crime but would be granted immunity under this Bill. For example, a person may have been severely injured and requires compensation, as would normally be the case through recourse to the Criminal Injuries Compensation Authority.

I believe that this is a grey area that should be tidied up before the Bill leaves Parliament. I hope that my noble friend will meet the requirement to seek satisfaction and clarification in this regard.

Lord Judd (Lab) [V]: My Lords, I speak in support of Amendments 3 and 4. If I may so, my noble friend Lord Dubs covered very well the arguments in support of his Amendment 3. Amendment 4 seems self-evidently right and should not cause controversy.

It is not possible to speak to these amendments without referring to the important speech made by my noble friend Lady Chakrabarti. Unfortunately, given the nature of human affairs, it is necessary to have as part of our defence of society provisions of the kind that we are discussing. We ought to put on record our appreciation of the courage of the many people who undertake such work on behalf of us all. Many of us, including our family and friends, probably enjoy the life that we take for granted because of the work that is unfortunately necessary in this sphere. The people who do that work should not feel that they do it under sufferance; they should feel that they are doing it with the full support of society as a whole because of its essential nature.

Having said that, it is crucial that, in the organisations operating in this area and responsible for this work, there is a culture—I cannot emphasise that word strongly enough—that never forgets that the essence of a society that is being protected is one in which accountability, transparency, the rule of law and human rights are essential: that is, they are not nice tea party things to be in favour of but essential elements, the muscle, in building the kind of society that we want in the interests of everybody. That culture is essential.

I want to take a moment to refer to events across the Atlantic to show just how important that culture is and how easy it is to start stepping away from the disciplines that are necessary to uphold it. Of course, in the kind of society that we want to protect, when the going is most difficult and the challenges are at their greatest, it is more important than ever to have at the kernel—the essence—of all that takes place a kind of conviction and philosophy for the culture to which I am referring. That is not weak. It is not a lovely liberal idea. It is an absolute necessity. In the same way, those who forged the Universal Declaration of Human Rights just after the Second World War were not sentimentalists in any sense; they were people who had seen and experienced the horrors of the Second World War, and were determined to build into our society disciplines and elements that were essential for its protection.

I say that, because such a culture is crucial. We must never slip into a situation in which we begin to justify the provisions in the Bill as a convenience for activities that cannot be fully reconciled with the points that I have underlined. That is essential, which is why what my noble friend Lady Chakrabarti said in introducing her amendment, for which I am grateful, is so essential for us all. We must evaluate for ourselves whether her formula is the best one, but all I can say is that it is essential—and long may it continue—that we have her strictures with us.

I strongly support Amendments 2 and 3, and hope that what I have said underlines the value of what my noble friend Lady Chakrabarti said.

4 pm

Baroness Kennedy of The Shaws (Lab) [V]: My Lords, I echo the grave concerns of many Peers. I also endorse what has been said about the good faith of my noble friend Lady Chakrabarti and her commitment to civil liberties. That has been the imprimatur—the standard she has been the bearer of in her professional life.

We should recognise the importance of discussing the rule of law and how we have to be the guardians of it even when we recognise the need for the state to make use of agents. I hope the House will note the serious risks of introducing law that grants immunity to informants, agents and spies. My great regret is that the Bill lumps together the needs of different kinds of agency. The requirements of, for example, the security services are distinctly different from some of the other agencies they have been lumped together with in the Bill. Perhaps our attitudes to those different needs should be distinctly different too.

Let me assure noble Lords that from my work in the courts over the years involving national security, I accept the vital need for the police and security services to use covert operatives in their investigations, particularly into serious crime. I accept that there are times when, to maintain their cover, agents or informants have to be involved in criminal activity. The status quo, which I would like to see preserved, has security service guidelines that provide an appropriate balance between the necessity of certain law enforcement operations and the public's legitimate expectation that informants and agents be deterred from acting with abandon and—if they go beyond what has been agreed and commit criminal offences—to be held accountable for their actions.

My noble friend Lady Chakrabarti mentioned that a level of uncertainty is quite curative; it is important for someone to be made to think, and not to feel they have the impunity of immunity. These issues are of serious importance to us, because they are about maintaining the moral equilibrium of ensuring that the law applies equally to all. That is what the rule of law is about. Let me make it clear to noble Lords: this is not some mild thing. The Bill will change the legal landscape that says we are all accountable to the law and nobody is above it. Having immunity for certain people means there is a greater sense of the weight of what people are involved in.

I have seen, in all my years of practising in the courts, that there are times when these matters go before the prosecuting authorities and no prosecution of informants or agents is forthcoming because it is not in the public interest to proceed. That is the better way of dealing with this. It is the better way of maintaining that commitment to the social contract we made that we are all answerable to law, save in exceptional circumstances, when their controllers—those who run agents in the field or deal with informants—step forward to give reasons why a person should not be prosecuted, explaining the circumstances in which crimes were committed. It is the granting of immunity that changes, in a fundamental way, relationships and the rule of law. That is why I am concerned and will support the amendment of my noble friend Lady Chakrabarti.

I am president of the JUSTICE Council—its advisory council—and it is not an organisation that goes into these things lightly. Huge care and consideration are given to the positions JUSTICE takes on matters of law and legislation going through these Houses. JUSTICE recommends that this House should be very cautious before throwing away the perfectly reasonable guidelines and provisions that currently exist and giving operatives certainty of never being prosecuted for what they do, when they may say, "I demand to be told that I will never be prosecuted for what I am doing".

I am very concerned about this Bill. I will be supporting my noble friend Lady Chakrabarti. I regret that I cannot take the position of my party in abstaining—this is too important to me. I am a lawyer and have spent my life in the law. I head an institute of human rights; I created, at Oxford, an institute of human rights; I believe in the rule of law. We are a nation that stands for the rule of law in the world and, by God, having watched what happened in the United States recently, the need for a nation to stand for the rule of law is vital.

I regret that we are going down this road. I do not believe that this legislation is necessary in the way others seem to think it is; we could have refined this in a better way. I will be voting with my noble friend Lady Chakrabarti, and I will be adding additional amendments later if these do not succeed, as I suspect is likely.

Baroness Bryan of Partick (Lab) [V]: My Lords, it is a privilege, if not somewhat intimidating, to follow my noble friend Lady Kennedy of The Shaws. But it does give me the confidence to believe that some of the points I am making are probably accurate and worthy of consideration.

We have been told that the purpose of the Bill is to bring the operation of CHIS out of the shadows and put existing practice on a clear and consistent statutory footing. This Bill, however, goes much further than existing practice by allowing prior immunity. The current regulation on "Immunity from Prosecution" in Section 71 of the Serious Organised Crime and Police Act 2005 states that

"immunity notices can only be granted in respect of offences which have already been committed."

There are many reasons why immunity should only be applicable to offences already committed, and we have not been given convincing reasons why this should change. There are occasions when it is in the public interest not to prosecute someone for a crime they have committed, but that does not change that there was a crime and, almost certainly, a victim. The Bill changes that: by giving prior immunity, it makes what in other circumstances would be a crime no longer a crime. The effect of issuing a CCA will commit the action of an undercover operative to

"be lawful for all purposes."

There are some principles in law that even a lay person like me can understand. One of them is the rule of law, which the *Oxford English Dictionary* defines as

[Baroness Bryan of Partick]

"the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes."

If this Bill becomes law in its current state, it will undermine that basic principle.

As the noble Lord, Lord Paddick, pointed out, some of the amendments in this group attempt damage limitation by mitigating the effect of granting prior immunity. They should be supported, but the key amendments are Amendments 1 and 2 in the names of the noble Baronesses, Lady Chakrabarti, Lady Ritchie of Downpatrick and Lady Jones of Moulsecoomb, and the noble Lord, Lord Paddick, who have all spoken persuasively on them.

I think we can predict that, if the Bill goes ahead in its current state, there will be public inquiries in the years to come into the behaviour that it will have permitted, and they will reveal even more horrific stories than those being exposed in the current Undercover Policing Inquiry.

No one is denying that undercover activities are necessary, and that they will sometimes involve using criminals, but that makes it even more important that their actions are constrained rather than given carte blanche. Those of us who are concerned about this are not being awkward or indulging in conspiracy theories; our concerns are based on the actual experience of undercover activities that have resulted, at the most extreme, in murder and rape and, quite commonly, in the destruction of innocent people's lives. I asked the Minister at Second Reading and again in Committee—and I ask it again today—whether she can give an example of when an undercover operative has been prosecuted after receiving legitimate authorisation.

If we were to read in the daily papers that the director of Amnesty International was hugely worried about a Government introducing deeply dangerous legislation that gave disturbing powers to their secret service, I am sure we would all be concerned and wonder which totalitarian regime she was talking about. However, that is what she said about this legislation going through our own Parliament. These two simple amendments would stop that happening and I will support them in a Division.

Lord Hendy (Lab) [V]: My Lords, it is a great pleasure to follow the noble Baroness, Lady Bryan, in supporting Amendments 1 and 2, moved by the noble Baroness, Lady Chakrabarti, a woman of unimpeachable integrity, as the noble Lord, Lord Cormack, the noble and learned Lord, Lord Thomas of Cwmgiedd, and the noble Baroness, Lady Kennedy of The Shaws, have pointed out. I do not overlook the other signatories to the amendments: the noble Lord, Lord Paddick, who put a case which appears irrefutable, and the noble Baronesses, Lady Ritchie and Lady Jones, who made powerful speeches, as did the noble Baroness, Lady Chakrabarti. My position is that, unless the amendments are passed or accepted by the Government, I shall have no alternative but to vote against the Bill. This is not a matter of petty factionalism, as was disgracefully suggested in a newspaper today; it is a matter of conscience.

Like the noble Baroness, Lady Kennedy of The Shaws, I cannot support a Bill which gives the state the power to grant immunity for crimes to be committed in the future by agents on its behalf. Such immunity is contrary to the rule of law. The rule of law prescribes that all are bound equally to observe it, not least the criminal law. Giving the state the power to exempt its agents prospectively from criminal law is the antithesis of this fundamental principle.

I accept, of course, that every state necessarily deploys undercover agents to protect itself and, indeed, the rule of law. I accept that, in the course of their work, it may be necessary to break the law, including criminal law, but I cannot accept that state agents should be given prospective immunity to do so, no matter how senior or judicial is the person who authorises that criminal conduct.

The evil here is the prospective immunity to be granted, based only on an assessment of possible future situations. A decision to prosecute or not should be made only retrospectively, when the facts and circumstances of the criminal conduct are known. This is the status quo and, as far as is known, it has worked perfectly satisfactorily, as the noble Lord, Lord Paddick, demonstrated.

4.15 pm

On the other hand, I see no problem with the state, through the DPP and the CPS, considering after the event whether a prosecution for such criminal conduct is warranted. In doing so, they will apply their experience, discretion and good sense and consider all the circumstances leading to the crime and the objective sought to be attained by it, the proportionality of it to that objective, and the overall justification for it; they will consider the anticipated and actual consequences of the conduct; they will consider any possible defences to such prosecution, including whether the conduct is criminal if its object was to prevent a greater crime; they will consider the requirements of the European convention; and, above all, they will consider whether it is in the public interest to prosecute.

Noble Members have made the point that this Bill does not confine CCAs to professional undercover officers of the state, responsible, trained and alive to the requirements of the rule of law. The Bill will grant CCAs to lay persons, often or usually criminals, deficient in civic responsibility and careless of the demands of the rule of law, as some of the recipients of the brown envelopes described by the noble Lord, Lord Paddick, must have been. Many will have only the weakest grasp of the limits of the criminal conduct authorised by their CCA. They should not be given carte blanche; it is right that they should fear that their conduct will be scrutinised by the CPS.

However, let us not forget that the Undercover Police Inquiry, in which I represent a number of trade unions, has revealed that professional law enforcement officers have participated, and were directed by superiors to participate, in conduct which was either criminal or morally reprehensible. One thousand groups, campaigns and unions were spied on. So far, it is not evident that infiltration by police officers acting as covert human intelligence sources gleaned any useful information to prevent crime. As one undercover officer put it, the

only useful information revealed by her infiltration of a women's liberation group was that it was not a group which would be violent or cause disorder.

So far, I am unaware of any justification for the infiltration of campaigns such as that in response to the murder of Stephen Lawrence or that formed to reopen the convictions of the Shrewsbury building workers. What justification can there have been for the systematic abuse of women, more than 30 of whom were groomed into having sexual and intimate relationships with men with fake identities, fake beliefs and fake personalities? This was not a tactic devised by a couple of coppers who were rotten apples; it was conduct authorised by, and reported to, senior officers in the Metropolitan Police and in MI5. This widespread, reprehensible and unjustifiable conduct over decades inspires little confidence in the issuing of CCAs by such senior officers.

The noble Baroness, Lady Ritchie, has drawn attention to very serious crimes committed by state agents. Against that, it may be superfluous to mention that the Undercover Policing Inquiry has revealed that undercover police committed other crimes; one, for example, is said to have acted as an agent provocateur in planning to firebomb a shop.

I find myself unable to accept the Bill while it contains the provision granting criminal immunity prospectively. Only a retrospective review by a professional prosecutor when all the circumstances are known is tolerable.

As at Second Reading, I wish to add the following, final, point. My understanding is that an undercover police officer may not be instructed by superiors to commit a crime. If the Bill becomes law without the amendments of my noble friend Lady Chakrabarti and her co-signatories, an officer will be refusing to obey a lawful instruction if she or he refuses to commit a crime when instructed to do so by a superior who has obtained a CCA. That will be a disciplinary offence potentially justifying dismissal. In my view, that is a powerful argument against prior authorisation; I think that many rank-and-file officers would not wish ever to be put in that position.

Baroness Blower (Lab) [V]: My Lords, it is indeed a great pleasure to follow my noble friends Lady Bryan of Partick and Lord Hendy, and to speak on Amendment 1 in the name of my noble friend Lady Chakrabarti, whose painstaking work, particularly on Amendment 1, both within and outwith the Labour Party, has been an education to me. It comes from a place of absolute lifelong commitment to the rule of law, the necessity of equality before the law, and of course very necessary civil liberties.

I am pleased also to join the noble Lord, Lord Paddick—I congratulate him on an excellent speech—and the noble Baronesses, Lady Jones of Moulsecoomb and Lady Ritchie of Downpatrick, whose names have been added to the amendment.

I am grateful too to Justice, the UK section of the International Commission of Jurists, for its expert and clear briefing, from which I quote. It says that the Bill unamended must fail, given the risk of

"serious violations of the European Convention on Human Rights", which could set the UK apart from accepted "international human rights norms"—surely not something that we would wish to do.

As I have said in previous speeches on the Bill, I want to live in a well-regulated society, so I recognise that covert operations and information from covert human intelligence sources are necessary. Accepting that, I also want to live in a society and in a state that fully observes the rule of law—a matter much discussed in your Lordships' House. I want to live in a state in which we are all equal before the law and in which there is one law for all.

Attempts made before the start of the passage of this Bill to claim that its intention and purpose were simply to legislate for the status quo have been shown to be false, as laid out by previous speakers, including my noble friend Lady Chakrabarti. The guidelines in force since 2011 clearly state that an authorisation

"has no legal effect and does not confer on either the agent or those involved in the authorisation process any immunity from prosecution."

Surely that is the very antithesis of what is proposed in the Bill. They go on to state that

"the authorisation will be the Service's explanation and justification of its decisions should the criminal activity … come under scrutiny by an external body."

So the creation of immunity introduced by this Government through the Bill is a deliberate policy decision.

Will the Minister say, in precise terms, how many prosecutions there have been to date of CHIS under the existing guidelines? That question was also asked by my noble friend Lady Bryan of Partick. I associate myself with the attempts of the noble Lord, Lord Paddick, to elicit hard information from the Minister.

Covert human intelligence sources are, in the main, far from being highly trained operatives. Of course some—possibly many—will be, but not all. The individuals to whom I refer are often members of the public, many of whom are seasoned and serious criminals, yet the Bill would have it that such individuals may engage in criminal conduct considered lawful for all purposes. If a covert human intelligence source is granted immunity for any conduct without let, hindrance or potential consequence, the risk to society is indeed grave. Crimes and criminal acts deemed not to be crimes or criminal in advance is a bridge too far—"legal for all purposes" is unacceptable. Where in this is the rule of law, and where is equality before the law?

Further, there is the matter of innocent victims. If, legally, no crime has been committed, given the existence of the CCA, access to redress—whether criminal, civil or through the criminal injuries compensation scheme, which was covered in detail by the noble Lord, Lord Anderson—is removed. It is unacceptable that there is no redress. Victims must have their rights protected, as indeed they are by Article 13 of the European Convention on Human Rights. Amendment 1 would remove immunity and thereby restore access to redress. It would provide that if covert human intelligence sources, under authorisation, carried out criminal activity, they would have a defence and justification, as at present. Such a caveat is necessary. Many noble Lords

[Baroness Blower]
far better versed in the law than me take this view. I am pleased to stand with them on this issue. Let us hold to the rule of law and equality before it.

Given the lack of clarity on immunity evident in the Bill, as outlined by the noble Lord, Lord Paddick, and as laid out in the plethora of amendments tabled, and given the damage limitation to which the noble Lord, Lord Paddick, referred, the secure route out of the lack of clarity and out of this damage limitation is to accept Amendments 1 and 2, which I absolutely support and for which I will vote.

Lord McCrea of Magherafelt and Cookstown (DUP) [V]: My Lords, the Bill is intended to provide a legal framework for the state authorising its agents to commit criminal offences where necessary. It mainly puts existing practice on a clear and consistent statutory footing. It will insert new Section 29B into Part II of the Regulation of Investigatory Powers Act, creating a criminal conduct authorisation. CCAs may be granted, where necessary, for a specified purpose:

"in the interests of national security … for the purpose of preventing or detecting crime or of preventing disorder; or … in the interests of the economic well-being of the United Kingdom."

Authorisation must be proportionate to what is sought to be achieved. Relevant considerations when considering proportionality include where conduct is part of efforts to prevent more serious criminality and where there are no other reasonable or practical means by which the outcome can be achieved. A covert human intelligence source will never be given unlimited authority to commit any and all crimes. The Bill does not prevent prosecutors considering a prosecution for any activity outside the authorised activity.

The use of agents and informers, including the authorisation of some criminal activity, is a legitimate and necessary tool in the fight against terrorism and serious organised crime. This has been accepted by Sir Desmond de Silva and the Investigatory Powers Tribunal. It is worth noting that in December 2019 the tribunal found that the current practice did not breach human rights or grant immunity to those who participate in serious criminal activity. The courts to date have found no breach of human rights in the current practice operated by the Government, MI5 and police forces. Without such tactics throughout the Troubles in Northern Ireland, the terrorist campaign would have been extended and more innocent lives lost.

4.30 pm

The CHIS remains just as relevant and critical in today's security environment. Last year, MI5 led a particularly successful operation against the so-called New IRA in Northern Ireland, arresting most of its so-called army council. That was a massive success and it will undoubtedly have been down to so-called covert human intelligence sources.

Of course, I agree that there should be a robust framework under which the authorisation of covert personnel engaging in crime can operate. I do not believe that sexual crime or torture can be authorised in any circumstances. Authorising officers must give due regard to a human rights framework in these areas.

Amendments 1 and 2 would ensure that the nature of and compliance with criminal conduct authorisation would be deemed relevant to any decision about criminal prosecution or civil liability. I believe that those who have acted in compliance with a properly devised criminal conduct authorisation should be protected from prosecution. This amendment may have the effect of wrongly keeping the door ajar for prosecution.

Amendment 3 would mean that, instead of a CHIS being immune from civil liability for authorised crime, the state would indemnify or recompense them. I do not come down strongly either way in relation to this amendment. Sources who have acted in accordance with a CCO should not be financially disadvantaged without fair recourse.

Amendment 21 would ensure that the Bill did not exclude prosecution for misconduct in public office of those involved in granting a criminal conduct authorisation or in situations where it is later nullified. I recognise the need for authorising officers to act in adherence to human rights principles. However, it is also important that they are not unfairly disadvantaged compared to other public servants or officials just because they are involved in those decisions. I will listen carefully to how the Minister responds to this amendment.

Lord Carlile of Berriew (CB) [V]: My Lords, it is a real privilege to follow the noble Lord, Lord McCrea of Magherafelt and Cookstown. With his immense experience of events in Northern Ireland, he has brought a real reality dose to this debate, and I commend every word that he said to be considered carefully.

The noble Baroness, Lady Chakrabarti, opened this debate with her customary clarity, consistency and commitment. However, it was noticeable that on her side of your Lordships' House very cogent speeches to the contrary were notably made by the noble Lords, Lord West and Lord Rooker, and I agree with both of them.

There are two issues that have not featured very much so far in this debate. One is that, far from dodging the rule of law, Her Majesty's Government have chosen, remarkably, to put CHIS on a fully statutory footing, which makes it more part of the rule of law than outside it. I say particularly to the highly respected lawyer, the noble Lord, Lord Hendy, that there is nothing about the rule of law that prevents something like CHIS being part of the rule of law. Indeed, it is right that the use of CHIS should be carefully circumscribed in that way.

The other issue that I particularly want to mention which I do not think has featured at all so far in this debate is the draft code of practice concerning the authorisation and use of CHIS, which says in paragraph 3.2:

"The 2000 Act stipulates that the authorising officer must believe that an authorisation for the use or conduct of a CHIS is necessary in the circumstances of the particular case for one or more of the statutory grounds listed in section 29(3) of the 2000 Act."

Indeed, if one looks at the paragraphs that follow paragraph 3.2, one sees that the code of practice makes it absolutely clear how careful authorising officers must be in the authorisation of a CHIS, whether just to be a CHIS or to commit a criminal act. Indeed, that code is not merely for guidance; in this instance, at least, it has the force of law.

To take an example other than those mentioned by the noble Lord, Lord McCrea, let us suppose, and I suspect I am not too far from reality in this, that a CHIS is asked and authorised to participate in acts forming part of a serious robbery in order to bring a major robbery gang to justice, maybe the robbery of a bank or a robbery at an airport. The CHIS has to determine whether to do that.

It is worth adding at this point, and I have some recollection of the way this is done from my time as the independent reviewer of terrorism legislation, that CHIS are not merely chosen randomly in a pub to become covert sources; they are considered with great care. In many cases, behavioural analysis is carried out to ascertain whether the CHIS is going to be reliable and will adhere to the authority that they are given. So someone becomes a CHIS not only if they are willing but if they have been assessed as suitable and it is necessary in the circumstances of the particular case.

So how is the CHIS going to react? These are not normally random people whom one bumps into on the high street; they are people who are usually already involved in crime or are in relationships with criminals; they are certainly involved in a criminal fraternity. What is their first reaction going to be? It is going to be, "If I do this, will I be immune from prosecution or do I run the risk of being prosecuted?" When someone takes the potentially huge personal risk, even to their life, of becoming a CHIS, provided that they are told that they must strictly adhere to their permission and not commit any other criminal offences, otherwise they may well be prosecuted, surely it is reasonable within the rule of law, and in the interests of society, not least in detecting and removing serious crime, for an assurance to be given that they will not be prosecuted.

Indeed, what is the reality of what happens without these clear new proposed laws? A CHIS is asked and authorised to commit a criminal offence. If they are prosecuted, they will naturally be horrified that they are being prosecuted because the public authority asked them to commit the act that they have committed. In the real world, the assurances that they have been given by officers will be certain protection against prosecution and the material of abuse of process applications before the court. However, going through that process is far from clear and far from providing the confidence that CHIS need, so I suggest to your Lordships, and respectfully to those who, with completely honourable arguments, have proposed Amendments 1 and 2, that in fact what is proposed is fairer, clearer and in the public interest.

I now turn briefly to Amendments 21 and 22, moved with great clarity by my noble friend Lord Anderson of Ipswich. Like him, I will be very interested in the Minister's response to this debate. The principle in Amendment 21 is sound: if there is public—I use the word in its broadest sense—corruption in the way in which the CHIS has been authorised to commit the crime, then that public misbehaviour should be capable of prosecution under the broad offence of misconduct in public office. This offence has proved flexible to deal with all kinds of circumstances in which serious and very reprehensible errors have been made by public officers. Indeed, on one occasion, in the Bishop Ball case, it was used to prosecute where some of the indecency offences were out of time—a bishop being in a public office. Amendment 21 seems an entirely sound principle, and I look forward to hearing the Minister's response.

Amendment 22 seems to provide the balance, which has been discussed by many noble Lords, as to how compensation should be given—for it should be given—if people suffer injury as a result of criminal offences committed by CHIS. The Minister may say that these circumstances are provided for under the existing law, but I urge her to the view—she always listens very carefully to what is said—that it would be of benefit to put the principles of Amendments 21 and 22, possibly amended, into the Bill.

Overall, I respectfully suggest that Amendments 1 and 2 should be rejected, and Amendments 21 and 22 accepted in principle.

Baroness Hamwee (LD) [V]: My Lords, the level of responses throughout the debates on the Bill indicates the level of concerns across your Lordships' House, including concern for the rule of law. But there is widespread acknowledgement that it is desirable to put these matters in statute; I do not think that is being denied.

The preservation of the status quo as regards the place of the Crown Prosecution Service in the criminal justice system is because the status quo—the CPS—has our confidence, and we support Amendments 1 and 2. There is a reason why we are so often advised to leave alone what is working. The DPP is able to consider, and is accustomed to considering, the detail of each case, including whether the individual concerned is an untrained member of the public. I agree that agents are not generally naive young things met in a supermarket queue, or wherever; they are not random choices. Like the noble Baroness, Lady Kennedy of The Shaws, I regret that such a range of CHIS, and thus of criminal conduct authorisations, is combined for the purposes of this debate.

In Amendment 2, the proposed new subsection (3B) sets out a clear sequence. It addresses the principle of whether a CCA can sidestep the detailed considerations to be applied, rather than rewriting those considerations—or rather, writing them differently—as Amendment 3 does. Most importantly, it applies the well-established principles underlying the decision to prosecute. I am very pleased that the noble Baroness, Lady Chakrabarti, is pursuing the issues of practicality and ethics.

4.45 pm

We support Amendment 21; it neatly deals with concerns about the responsibilities and liabilities of controllers and handlers, both criminal and civil. It is very helpful to be reminded that our law—some might describe it as our legal ecology—includes the underlying notion of how to conduct oneself in public office, and the offence of misconduct in that office. Civil liability, when looked at from the other end of the telescope, is the right of someone aggrieved, injured, or who has suffered collateral damage, to access compensation. In Committee, my noble friend Lord Paddick referred to an injured security guard, and we have had other examples. We are happy to support any amendment

[Baroness Hamwee]
that achieves that, although we have difficulty with Amendment 3 because it accepts the phrase "lawful for all purposes".

We tabled Amendment 32, which amends RIPA, under which the tribunal has the power to make an award of compensation. RIPA is—or will be—the basis for CCAs and the tribunal is, by definition, familiar with investigatory powers. It can deal with hearings involving sensitive matters in an appropriate way. It seems the right home for this, though I acknowledge the practical considerations that have been mentioned.

Section 29B will be new to RIPA, even though authorisations are not new. We are not happy to rely, for this purpose, on the Advocate-General's explanation in Committee that,

"An authorisation must consider and minimise the risk of impacting those who are not the intended subject of the operation",—[*Official Report*, 24/11/20; col. 185.]

nor—again for this purpose—that they will be, in the Advocate-General's words, "tightly bound". That is not the point.

Unless the issue of redress has been dealt with satisfactorily by the time we reach Amendment 32 in the Marshalled List, I intend to move it and seek the opinion of the House. We tabled it before the noble Lord, Lord Anderson of Ipswich, tabled his Amendment 22. If the criminal injuries schemes include the injuries in question—the amendment uses the words "not excluded"—we welcome that. The Advocate-General indicated in Committee that he did not have information regarding the schemes, and that he would write. My noble friend and I had not heard until publication this morning of the Government's response to the JCHR's report—apart from an email which the noble Lord, Lord Anderson, copied to us, in which a Home Office official wrote, "The Bill does not in practice interfere with the operation of the scheme." I read that as a bit topsy-turvy, and certainly not enough; we want it to be clear in the Bill.

I am with the noble Lord, Lord Anderson: the gift horse needs a bit more to chomp on. We support there being clear provision in the Bill to deal with the problem of "lawful for all purposes".

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, I thank all noble Lords who have taken part in this debate, which I think has gone on now for over two and a half hours, signalling the importance of this subject and this Bill. The noble Baroness, Lady Chakrabarti, started off by really pressing the importance of parliamentary democracy and the rule of law. She was, of course, supported in that endeavour by the noble Baronesses, Lady Kennedy of The Shaws, Lady Bryan of Partick, Lady Blower, and my noble friend Lord Cormack. I agree absolutely wholeheartedly with those sentiments of democracy and the rule of law.

However, it also led me to reflect, thinking about events the other day on Capitol Hill, on some of the events that have taken place close to our Parliament in the last few years. The noble Baroness will recall her erstwhile colleague John McDonnell, saying:

"Parliamentary democracy doesn't work for us … we used to call it insurrection. Now we are polite and say, 'direct action'. Let's get back to calling it what it is. It is insurrection. We want to bring this Government down by whatever mechanism we have."

I stand by the principles of democracy and the rule of law, and that there can be no departure from them. The noble Lord, Lord Carlile, whom I do consider my noble friend, posits some of the points that noble Lords have made about whether we are dodging the rule of law. We are not. We are putting covert human intelligence sources engaging in criminal conduct beyond statutory doubt in the Bill.

I will begin with Amendments 1 and 2. The question of whether properly authorised conduct should be rendered lawful or left open to prosecution was discussed at great length in Committee. I have listened very carefully to the points made by noble Lords on this issue, and to the views of operational partners, and the Government's view is that the approach in the Bill as drafted is the right one. It seems unfair and unreasonable for different approaches to be taken here from those for other investigatory powers, such as interception and equipment interference, where otherwise criminal conduct is rendered lawful by properly granted authorisation.

In response to the remarks of the noble Lord, Lord Paddick, regarding the assertion of my noble and learned friend the Advocate-General for Scotland—and I thank the noble Lord for giving me notice that he would be making this point—that all noble Lords agree with this position, clearly, if he does not, then it is not the case. However, I hope that most noble Lords can see the merit of the Government's position on this issue. Covert human intelligence sources operate in the background and take great personal risks to keep the wider public safe from harm. It seems a disservice to them to expect them to carry out this activity and not provide them with the appropriate protection for doing what they were asked to do.

Noble Lords are all aware, and I think appreciate, that we are limited in what we can say publicly about this tactic, so I am afraid that I cannot go any further. What I can say is that we risk damaging the future operation of this tactic if we take the approach suggested in these amendments. At the end of the day, CHISs are humans. Each CHIS is one of us and not a machine that can be switched on and off. We must do what we can in this Bill to protect them in exchange for the work that they do on our behalf to protect us.

Amendment 3 seeks to remove the exemption from civil liability for CHIS criminal conduct. Let me start by setting out the legal position in RIPA. The effect of a valid authorisation under Part 2 of RIPA is that authorised conduct is rendered

"lawful for all purposes"

by Section 27. Section 27 sets out a requirement for the conduct to be in accordance with an authorisation in order for it to be made lawful for all purposes. Where a court finds that the authorisation under the Bill does not meet the requirements of the new Section 29B, or where the conduct goes beyond what is permitted by the authorisation, it will not be rendered lawful. I will make this point again, as it is very important: an authorisation will have been granted because the authorised conduct was deemed to be both necessary and proportionate to tackle threats such as crime, terrorism or hostile state activity—and,

as the noble Lord, Lord Carlile, says, it is laid out in the code of practice. Where that authorisation has been validly and lawfully granted, it is right that those criminals or terrorists cannot then sue the CHIS or the state for that same vital activity.

Let me be clear that it is not the intention of the Bill to close off routes of redress where an authorisation has not been lawfully granted, or where a person has been the victim of conduct by a CHIS that was not covered by the tightly bound authorisation. It is right that in these cases appropriate routes of redress remain open to those affected. For example, where the person is a victim of conduct not covered by the tightly drawn criminal conduct authorisation, the authorisation would not offer protection from criminal liability. This would mean that the conduct was not rendered lawful, the person could report the crime in the normal way to the police and the normal routes of redress would be available. The approach that we have taken in the Bill does not leave open the possibility of criminals and terrorists suing public authorities for legitimate and lawful activity, but it will still be possible for innocent people to seek redress where appropriate. That is why the Government cannot accept Amendment 3.

Amendment 32, from the noble Lord, Lord Paddick, seeks to ensure that conduct authorised under the Bill is within the remit of the Investigatory Powers Tribunal. I absolutely assure him that this will already be the case. Section 65 of RIPA sets out that conduct to which Part 2 of RIPA applies falls within the jurisdiction of the tribunal. The Bill creates a new Section 29B which will be inserted into Part 2 of RIPA. Any person or organisation will be able to make a complaint to the tribunal regarding CHIS criminal conduct. The tribunal also has the same remedies available to it as other courts, including the ability to grant compensation. This amendment is therefore not necessary.

Responding to the amendment tabled by the noble Baroness, Lady Jones, on the Proceeds of Crime Act 2002, I should first highlight that CHISs are authorised in essence for the purpose of acquiring information. A CHIS will be authorised to participate in criminal conduct only where it is truly necessary in connection with that overall aim. The proposal to carve out certain activity from the Bill is inconsistent with the approach of the Bill, which is to render properly authorised conduct lawful for all purposes. I assure the noble Baroness that a CHIS could not be authorised for the purpose of legalising an otherwise unlawful profit-making exercise, as it would not be necessary for a statutory purpose.

In Amendment 21, the noble Lord, Lord Anderson, seeks reassurance that the Bill will not provide a blanket immunity that results in improper conduct being excluded from prosecution. I can be very clear on this point. I would expect any improper conduct on behalf of an authorising officer to be picked up by the stringent safeguards that are in place, thereby preventing such an authorisation being granted in the first place. However, if an authorisation did not meet all the requirements of new Section 29B, a court could find that authorisation to be invalid. The conduct would not then be rendered lawful and prosecutions could be brought.

In practice, if the Investigatory Powers Commissioner's Office felt that an authorisation was improperly granted, it would flag up any concerns that it had to the authorising authority. This could include recommending that it refers the conduct to the appropriate authorities. While the primary responsibility for reporting crime rests with the authorising public authority, IPCO could refer a case directly to the appropriate authorities, subject to the process set out in the Investigatory Powers Act. The courts could then decide whether the authorisation was improperly granted and therefore whether it was unlawful.

As a matter of public law, a decision made subject to a discretionary power, such as the decision to issue a criminal conduct authorisation, must be "reasonable". The decision must be rationally open to a reasonable decision-maker in possession of the facts of the case, or it will be unlawful. In terms of the additional reassurance that the noble Lord, Lord Anderson, sought, it is clear that authorising officers must be acting lawfully when properly granting a CCA. That does not prevent a prosecution of that officer for having improperly granted a CCA, including for misconduct in a public office if the authorisation was corruptly granted—but we would expect a court to consider the validity of that CCA as a preliminary issue.

I can also confirm that judicial commissioners have the ability to report conduct directly to prosecutors, subject to the process set out in the Investigatory Powers Act, and that anyone who has been impacted by a criminal conduct authorisation can make a complaint before the IPT. Where that complaint is upheld the IPT can provide redress, including compensation.

5 pm

I turn to the amendment from the noble Lord, Lord Anderson, on the availability of the criminal injuries compensation scheme for those impacted by a criminal conduct authorisation. The Bill does not, in practice, interfere with the operation of that scheme, which is narrow in scope and available only to a victim of a crime of violence. While I cannot discuss the limits to the conduct that can be authorised under the Bill, I will say again that all authorisations must be compliant with the Human Rights Act. Public authorities cannot act in a way that is contrary to its requirements; for example, if, on the particular facts, an authorisation would amount to a breach of, say, Article 3, it would be unlawful.

There are also protective obligations on the state. Where the state knows of the existence of a real and immediate threat to a person, the state must take responsible measures to avoid that risk. This protective obligation is at the heart of CHIS authorisation. As I said earlier, where a person is a victim of conduct not covered by the tightly drawn authorisation, the authorisation would not offer protection from criminal liability. This includes any claim made under the criminal injuries compensation scheme. I hope that this provides reassurance on both these issues and that noble Lords are content not to press their amendments.

Before I sit down, in responding to this group I also want to take the opportunity to make noble Lords aware of the Government's ongoing discussions with the Scottish Government, which may affect the ability

[Baroness Williams of Trafford]
to authorise criminal conduct in Scotland for devolved purposes. Discussions on support for a legislative consent Motion have been running in parallel to the passage of this Bill. The Government's preference is for a UK-wide Bill, but it appears that agreement on this may not be possible.

Were the Scottish Government to not recommend consent, then, respecting the Sewel convention, the Government would seek to table amendments at Third Reading which carve out authorisations for devolved purposes in Scotland, and would not move government amendments on Report where they relate to devolved matters. I would appreciate noble Lords adopting a similar position in this scenario, if their amendments relate specifically to RIP(S)A. I have already discussed this matter with the noble Lords, Lord Paddick, Lord Rosser and Lord Kennedy. However, I undertake to write to all noble Lords before the debate on Wednesday outlining the final position, any reasons for the decision and any operational impact that it might have.

The Deputy Speaker (Baroness Henig) (Lab): I have received a request to speak after the Minister and to ask a question from the noble Baroness, Lady Hamwee.

Baroness Hamwee (LD) [V]: My Lords, with regard to the criminal injuries compensation scheme, the Minister said that the Bill does not "in practice"—I stress those words—interfere with its operation. Can she confirm that it does not interfere with the scheme either in law, as distinct from practice, or as the scheme is currently drawn; in other words, should we regard the term "in practice" as limiting the scope for application to it, which noble Lords have made clear is something that concerns us?

Baroness Williams of Trafford (Con): I noticed that the noble Baroness mentioned that point in her speech. The practical application of this will not interfere with the operation of the scheme. She is shaking her head—I do not think she is very satisfied.

Baroness Chakrabarti (Lab) [V]: My Lords, I am grateful to everyone who has spoken in this debate and was quite humbled by so many of the speeches—both those I agreed with and many with which I disagreed—not just by the kind remarks about me and my intentions with these amendments, but by the sheer eloquence and experience which so many noble Lords displayed on all sides of your Lordships' House. Please forgive me if I do not pay appropriate tribute to everyone individually, as I am sure your Lordships would not thank me for the amount of time that that exercise would take.

We have been dealing with some difficult realities on this legislation, but also some important principles. That has come across in the nature of this important debate. The noble Lords, Lord Paddick and Lord Naseby, and others, talked about difficult realities from both sides of the argument. The noble Lord, Lord Paddick, gave a speech rooted in being, as far as I noticed, the only former police officer who has spoken on the Bill. His picture of handing out banknotes to undercover agents is not a difficult reality, designed to undermine the importance of using undercover agents in the community. It is not designed to undermine the difficult reality of some of those people being current or former criminals—or, indeed, having turned terrorist, for that matter. But it is important to demonstrate that not everyone involved in this kind of activity—in the past, present or future—has been or will be of the character or ability of the finest trained officers and agents. There will necessarily be a variation; that is a difficult reality.

I do not say this to criticise the need to have undercover operatives. It just makes the checks and balances in a democracy founded on the rule of law even more important. I say that to those who are flabbergasted at the idea that I should not just take the Government's case studies without looking at any other experience, including that of the noble Lord, Lord Paddick. I think it was the Minister who said, rightly, that undercover agents—or CHIS—are human. They cannot be turned off and on. I absolutely agree; they are human, as we all are, and therefore flawed. They are not robots; they cannot be pre-programmed to cover every situation in the moment. We therefore need to create ethical incentives, not just blanket immunity. We have been dealing with the difficult realities of having to go undercover and keep cover. That will mean engaging in criminal activity, perhaps quite serious criminal activity such as being a member of a terrorist group or dealing drugs, for example.

There are also important principles such as the rule of law, as rightly pointed out by the noble Lord, Lord Carlile, even if he did not agree with my emphasis or my argument. He is right, and so is the Minister, in saying that the clarity and accessibility of the law are important rule-of-law principles. With that in mind, there is great value in putting these matters on a clear statutory footing. This is so that the public at large understand, in a clear statute for all to see, if they look it up, that sometimes undercover agents of the state will be authorised to engage in crime for the purposes of keeping their cover. The noble Lord, Lord Carlile, and the Minister are quite right to say that that is one attempt towards the rule of law.

However, another foundational principle of the rule of law in any jurisdiction anywhere in the world is equality before the law—as expounded by my noble friends Lady Kennedy of The Shaws, Lady Bryan, Lady Blower, Lord Hendy, Lord Judd, and many others. Equality before the law means that there is one law of the land for Prime Ministers, police officers—uniformed or undercover—and undercover agents or CHIS. That creates a conundrum for us: how can we respect equality before the law but also authorise criminal activity in certain situations in order to keep us safe? That is a genuine conundrum that I accept we are having to engage with here.

How does our current law tend to grapple with such a conundrum? Generally, this is not done by advance blanket licence or immunity, but by defences. Whether reasonable excuse defences or public interest defences are used, these would be taken into account by an investigating officer, prosecutor or, if necessary—and it does not seem to be very often—by a court after the fact. That is the kind of regime which protects all of us, including officers and agents and people who put

themselves in difficult situations in harm's way. This includes the armed police officers who are marksmen and those who protect all of us in your Lordships' House. Those brave uniformed officers, who have sometimes made the ultimate sacrifice to defend your Lordships' House, have used whatever reasonable force they could. They have done this, not with advance immunity, but in the knowledge that they were doing what was right and in the public interest. They have reasonable force defences or reasonable excuse defences, and nobody would dream of prosecuting them in the public interest. If it is good enough—

Lord Parkinson of Whitley Bay (Con): I am sorry to interrupt the noble Baroness, but we are making slow progress on the Bill and we have a number of groups to try to reach today. She had time at the beginning of the debate to set out her views. If she would let your Lordships' House know whether she intends to divide, that would be appreciated.

Baroness Chakrabarti (Lab) [V]: I think I made my intention to divide clear earlier and I will say one or two sentences more before I close. I have not heard a good enough explanation as to why we should make what the noble Lord, Lord Paddick, called a "monumental shift" in our rule-of-law arrangements. My noble friend Lady Kennedy called it a "dramatic" change to the legal landscape to license criminality with total immunity for some people in advance and to make their activity lawful for all purposes. The stringent safeguards offered by the Minister, such as Article 3, are not going to operate in sufficient detail in the mind of an undercover agent in real time, in the moment, if they are given total immunity. I shall be seeking to test the opinion of the House.

Lord Parkinson of Whitley Bay (Con): There appears to be a technical problem with the voting. I suggest that the House adjourn for 15 minutes until it is resolved.

5.19 pm

Sitting suspended.

5.34 pm

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Gold, L.
Goldie, B.
Goldsmith of Richmond Park, L.
Goodlad, L.
Goschen, V.
Grabiner, L.
Grade of Yarmouth, L.
Green of Deddington, L.
Greenhalgh, L.
Greenway, L.
Griffiths of Fforestfach, L.
Grimstone of Boscobel, L.
Hague of Richmond, L.
Hailsham, V.
Hamilton of Epsom, L.
Hammond of Runnymede, L.
Hannay of Chiswick, L.
Harries of Pentregarth, L.
Harris of Haringey, L.
Harris of Peckham, L.
Haselhurst, L.
Hay of Ballyore, L.
Hayward, L.
Helic, B.
Henley, L.
Herbert of South Downs, L.
Hill of Oareford, L.
Hodgson of Abinger, B.
Hoey, B.
Hogg, B.
Holmes of Richmond, L.
Hooper, B.
Hope of Craighead, L.
Horam, L.
Houghton of Richmond, L.
Howard of Lympne, L.
Howard of Rising, L.
Howe, E.
Howell of Guildford, L.
Hunt of Wirral, L.
Janvrin, L.
Jay of Ewelme, L.
Jenkin of Kennington, B.
Johnson of Marylebone, L.
Jopling, L.
Judge, L.
Kakkar, L.
Keen of Elie, L.
Kerr of Kinlochard, L.
King of Bridgwater, L.
Kirkham, L.
Laming, L.
Lamont of Lerwick, L.
Lancaster of Kimbolton, L.
Lang of Monkton, L.
Lansley, L.
Leigh of Hurley, L.
Lexden, L.
Liddle, L.
Lilley, L.
Lindsay, E.
Lingfield, L.
Lipsey, L.
Liverpool, E.
Livingston of Parkhead, L.
Lothian, M.
Lucas, L.
Lupton, L.
Mackay of Clashfern, L.
MacKenzie of Culkein, L.
Mackenzie of Framwellgate, L.
Mancroft, L.
Mann, L.
Manningham-Buller, B.
Manzoor, B.
Marland, L.
Marlesford, L.
Maude of Horsham, L.
McColl of Dulwich, L.
McCrea of Magherafelt and Cookstown, L.
McGregor-Smith, B.
McInnes of Kilwinning, L.
McIntosh of Pickering, B.
McLoughlin, L.
Meacher, B.
Mendoza, L.
Meyer, B.
Mone, B.
Montrose, D.
Moore of Etchingham , L.
Morgan of Cotes, B.
Morris of Bolton, B.
Morrissey, B.
Morrow, L.
Moylan, L.
Moynihan, L.
Naseby, L.
Nash, L.
Neuberger, B.
Neville-Jones, B.
Neville-Rolfe, B.
Newlove, B.
Nicholson of Winterbourne, B.
Noakes, B.
Northbrook, L.
Norton of Louth, L.
O'Neill of Bengarve, B.
O'Shaughnessy, L.
Parkinson of Whitley Bay , L.
Patel, L.
Patten, L.
Penn, B.
Pickles, L.
Pidding, B.
Polak, L.
Popat, L.
Porter of Spalding, L.
Powell of Bayswater, L.
Price, L.
Rana, L.
Randall of Uxbridge, L.
Ranger, L.
Rawlings, B.
Reay, L.
Redfern, B.
Renfrew of Kaimsthorn, L.
Ribeiro, L.
Ridley, V.
Risby, L.
Robathan, L.
Rock, B.
Rogan, L.
Rooker, L.
Rose of Monewden, L.
Rotherwick, L.
Saatchi, L.
Sanderson of Welton, B.
Sarfraz, L.
Sassoon, L.
Sater, B.
Scott of Bybrook, B.
Seccombe, B.
Selkirk of Douglas, L.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Sheikh, L.
Shephard of Northwold, B.
Sherbourne of Didsbury, L.
Shields, B.
Shinkwin, L.
Shrewsbury, E.
Skidelsky, L.
Smith of Hindhead, L.
Spencer of Alresford, L.
Stedman-Scott, B.
Sterling of Plaistow, L.
Stewart of Dirleton, L.
Stirrup, L.
Stowell of Beeston, B.
Strathclyde, L.
Stroud, B.
Stuart of Edgbaston, B.
Sugg, B.
Suri, L.
Swinfen, L.
Taylor of Holbeach, L.
Taylor of Warwick, L.
Tebbit, L.
Thurlow, L.
Trefgarne, L.
Trenchard, V.
Trevethin and Oaksey, L.
Trimble, L.
True, L.
Truscott, L.
Tugendhat, L.
Ullswater, V.
Vaizey of Didcot, L.
Vaux of Harrowden, L.
Vere of Norbiton, B.
Verma, B.
Vinson, L.
Wakeham, L.
Waldegrave of North Hill, L.
Walker of Aldringham, L.
Walney, L.
Wasserman, L.
Watkins of Tavistock, B.
Waverley, V.
Wei, L.
West of Spithead, L.
Wharton of Yarm, L.
Whitby, L.
Willetts, L.
Williams of Trafford, B.
Wolfson of Tredegar, L.
Woodley, L.
Young of Cookham, L.
Young of Graffham, L.
Younger of Leckie, V.

5.48 pm

Amendments 2 to 4 not moved.

The Deputy Speaker (Baroness Henig) (Lab): We now come to the group beginning with Amendment 5. I remind noble Lords that Members other than the mover and the Minister may speak only once and that short questions of elucidation are discouraged. Anyone wishing to press this or any other amendment in the group to a Division must make that clear in debate.

Amendment 5

Moved by ***Lord Dubs (Lab)***

5: Clause 1, page 2, line 8, at end insert—

"(1A) Authorisations granted under this section require judicial approval in accordance with section 29C."

Member's explanatory statement

This amendment imposes a requirement for prior judicial approval of CCAs (with provision for urgent cases), and relates to the amendment to Clause 1, page 3, line 16 in the name of Lord Dubs.

Lord Dubs (Lab) [V]: My Lords, in moving Amendment 5, I shall speak also to Amendment 23, which is grouped with it. I intend to seek the opinion of the House, unless I get a dramatic concession from the Minister at the end of the debate.

These amendments impose a requirement for prior judicial approval of criminal conduct authorisations, with some provision for urgent cases. I speak as a member of the Joint Committee on Human Rights. Our report, which has been widely applauded in this and previous debates on the Bill, has obviously been very helpful, and I am using a lot of information from it. I am also grateful to Justice, which provided a comprehensive report, with proposals for amendments. I am grateful to the Minister, who arranged for my noble friend Lady Massey and myself to have a briefing with some of the officials and senior police officers. We had a detailed discussion, and although it was directed at amendments relating to children which will be discussed on Wednesday, some of it is nevertheless relevant to the amendments that I am proposing today. I think I may quote from that without pre-empting the discussion about children on Wednesday.

The Government claim that prior judicial authorisation is not necessary because:

"The use of CHIS requires deep expertise and close consideration of the personal qualities of that CHIS, which then enables very precise and safe tasking."—[*Official Report*, Commons, 5/10/20; col. 662.]

As I understand it, the Government believe that authorisations are better left to public authorities' delegated authorising officers, who are, supposedly, more equipped to deal with CHIS than judicial commissioners, who are one step away.

However, the noble Lord, Lord Macdonald, the former Director of Public Prosecutions, who has been quoted more than once in this debate, said:

"There is no comfort in allowing senior figures in the police or the intelligence agencies the power to sanction lawbreaking, without the need to first obtain independent warrants from judges or some other authority."

That seems pretty clear.

The use of prior judicial authorisation has, of course, been discussed in the past in relation to RIPA. But in 2016, the European Court of Human Rights held that judicial authorisation

"offers the best guarantees of independence, impartiality and proper procedure."

This is particularly pertinent to surveillance, which is,

"a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society".

The court concluded that

"it is in principle desirable to entrust supervisory control to a judge".

That is part of the basis of this amendment.

Concerns about whether this is feasible do not carry much weight. There is no reason why judicial commissioners could not review CCAs; they are already well-practised in making complex assessments of sensitive material in an independent, detached manner and at short notice, and they are always very senior judicial figures.

The Select Committee looked at all this. It is very clear that the Bill does not provide for any independent scrutiny of criminal conduct authorisations before they are made and acted upon. The report of the Joint Committee on Human Rights noted that, while the process of granting criminal conduct authorisations would be kept under review by the Investigatory Powers Commissioner, his

"role in the oversight of CCAs is entirely 'after the event' … nor does the Bill provide for the IPC to be informed of authorisations at the time they are made, so that prompt scrutiny can take place."

The report further noted:

"The lack of prior independent scrutiny for CCAs under the Bill stands in marked contrast to the procedures in place for other investigatory functions",

such as police search warrants and phone tapping. The former Director of Public Prosecutions, Sir Ken Macdonald—as he then was—has been quoted several times as saying that:

"Under this bill it will be easier for a police officer to commit a serious crime than to tap a phone or search a shed."

This has been quoted so often it must go in the *Oxford Dictionary of Quotations*. The argument in favour of judicial approval is there.

I refer to the Pat Finucane case in Northern Ireland—one of a number of cases—which is also mentioned in the report of the Joint Committee on Human Rights. There was a real abuse of powers which under my amendment would, I am pretty sure, have been prevented by a judicial commissioner. That case is very much unfinished business. Indeed, there is a plea, which I fully support, for a full independent review of what happened when Patrick Finucane was murdered by, or with the knowledge of, British agents. That is business for another day but, in the meantime, we have this amendment.

Some of these amendments are so crucial to the working of the Bill that it is difficult not to tread from one into the area of another, but this amendment is fundamental. Prior judicial approval for a CCA is absolutely essential to providing the safeguards which were referred to in the previous debate and which we need before we can allow such a Bill to become law in this country. I beg to move.

Lord Hain (Lab) [V]: My Lords, I will speak to Amendment 16 in my name and those of my noble friend Lord Blunkett, a former Home Secretary, the noble Lord, Lord Cormack, and the noble Baroness, Lady Wheatcroft, to each of whom I am grateful. It is a very

[Lord Hain]
straightforward amendment that would add confidence to the deployment of state-employed undercover officers by ensuring that each had to be authorised by a Secretary of State in exactly the same way as existing legislation requires for surveillance operations.

My noble friend Lord Blunkett and I both signed hundreds of warrants for surveillance operations under the Regulation of Investigatory Powers Act 2000, which was updated by this Conservative Government in the Investigatory Powers Act 2016, at a time when the noble Baroness, Lady Williams, was a government Minister, even if not in her current role. In other words, she and her Conservative Government re-enacted legislation requiring Secretary of State authorisation for surveillance, and so it is a puzzle to me why Ministers have not accepted this amendment.

The amendment endorses the identical principle for CHIS or undercover officer deployment in a way that would add to public confidence, which has been badly damaged by evidence that led to the current inquiry on undercover officers established by Prime Minister Theresa May and chaired by Sir John Mitting, a former High Court judge. It was established because the Conservative Government—in which the noble Baroness was a Home Office Minister at the time—felt undercover policing had got out of control and needed to be made more accountable.

The abuses so far revealed in the inquiry's proceedings fully justify the Conservative Government's decision to launch it. I will mention only several. We have learned that the campaign by the noble Baroness, Lady Lawrence, and her family to discover the truth about her son Stephen's brutal racist murder was outrageously infiltrated by undercover officers. Why were they not instead targeting the racist criminals responsible for Stephen's murder? If that deployment had been subject to authorisation by the Home Secretary, would it have happened? I very much doubt it, because surely a question would have been asked of the operational police decision as to why the innocent victims of a vicious racist murder were being targeted and not the criminals responsible.

There are many other examples, including my own personal experience. As confirmed by evidence given to the Mitting inquiry, from 1969 to 1970, a British police or security service officer was at almost every anti-apartheid and anti-racist meeting that I attended, private or public, innocuous and routine, or serious and strategic, such as stopping all white apartheid sports tours and combatting pro-Nazi activity. Why were they not targeting Nazi groups responsible for attacks on black people, Jewish citizens and Muslims?

Why were they not targeting the criminal actions of the apartheid state responsible for, among other things, fire-bombing the London offices of Nelson Mandela's African National Congress in March 1982 and, in 1970, murdering South African journalist Keith Wallace, who had threatened to expose the apartheid security service operations in the UK? In June 1972, why did they show no interest whatever in discovering who in South Africa's Bureau of State Security sent me a letter bomb capable of killing me, similar to those that had killed anti-apartheid leaders across the world?

6 pm

A warrant procedure would force police chiefs to stop and ask serious questions before recommending authorisation from a Secretary of State, as this amendment requires, preventing policing from slipping from its primary task of preventing crimes into policing politics.

Such authorisation from a democratically accountable Cabinet Minister would surely also have stopped in its tracks the infiltration by an undercover officer, going under the name of Sandra, of the north London branch of the Women's Liberation Front between 1971 and 1973. She explained to the Mitting inquiry that she had failed to discover any useful intelligence whatever. She said that some of the meetings were attended by just two activists. She told the inquiry on 18 November:

"I could have been doing much more worthwhile things with my time."

That is exactly my point.

The purpose of our amendment is to ensure that policing is focused on what should be its real purpose: catching criminals and terrorists, not political activists pursuing causes like women's rights, seen as outlandishly radical 40 years ago but now accepted as mainstream. It is striking that almost every example I could cite, and there are countless others, reveals the abuse of the role of covert human intelligence operatives.

To submit that these are all from history and that all is well today would be deeply complacent. Only last year, when the noble Baroness, Lady Williams, was in her present post, it was revealed that counterterrorism police had put non-violent Extinction Rebellion on their list of terrorist groups. That hardly inspires confidence that they know where the line is between legitimate and illegitimate undercover work. Whatever you may think of Extinction Rebellion's climate change tactics—inconveniencing Parliament, for example—is any government Minister seriously suggesting that they are the acts of terrorists like the London 7/7 underground bombers? I trust not.

When I was Secretary of State for Northern Ireland and my noble friend Lord Blunkett was Home Secretary, we signed hundreds of warrants to place terrorists and hardcore criminals under surveillance. Sometimes, and this argument is occasionally used against my amendment, these were in real time. I can think of one occasion when I was happy to be woken up in the middle of the night to prevent Islamist terrorists, one of whom I learned had just shaved his hair in preparation to unleash a bomb on London. I underline that these were essential security and policing operations, yet they required ministerial authorisation, in that case for surveillance. Why? Because, ultimately, it brings ministerial responsibility and therefore accountability. The operational decision, quite properly, was for the police or the intelligence services, but the accountability was ultimately governmental and political.

I believe that the time has come to bring that principle into the sphere of undercover policing, because it has involved far too many abuses for decades. If there is not the same kind of accountability as for surveillance, there may well be even more abuses in future. I have direct experience of how undercover officers can perform vital functions to save lives and

prevent crimes or terrorist attacks, but also of how their deployment can be terribly abused and can undermine vital civil liberties and constitutional rights.

The noble Baroness, Lady Williams, was kind enough to invite my noble friend Lord Blunkett and me to discuss our amendment with her last week, and I am grateful for that. It is a mystery that, unless she surprises me, she has not been able to persuade the Home Secretary to accept it, because it would add accountability and therefore—I stress this—legitimacy to CHIS work. Surely we should all share the common aim of deploying the limited resources of undercover police officers, who do dangerous jobs, to catch real criminals, such as drug traffickers, human traffickers, terrorists and criminal gangs, not political activists challenging the prevailing orthodoxy of the time, whether on anti-apartheid, racism, women's rights or climate change. I will await the noble Baroness's reply before I decide whether to beg leave to divide the House on my Amendment 16.

Lord Anderson of Ipswich (CB) [V]: My Lords, in speaking to Amendments 33, 37, 44 and 46, which are also signed by the noble and learned Lord, Lord Mackay, and the noble Lords, Lord Butler and Lord Rosser, I first pay tribute to the Minister and the Bill team, who offered to co-operate with me on these amendments and have been as good as their word. They now give more complete effect, in language approved by parliamentary counsel, to the homemade amendments that I moved in Committee. The lead amendment is Amendment 33; Amendment 37 mirrors it for Scotland; and Amendments 44 and 46 are consequentials.

The amendments provide, in summary, not for prior judicial authorisation but for judicial scrutiny of another kind: the real-time notification of authorisations to a judicial commissioner, as soon as reasonably practicable and in any event within seven days. That should be seen very much as an outer limit for notification that should, so far as possible, be in real time. It will be open to the Investigatory Powers Commissioner to encourage not only prompt notification but pre-notification for informal guidance, as already occurs in some other surveillance contexts. This might be particularly useful for bodies that do not make frequent use of the power.

The case for real-time notification, as I shall call it, has been put most persuasively by those who signed the equivalent amendments in Committee—the noble Baroness, Lady Manningham-Buller, and the noble Lords, Lord Butler and Lord Carlile. I shall summarise it as briefly as I can.

My immediate reaction to this Bill was to support prior judicial authorisation. I championed the use of prior judicial approval for other investigatory powers in my report *A Question of Trust*, and was delighted to see this in the Investigatory Powers Act 2016. I accept that it might also be feasible in this context, given sufficient judicial training, yet I have reservations about prior judicial approval in this Bill, not only for the pragmatic reason that the Government have so firmly set their face against it. Handling and authorising a CHIS is a highly specialised function that requires a close and dynamic understanding not only of the details of the operation but of the characters of those involved. That is not something that a judge, let alone a Secretary of State, will necessarily have the capacity to pick up. It differs considerably from the classic judicial exercise of weighing the benefits of tapping a phone or an undersea cable against the associated intrusion of privacy.

The person who tasks a CHIS, including by authorising criminality, effectively takes on a long-term duty of care, not only towards any potential victims of that crime but towards a CHIS for whom exposure could result in injury or death. Perhaps it is for that reason that the American and Canadian models of prior judicial authorisation, both of them inspirations for *A Question of Trust*, are not applied in either country to the tasking of a CHIS to commit crimes.

The main objection offered to these amendments in Committee was to the insufficient sharpness of their teeth. It is true that real-time notification may mean that the judicial commissioners are powerless to stop a particularly rapid deployment. It is also true that criminal deployments of this kind cannot just be turned on and off like a tap, but I say three things in response.

First, precisely the same result may arise under a system of prior judicial authorisation, for such a system, like its equivalents in other areas of investigatory powers, will inevitably involve an urgency procedure: deploy first, seek authorisation later.

Secondly, there is an existing precedent for real-time notification—the deployment of undercover police under the so-called relevant sources order of 2013, which, judging from IPCO's annual reports, works well. The knowledge that a CCA will go straight before a senior judge is a useful discipline for authorising officers. My experience of IPCO, and my own work until last year as Investigatory Powers Commissioner in the Channel Islands, is that the prospect of an interrogation, investigation, recommendations and a possible serious error report are, from the police's point of view, striking enough to encourage a high standard of conduct, but not so intimidating as to encourage the concealment of honest error. Further assurance would be given by Amendment 34 in the name of the noble and learned Lord, Lord Thomas of Cwmgiedd, which I will leave him to develop but which I support for making this explicit in the modern practice of undercover policing.

Thirdly, though the precise mechanism may still be in dispute, it is clear that neither RIPA nor this Bill provides for complete immunity from prosecution for those who authorise criminal conduct. I mentioned earlier the assurance of the Bill team, which the Minister repeated just now, that nothing in the statute prevents the prosecution of an authorising officer for misconduct in public office—for example, a corruptly obtained authorisation. She has also accepted that such immunity as provided by Section 27 of RIPA will be removed if an authorisation is found by a competent civil or criminal court to be either not necessary or not proportionate.

I propose to move these amendments on Wednesday, subject to one point on Amendment 37, the Scottish one. The Minister updated us on engagement with the Scottish Government during the first grouping. Were

[LORD ANDERSON OF IPSWICH]
the Scottish Government to indicate before Wednesday's debate that they would not recommend a legislative consent Motion, with the result that Scotland is carved out of the Bill, I would not wish to move Amendment 37.

Lord Rosser (Lab) [V]: Amendments 5 and 23, tabled by my noble friend Lord Dubs, provide for prior judicial oversight. They have the Opposition's support. A criminal conduct authorisation would not have effect until approved by a judicial commissioner, unless it was urgent, in which case it would come into effect immediately but with the proviso that it must receive judicial approval within 48 hours.

Amendment 17 provides that, where a criminal conduct authorisation is granted, the Investigatory Powers Commissioner must be notified of certain details, including the purpose and extent of the deployment, before the CHIS can be deployed. In urgent cases, notification can be given afterwards—as soon as reasonably possible, but within seven days. We will support Amendment 17 in the names of the noble Lord, Lord Paddick, and the noble Baroness, Lady Hamwee. It provides a further form of prior oversight to help ensure that the criminal conduct authorisation will not be used in an inappropriate manner.

We support Amendment 33 in the lead name of the noble Lord, Lord Anderson of Ipswich, which provides that the Investigatory Powers Commissioner must be informed of an authorisation as soon as reasonably practicable, and within seven days at the latest. It also represents a significant improvement in the Bill, in which the noble Lord, Lord Anderson, has played a key role. It enables an effective and powerful independent and impartial check on the use of criminal conduct authorisations, which will help to ensure that the bodies being given the power to authorise criminal conduct by covert human intelligence sources use that power appropriately and lawfully, in the knowledge that they will be held to account, albeit probably afterwards, by the Investigatory Powers Commissioner.

Amendment 34 would make it explicit in the Bill that, if the Investigatory Powers Commissioner thinks an authorisation should not have been granted, the authorisation will be cancelled. We support that. However, there are benefits from prior independent oversight that post-notification oversight does not provide: namely, the opportunity to prevent something out of order occurring before it happens. Prior judicial consideration is about approving or otherwise beforehand what is said needs to happen, and why. Post authorisation, it is about what actually happened and why. Both forms of consideration are important.

The absence of prior independent scrutiny for criminal conduct authorisations under this Bill is not in line with procedures that apply to other investigatory functions, although I appreciate that it has been argued that these investigatory functions are not similar to the authorisation of a CCA. Police search warrants require a magistrate to be satisfied that there are objective reasonable grounds for them. Targeted interception of communications or phone tapping must be approved by the Secretary of State and authorised by a judicial commissioner before being carried out—a double lock which the Investigatory Powers Commissioner says ensures that all investigatory powers warrants issued are necessary, proportionate and lawful. The power to require telecommunications operators to retain communication data for investigatory purposes can be used by the Secretary of State but must be approved by a judicial commissioner.

If these requirements for prior judicial approval, including in some instances a double lock of independent scrutiny, are needed for search warrants, phone tapping and retention of data, surely they are even more necessary for the potentially more damaging human rights violations, including physical violence, that could arise from the authorisation of criminal conduct by a covert human intelligence source.

6.15 pm

As my noble friend Lord Dubs said, European Court of Human Rights case law indicates that where public authorities are granted exceptional powers with the potential for affecting human rights, which would include criminal conduct authorisations, protection against inappropriate use of those powers is best provided by prior independent scrutiny by a judge. That can help to ensure that the bounds of necessity are not exceeded. As we already know, the risk of inappropriate use of powers, with potentially harmful and unacceptable consequences, is not simply a figment of someone's imagination.

There is therefore a strong case for the amendment moved by my noble friend Lord Dubs, which requires prior judicial approval of a criminal conduct authorisation. It provides a recognised independent and impartial source as the final key part of the approval process. It helps to ensure that there can be full confidence in the procedure and its ability to ensure that a criminal conduct authorisation is necessary and proportionate and does not stray into areas which the Government have said would be excluded from such authorisations, such as legitimate trade union activity. Such prior judicial approval would also provide a strong safeguard against unreasonable authorisations being granted and a check against a CHIS subsequently finding out that their criminal conduct was not covered by a valid criminal conduct authorisation.

Under the JCHR amendment of my noble friend Lord Dubs, the prior oversight would be undertaken by judicial commissioners who support the Investigatory Powers Commissioner. Such judicial commissioners would not be unaware of the issues surrounding the use of covert human intelligence sources; they would be in a position to judge whether the information they were being given about the need for and use of a criminal conduct authorisation added up and met the criteria for such an authorisation. These would also be among the issues the Investigatory Powers Commissioner would need to consider in looking at such authorisations after the event. It would not be spreading information about the activities of covert human intelligence sources across a wider field.

The amendments we are supporting provide for effective pre-judicial and post-judicial scrutiny of criminal conduct authorisations while still enabling such authorisations to be given when the degree of urgency precludes prior judicial authorisation. In so doing, the

amendments provide the balance between the need for flexibility over the procedure for giving authorisations and the importance of prior judicial authorisation to minimise the prospect—in what is otherwise self-authorisation by an agency or other body—of a potentially ill-judged or incorrect authorisation of criminal conduct by a covert human intelligence source, with all the consequences that might have.

Lord Paddick (LD) [V]: My Lords, it is again a pleasure to follow the noble Lord, Lord Rosser. We agree with the arguments he put forward for the need for additional safeguards, beyond what is contained in the Bill. My noble friend Lady Hamwee and I have Amendments 17 and 43 in this group.

Amendment 43 provides for a senior judge to undertake a review of the use of informants and agents and their participation in crime; in other words, to get answers to the questions, "Why do we need this Bill?" and "How far should it go?", questions the Government have been unable to provide any evidence for. Contrary to what the Minister claimed in Committee, this review would not duplicate the oversight that the Investigatory Powers Commissioner provides in his annual review of the current use of the powers under the Regulation of Investigatory Powers Act. Instead, it would answer the questions we have been asking at every stage of this Bill that the Government have been unable to answer.

How widespread is the practice of using agents or informants who have been tasked to participate in crime? Who has been involved? Have they been brave men and women whose sole motivation is the public interest, or have they been people who lack civil responsibility, who do it for money and who have been engaged in very questionable activity—or is it both? The evidence we have heard on this point, arguably from equally reliable sources, has apparently been contradictory. To what extent has immunity from prosecution been a factor in the loss of intelligence and in potential covert human intelligence sources being deterred from helping public authorities? The Government have been unable to tell us, but this review would be able to answer the question—fundamental to the provisions of this Bill—of whether they are all needed. It would also answer the other crucial question: are the safeguards adequate?

That brings me to our Amendment 17. We have heard from Members of your Lordships' House who have had hands-on, practical, operational experience of the issues covered by the Bill, of whom I am only one. I hesitate to use the word "expert" after I was once described as an expert on drugs—a rather dubious accolade—so I shall use the term "practitioners". What we have heard from practitioners are the operational difficulties of prior judicial or ministerial authorisation. Practitioners have highlighted the differences between the existing provisions of the Regulation of Investigatory Powers Act—which relate to the interception of communications—and the new provisions, which relate to the use of covert human intelligence sources tasked to commit crime; I will refer to them as "participating informants".

The former usually involve the use of technology, such as the planting of a listening device or corrupting the software of a mobile telephone or a computer. The stream of information can be turned on and off remotely, without the target even knowing. The latter involves placing someone in an uncontrolled, unpredictable, often volatile situation, where the participating informant often interacts with dangerous criminals and often must use their own initiative to deal with rapidly changing and unpredicted scenarios with no real-time contact with their handlers or authorising officers. The former is passive and controllable intrusion. The latter is interactive and often uncontrollable.

The noble Lord, Lord Anderson of Ipswich, told us in Committee that he had been

"converted to the idea of prior judicial approval"

in the case of communications interception—as he has just restated—but that, again, tasking a CHIS

"requires decisions of a quite different nature based on immersion in the human complexities of fast-changing situations. Those decisions depend on close personal knowledge of a person's character, which will often be unreliable and volatile, and on assessments of the underworld group in which that person is embedded. The authorisation of criminality is simply one part of that complex human relationship."

The noble Lord also said that judges were good at assessing

"the likely operational dividend against the likely intrusive effects".—[*Official Report*, 24/11/20; col. 198.]

Our Amendment 17 is the result of listening to practitioners—and to those like the noble Lord, Lord Anderson of Ipswich, who has experience of being an Investigatory Powers Commissioner—and coming up with a compromise. The amendment allows the practitioners to do what they are good at: use the close personal knowledge of the participating informant's character, assess the underworld group in which that person is to be embedded and define the crimes that the participating informant is to be authorised to commit.

However, once the informant has been granted a criminal conduct authority by the authorising officer, that now participating informant cannot be used or deployed unless the Investigatory Powers Commissioner has authorised use or deployment. The Investigatory Powers Commissioner must consider the purpose and extent of the deployment and the type of criminality, in general terms, that it is anticipated the informant will be participating in. If the informant is not to be used to commit crime, IPC authority is not required. It is only once the informant is authorised to commit crime that IPC authority is needed.

If I may use this analogy, if you want to deploy a missile, you need one level of authority—in this case, the authorising officer. If you want to arm the missile with a warhead, you need another level of authority—in this case, the Investigatory Powers Commissioner. If the purpose or extent of the deployment changes, or the type of criminal activity in general terms changes, the IPC has to re-authorise the use of the participating informant. Contrary to what some critics have said, it would not be the case that, once given, IPC authority would give the authorising public authority carte blanche to use the participating informant at will.

The amendment allows judges, the Investigatory Powers Commissioner and his judicial commissioners, who must hold or have held high judicial office, to do what they are good at: consider the likely operational dividend against the likely intrusive effects, including

[LORD PADDICK]
the potential for collateral damage or injury. If it is necessary to deploy the participating informant urgently, prior approval is not required but notification must be given as soon as reasonably practicable and, in any event, not less than seven days after deployment.

Our amendment attempts to square the circle. How can you have prior judicial authorisation without getting the Investigatory Powers Commissioner involved in the sordid details of participating informants but at the same time safeguarding against the kind of malpractice we have seen in the past, such as that described by the noble Lord, Lord Hain: infiltrating anti-apartheid groups, the Lawrence family support group, legitimate environmental groups and trade unions?

I believe that Amendment 17 provides prior authority by the Investigatory Powers Commissioner in a way that would be more practical in an operational setting. Amendments 22 and 33 lack the power to stop a CCA without Amendment 34; in any event, they do not amount to prior judicial authorisation, which is what many noble Lords have been calling for. As Amendment 17 authorises the deployment once the CCA has been granted, and not the criminal conduct authority itself, I believe that it is consistent with Amendments 5 and 16—that these amendments, if passed, would not pre-empt Amendment 17, which would also not pre-empt any other amendments in this group.

In Committee, the Minister said:

"We have been consistently clear that we want this important legislation to command the confidence of Parliament and the public and are thus willing to consider proposals which provide greater reassurance on oversight but do not impact operational effectiveness."—[*Official Report*, 1/12/20; col. 651.]

As a former police officer, I can say that this amendment fits the Bill. I intend to test the opinion of the House when we get to Amendment 17.

6.30 pm

Lord Thomas of Cwmgiedd (CB) [V]: My Lords, I do not wish to address at any length the various competing amendments that are being suggested. Speaking for myself, I believe that pre-authorisation in one of the forms suggested is the obvious way forward. I have absolute confidence in the ability of the judicial commissioners to assess and make a judgment and, although I have much sympathy with the view that things are better now than they were in the past, we simply cannot ignore past experience, as we are constantly reminded.

As my second choice, I would go for real-time notification. I tabled Amendment 34—this is the subject on which I wish to speak—to clarify the position as to what happens if, after notification, the judicial commissioner expresses the view, or says, "This should not have happened." It is clear from the way the Bill is drafted that, as the term "notification" is used, everything that is done prior to any decision by the judicial commissioner would remain authorised. The amendment proceeds on that basis and seeks to make that clear. However, what then happens if the judicial commissioner says, "Well, this should not have been granted"? It is very important when we try to clarify the law and put it on a statutory basis that we do not engage in a fudge. The word "notification" is used deliberately to provide for notification, but it simply does not say what happens when the commissioner makes a decision. This amendment makes it very clear that, if the judicial commissioner says that this should not have been authorised, then, subject to unwinding under a degree of judicial supervision, the activity must stop.

I have had very helpful discussions. I pay tribute to the Minister for organising this and to the officials who have been clear in some of their views. However, it has been explained to me that, in these circumstances, it is thought that, if the activity has not started, it would stop; but if it has started, it must be for the authorising officer to consider what to do. This is plainly not good enough. First, the judicial commissioner is not giving advice but making a determination; although not they are not sitting as a judge, it is as close to a judicial decision as you can get. Secondly, if the judicial commissioner says that this should not have been granted, can the authorising officer say that he is acting lawfully by going on with the activity? Thirdly, in those circumstances, is the officer at risk of committing the offence of misconduct in public office? It would be extraordinarily difficult to see how he could continue. What happens during the process of a criminal trial if a person continues in such circumstances? Does all this have to be disclosed?

Worst of all, what is to happen when the Investigatory Powers Commissioner publishes in his report that he said, "This should not have been granted" but the police or security services went on with it? As I understand it, the justification for opposing this, or saying that it is unnecessary, is, first, that the judicial commissioner is not making a decision but merely giving advice. With respect, that is pure sophistry. Secondly, it is said that you cannot have unwinding under judicial control as judges are not experienced in this sort of matter. I ask those who have doubts about the ability of judges to protect people to read the decision to which I was a party in a case called WV in 2011. In respect of a person who provided very valuable information to the police, the judiciary had to act to protect the person concerned, but in circumstances where in no way could that person be identified.

Therefore, it seems that the question of this amendment is straightforward. If a police officer or a member of the security services who has granted authorisation continues and does not accede to the judge's decision, this says that we are a country that does not abide by the rule of law. In my respectful submission, it would be very difficult to see how this could be judged internally and it would do our security services great damage if it related to something overseas.

However, as this last remark shows, what I fear for in this is the damage that continuing with activity if the judicial commissioner says no will do to the security services. If the Minister opposes this amendment, I would ask her to set out what is to happen; we cannot leave this point undealt with. If it is possible, I ask her to deal with three of the main scenarios. If no activity has happened, surely the activity must not proceed. If activity has started, it must be stopped and unwound. I would hope for an assurance that, once the views of the judicial commissioner have been expressed, the activity would not go on.

This amendment seeks to deal with a subject that may be uncomfortable for people to face up to: that you have an authorising officer who says, "Yes, I think this is all right" and then a judge says, "No, it wasn't." We need clarity. When you think about this question, it shows the dangers of not having pre-judicial authorisation in a system. I suspect what will happen—this is why it is a great pity that we have not been able to go into this in much more detail with examples of what actually happens—is that once a judge says, "This should not have been granted" we will probably gradually move to a system of pre-authorisation.

Baroness Massey of Darwen (Lab) [V]: My Lords, I very much enjoyed the previous speech, which gave me much information about a great number of things. I thank the noble and learned Lord, Lord Thomas.

My noble friend Lord Dubs has set out the parameters of Amendments 5 and 23 and my noble friend Lord Rosser has made incisive comments on them. I will add just a few comments in support of my noble friend's arguments. Basically, the issues in the amendments are covered in Chapter 7 of the Joint Committee on Human Rights report on CHIS, entitled "Adequacy of oversight mechanisms"—surely absolutely essential. The Joint Committee had several concerns about this part of the Bill.

First, the Bill does not suggest any independent scrutiny of criminal conduct authorisations before they are made and acted upon. Secondly, the process of granting CCAs will be kept under review by the Investigatory Powers Commissioner in the oversight of CCAs after the event. He or she will not be informed of the authorisations at the time they are made, so how can prompt scrutiny take place? It is worth repeating those points, which were made by my noble friend Lord Dubs.

The Joint Committee on Human Rights report quotes Sir Desmond de Silva's report on the death of Patrick Finucane. He accepts as legitimate the running of agents within terrorist groups as at the heart of tackling terrorism but says that the

"agent-running must be carried out within a rigorous framework. The system itself must be so structured as to ensure adequate oversight and accountability."

Those conclusions are consistent w\ith the requirements of human rights law. There must be effective safeguards against abuse. The question is: does the Bill provide that rigorous framework of oversight and accountability? The amendments query that. In its submission to the JCHR, the law reform and human rights organisation Justice said that the Bill is

"extremely limited in its oversight mechanisms"

and that its safeguards were "woefully inadequate".

The draft code of practice published with the Bill describes how the CCA practice will operate. Only a designated officer within a public authority may make a CCA, and this must be made in writing unless urgent.

Oversight of the Investigatory Powers Commissioner —who must be a senior judicial figure, of course— applies to CCAs. The IPC has the powers to conduct investigations, inspections and audits, but these are oversight functions only. The IPC does not have the capacity to investigate every time a CCA is used. The IPC role is restricted to covering the use of the power to grant CCAs in the annual report to the Prime Minister. This can be redacted before going before Parliament.

Reprieve has said:

"Once more, the oversight powers in this Bill are far weaker than those operated by the UK's intelligence partners. The FBI has repeatedly released details of the number of crimes committed by its agents as part of efforts to increase transparency over the use of this power."

There is currently a lack of prior independent scrutiny or approval for CCAs, as described in the report of the Joint Committee on Human Rights. This contrasts with, for example, police search warrants and phone tapping.

The Bill requires amendment—and these amendments in particular—to remedy this lack of prior judicial approval for CCAs, with provision for urgent cases, and I strongly support Amendments 5 and 23.

Lord Cormack (Con) [V]: My Lords, for the second time today, I have the great pleasure of following the noble Baroness, Lady Massey of Darwen, and I am delighted to do so.

There seems to be a degree of consensus among those who have spoken so far. We all believe that oversight at a high level is essential. I have signed the lead amendment of the noble Lord, Lord Dubs, and I meant to sign Amendment 23, but something went wrong—it certainly must have been my fault—and his amendments offer one route forward. I have joined forces with my friend, the noble Lord, Lord Hain, the noble Lord, Lord Blunkett, and my noble friend Lady Wheatcroft to offer an alternative: the Secretary of State. I do not have terribly strong feelings as to whether the oversight should be judicial or conducted by the Secretary of State, but they could be complementary—they are not incompatible—and the excellent amendments of the noble Lord, Lord Anderson, are certainly not incompatible with Amendments 5 and 23, as the noble Lord, Lord Rosser, pointed out, having signed all three himself. When we are dealing with matters of life, death and the country's security, we do not want what the noble and learned Lord, Lord Thomas, fears—fudge rather than clarity, as he advocated with particular clarity.

I have a suggestion, and I hope that my noble friend the Minister will take it seriously. She has been very kind in making officials available to many of us. I have much enjoyed the discussions I have had, which have mostly focused on young people being used as CHIS; we will come to that later in our debate. She has been very helpful, as the noble Lord, Lord Dubs, said. I would like her to talk personally to the noble Lords, Lord Anderson and Lord Dubs, probably on one of these ghastly Zoom calls where they can all talk together. The noble and learned Lord, Lord Thomas, and the noble Lord, Lord Hain, should also certainly be included. I would like to come out of this an amendment which the Minister can table and introduce at Third Reading, incorporating the best features of all the amendments before us this evening.

Oversight at a high level is essential to create public and parliamentary confidence. Whether that high level is judicial or the Secretary of State, I have a

[LORD CORMACK]
reasonably open mind, but it is important that we try to reach a consensus, so that the Bill commands parliamentary and public confidence and we do not have the sort of fudge the noble and learned Lord, Lord Thomas, feared but, instead, the clarity he so brilliantly advocated.

6.45 pm

Lord Blunkett (Lab) [V]: My Lords, I support my noble friend Lord Hain in his admirable description of what has happened historically and what we need to avoid in the future. Our previous debate was cracked before Christmas because we had a break and started again on another day. I shall try to be brief because I hope that will not happen this evening and that we can move forward with some form of consensus.

In commending the admirable speech of my noble friend Lord Hain, I have to say that we are getting ourselves in a real muddle. Having sat through the earlier debate on the previous group on the very reason why this Bill is necessary, I feel incredibly sorry for the Minister. Not only does she have three major Bills on her hands and all the other day-to-day questions and activity, but she must scratch her head about why something that was taking place without the framework we are trying to develop is now being criticised when a framework is being put in place.

I have a great deal of sympathy with her, and I am grateful that she was prepared to talk to my noble friend Lord Hain and me about this. I was also grateful to the Met, the counterterrorism branch and the security services for the discussion I had with them, refreshing my memory—as the noble Lord, Lord Anderson, has—about what has taken place over the years since I was Home Secretary and the improvements that have been put in place, including the order passed in 2013 that the noble Lord referred to. I think it was Statutory Instrument 2788.

The other part of the muddle seems to be this: the noble Lord, Lord Anderson, is right, in my view, to say that it is probably not appropriate for a judge to make the pre-review, and therefore the authorisation of criminal activity. I too think it is not appropriate, not for the reasons he gave, but because I do not think that judges should authorise criminal conduct and criminal activity. They are then in an entirely different role to the one they were trained to undertake and have our confidence in carrying through independently. That is why the Minister is almost certain to agree to Amendment 33—spoken to by the noble Lord, Lord Anderson, today and in its previous iteration before Christmas—to make some progress. I say to the noble Lord, Lord Cormack, with whom I often agree, that I think there has been some move behind the scenes and that we will see that carried through on Wednesday.

I can understand the concerns of those operating in the field that we should distinguish between, for instance, those taken on as what used to be called "snouts" or informers and placing someone, as a police officer, in a situation of potential criminal conduct, which is very different. I understand that very well. At a higher level, it is really important to see the implications of placing an officer in those situations, which might have a major knock-on effect in terms of the reputation of the Government, never mind the policing and security services.

In those circumstances, it would be appropriate for the Secretary of State to authorise the clearance prior to the activity beginning, as happens with phone taps and surveillance. In those circumstances, while this amendment is much tighter than the previous one that I, my noble friend Lord Hain, and others signed, it is desirable to have that level of authorisation for very specific placements of trained officers while giving greater flexibility to what the noble Lord, Lord Paddick, has talked about and must have experienced on a day-to-day basis when he operated in the police service.

This is so complicated because these elements do not sit easily with each other. It is not easy to sort out what would be the most appropriate way forward. I simply ask the Minister to consider whether a higher level of authorisation is required for very specific activities where an officer, whether in the police or security services, is placed in circumstances and situations that could lead to considerable reverberations down the line, taking into account the strictures made on human rights and, of course, our duty of care.

I am not sure that I feel comfortable with the amendment moved and supported by my own side, and I will finish on this. There is a wonderful feeling at the moment that politicians are not appropriate for, or capable of dealing with, high-level situations, even though they have been elevated to the highest possible level. I understand that, particularly at the moment, but I cannot for the life of me understand why my own party is so taken with giving the judiciary roles that are not about judgments of criminality or even carrying out reviews, both of which judges are perfectly capable of because that is their role. What is this love of the belief that we should hollow out the state, as we call it in the academic world, so that politicians are seen as incapable of making decisions and taking responsibility for them, but judges are not? I worry about this, because we are getting ourselves into a terrible mess, where eventually politicians will dance to the tune of Covid but very little else.

Baroness Wheatcroft (CB) [V]: My Lords, it is a pleasure to follow the noble Lord, Lord Blunkett, who speaks with deep personal experience and authority. I listened to the passionate debate on the previous group of amendments, and now on this group. The noble Lord, Lord Dubs, made his case for Amendment 5 in his usual persuasive manner, but I favour a slightly different approach, not least for the reasons outlined by the noble Lord, Lord Blunkett. Hence I will speak to Amendment 16, as introduced so effectively by the noble Lord, Lord Hain, and supported by the noble Lord, Lord Cormack.

If the state is to grant advance pardon to individuals to commit serious breaches of the law, this should not be a common occurrence, and it is a decision that should be taken at the highest level. To my mind, that should be at the level of government. I accept that there might be occasions when, for matters of national security, criminal acts will need to be committed, but I have not been convinced of the need for change in the

status quo regarding the way these authorisations are given. However, as the charity Justice says, it is inconceivable that the Government should not be accountable for serious criminal offences committed with their approval—but if that approval is delegated to officials, who will be accountable?

I have many qualms about this legislation. As many have remarked, the Government have repeatedly failed to make a convincing case as to why such a drastic abandoning of moral norms should be sanctioned. They have certainly failed to provide convincing arguments as to why such a broad set of agencies should need access to criminal conduct authorisation. What undercover activity does the Food Standards Agency, for instance, envisage having need of? However, while I am not comfortable with aspects of the legislation, I have no doubt of the Government's determination to press ahead with it. It is therefore down to this House to try to make it more palatable.

As ever, the Government are keen to embrace anything that will show contempt for the European Court of Human Rights, and this obviously presents an opportunity to do that. But it is imperative that we try to stop these powers being used with impunity—and how better than by making government directly accountable? It would clearly be wrong for officials to have the power to grant immunity from prosecution to undercover agents on the basis of what they perceive as necessity without external authorisation.

The noble Lord, Lord Dubs, believes that the judiciary could provide that authorisation; the noble Lord, Lord Blunkett, pointed out the flaws in that. I would prefer it to be the Government: the shift in responsibility from Ministers to officials has become a worrying trend. It seems that senior officials are deemed dispensable these days, but Ministers are not; ministerial resignations are now very rare, although I am sure that most of us have a little list of those that we feel are long overdue. The issuing of these orders is a very serious decision, with potentially enormous effects; it would surely be appropriate for a Minister to take ultimate responsibility.

The Deputy Speaker (Lord Lexden) (Con): My Lords, the name of the noble Lord, Lord Rosser, appears next on the list by mistake—he has already spoken—so I call the noble Lord, Lord Butler of Brockwell.

Lord Butler of Brockwell (CB) [V]: My Lords, in supporting the new clause in Amendment 33 and its consequentials, I am riding pillion to my noble friend Lord Anderson of Ipswich. When I heard his speech at Second Reading, I immediately felt that his approach struck the most practical balance in controlling the activities of intelligence agencies embedded in groups carrying out criminal activities. Following the noble Baroness, Lady Wheatcroft, I rather suspect that the scale of this is both at a lower level and in a larger quantity than previous speeches have suggested. One has to see the practicality of that in those terms.

My experience, both when I was in government and when I was on the Intelligence and Security Committee of Parliament, leads me to believe that control of these operations requires three things. First, it requires better precision than there has been so far in the definition of how far agents can be authorised to go in participation in criminal activities. That is fair to them, and it is fair to the authorities. Ever since the case of Brian Nelson, the Northern Irish loyalist informer, to which I referred in Committee, I have felt that it is unsatisfactory that judgments on these matters should be left open and to the discretion of prosecuting authorities after the event, although I have no doubt that the decision to prosecute Nelson—indeed, he confessed—was correct.

Secondly, there is a need for close contact and immediacy in the control exercised. These situations in which covert intelligence agents are involved are often fast-moving. Communication between agent and controller may need to be rapid, and control needs to be agile. I do not believe that that can practicably be provided by a judge or a Secretary of State.

Thirdly, independent oversight is needed in as close to real time as possible. Controllers cannot be the judge and jury in these matters—certainly not the sole judge and jury—since there is an obvious temptation to cross lines in the interests of achieving what are often laudable objectives. I am persuaded that oversight is likely to be best achieved by giving the independent Investigatory Powers Commissioner a more active and immediate role. It seems to me that the provision proposed by my noble friend in the proposed new clause achieves these objectives in a practical way, and I am glad to hear that the Minister is inclined to agree that this is a fair and effective way forward.

The Liberal Democrats' Amendment 17 takes a similar approach and, to that extent, I am sympathetic to it, but I am sceptical about whether the requirement for "prior approval" by the Investigatory Powers Commissioner, even with a get-out clause in circumstances of urgency, would meet the requirement for operational agility—so I will stick with my support for my noble friend's amendment.

7 pm

Lord Mackay of Clashfern (Con) [V]: My Lords, it is a great relief to follow the noble Lord, Lord Butler of Brockwell, because I entirely agree with him. Agility, competence and experience in looking at a matter such as this are important. The commissioner has just that, being very flexible and close to the situation.

I have had difficulty in following some of this debate, as well as that on earlier amendments. I cannot believe that it is in accordance with the rule of law that Governments and their officials should ask people to commit crimes. That seems the very reverse of the rule of law, which says that you should not commit crimes and you should do what the law tells you to do as a general and universal rule. This Bill sets out a framework under which certain kinds of necessary activity in relation to the subject matter are defined in respect of day-to-day requirements, so that when the act is performed it is no longer a crime and therefore it is perfectly reasonable for the handler to ask the person in question, the participant, to do it. If it was kept as a crime, it would be breaking the rule of law.

I agree with the view that those initially responsible for activating this procedure need to be trained and experienced, and I have seen evidence that that is so. What I find difficult to be sure of is the exact level at which some help and advice should be given. I am

[Lord Mackay of Clashfern]
confident that the Investigatory Powers Commissioner is qualified to give a view on the propriety of a particular course of action and whether it should be regarded as a crime.

As was said earlier, those who defend us when we are in the Palace of Westminster have to take serious decisions very quickly against an existing background of law. The problem in this context is that there is no particular background of law except that the actual doing of the thing is a crime at the present time. I do not agree with the view that that is a satisfactory system which should remain, but it is right that, so far as is possible, prescription of what can be done in regard to a matter of this kind should be available to the participant in advance, with as high judicial or legal authority as is appropriate in the circumstances; namely, that time may be of the essence and therefore it may be urgent to obtain advice. I agree with the view that this is best done by the commissioner.

I agree with the amendment tabled by the noble and learned Lord, Lord Thomas, if it is necessary. I have the feeling that the investigation commissioner has authority to deal with an objection of this kind in terms of the 2016 Act. I do not feel sufficiently confident to contradict the noble and learned Lord, Lord Thomas, on the need for this amendment, but I would be glad to know what the position is on the powers the commissioner has to deal with this matter.

Baroness Chakrabarti (Lab) [V]: My Lords, I can be brief on this, currying some favour, I hope, with the Government Whip that will be taken on board when I speak in a later group to my own amendments once more. It is a great privilege to follow the noble and learned Lord, Lord Mackay of Clashfern. Your Lordships heard it from him: when is a crime not a crime—when it has been pre-authorised with immunity attached in advance? That would be a difficult thing to explain to most members of public. However, it is not so difficult, perhaps, when you compare it with intrusions into our privacy, which is where this model comes from.

The complexities of this debate just make me sadder about where we got to in the previous one. We now have to decide about safeguards, because your Lordships have potentially created a breath-taking immunity. Under existing surveillance law, there are different models: it takes a magistrate to authorise an intrusive search of your premises; it takes a Minister to authorise the tapping of your telephone; yet inserting an undercover agent—more intrusive than either of those two measures, because a human will change your behaviour, not just monitor it—is internally authorised. Now, we have gone further, and a crime can be committed, authorised by the Executive, authorised by the police for their agents, authorised by the intelligence services for their agents, and so on.

Clutching at straws for safeguards, I have to support some kind of external authorisation at the very least. If it is good enough for search warrants and telephone taps, it must be even more necessary when criminal conduct, including violent conduct, might be authorised. As for which model, I have heard the arguments either way, and I tend to think political warrantry of something so politically dangerous is problematic, and it has proved so in the past. Former Government Ministers have written in their memoirs about how tired they were when, late at night, they were making endless intrusive surveillance authorisations. It is not about hollowing out the state; it is about trying to insert independence into the realm of criminal law. I admire the thrust of the eloquent speech of the noble Baroness, Lady Wheatcroft: if Government are to do such a thing, they should take some responsibility, not just for legislation but for authorisations.

We heard from the noble Lord, Lord Butler, with his enormous experience, his prediction that there will be some low-level warrants here and a very large number of them. This would present a real problem if it was political warrantry, because Secretaries of State have a lot to do, and there are going to be a lot more warrants under this legislation than those limited to, for example, the security services.

These are all imperfect checks and balances but, on balance, at the moment I prefer judicial authorisation, even though that will, in my view, bring dangers for the judiciary. Post-notification authorisation is a very weak protection but, if it is to happen, I agree completely with the noble and learned Lord, Lord Thomas of Cwmgiedd, that Amendment 33 without Amendment 34 is pretty much a nonsense.

Lord West of Spithead (Lab) [V]: My Lords, it is a pleasure to follow the noble Baroness, Lady Chakrabarti. She kept me well aware of civil liberties for three years when I was the Minister with responsibility for security, counterterrorism and cybersecurity, and she did it with complete purity of purpose. I do not think that anyone should have a go at her for anything other than that, so it is a pleasure to follow her.

An awful lot has been said already and time is running short. I am strongly supportive of judicial oversight of these powers. Looking at the package of amendments before us, Amendment 33 appears to be a balanced and practical proposal, and I rather like it. However, the noble and learned Lord, Lord Mackay of Clashfern, has convinced me that, in a sense, it has to be looked at in conjunction with Amendment 34, in the name of the noble and learned Lord, Lord Thomas, because the two sit well together. The Minister needs to look at them, as together they would achieve what we want in this very sensitive area.

On Amendment 16, I have considerable sympathy with having a Minister involved, but there is an issue with how many things one has to sign. I found that, when I was a Minister, I had all the dross and had to pass the really meaty bits up to the Home Secretary, who seemed to think that she was rather overloaded anyway—and that was after I had taken a hell of a lot of the weight away. So there is an issue there.

We also need to look at the wording of that amendment very carefully. Saying that one of these people is "employed" is quite specific and tricky. Similarly, the wording of Amendment 23 is slightly unclear, and we need to be careful. However, the amendment that I really like is Amendment 33, probably in conjunction with Amendment 34.

Lord Rooker (Lab) [V]: My Lords, it is an absolute pleasure to follow my noble friend Lord West of Spithead.

There are some amendments in this group that I object to, and I shall vote against them if they are pushed to a vote. I want to restrict my remarks to two amendments—Amendment 16 and Amendment 33 with its consequentials.

I am a bit confused about Amendment 16 in the same way as my noble friend Lord West has just alluded to. I have massive respect for my noble friends Lord Hain and Lord Blunkett. I operated as Minister of State for each of them for a year—at the Northern Ireland Office, under direct rule, and at the Home Office. In both cases, my role involved purely domestic policy—the only time I got close to anything remotely related to this was at the Northern Ireland Office on two of the 13 duty weekends that I did in a year.

However, as I made clear in Committee, I simply do not agree that the Secretaries of State should be involved in the issuing of authorisations. We are talking here about a level of detail and relationships with people—probably long term, in the case of many CHIS—that means it is just not possible, practical or, in my view, proper for Secretaries of State to be involved. I agree completely with the arguments put forward, both this time and the previous time, by the noble Lord, Lord Butler.

As for paragraph (b), which would require the CHIS to be an employee, as my noble friend Lord West has just referred to, I am at a slight loss to understand it. The Bill is not talking about undercover police officers who are employed as police officers, or undercover security officers employed by the security services. We are talking about a range of people with civilian occupations who are employed by other authorities—I will give some examples in a minute—or about common criminals, who are probably not employed by anyone. So I do not understand the idea that they have to be an employee of the authority. That simply cannot be done; it is a contradiction.

7.15 pm

The business case provided by the Minister, which was sent to everyone a few days ago, gives around 20 case studies. As far as I can tell from the careful language that they are written in, the vast majority of the CHIS examples in the case studies are employees of a company committing a crime.

In example 6, concerning the Competition and Markets Authority, the board of directors of a company had been complicit in a price-fixing cartel. It was the board of directors that decided that it was going to get out of that and comply fully with the law—and obviously in order to do that arrangements had to be made.

Two examples concern the Environment Agency. Example 7 involves a maintenance engineer who contacts Crimestoppers to say that their company is up to no good; he or she then becomes a CHIS. The other example is a fisherman, licensed to take a sustainable amount of endangered species, who has become unwittingly involved in criminal activity. Those are not employees of the issuing authority; they are ordinary citizens who have been pulled into criminal activity by the company that employs them, and they do not want to be part of it.

The noble Baroness, Lady Wheatcroft, mentioned food. Example 9 concerns the Food Standards Agency. One of the examples given here is of an employee, as you would expect, involved in a food business, who has seen something or been pulled into something that they know to be wrong, and so decides to make a phone call. It is crucial that that person then becomes a CHIS. It is a big business, involving billions of pounds. There is a lot of money to be made in mistreating meat and mislabelling it, and in selling one thing as something that it is not.

You are not going to get employees of local government or the FSA being sent to companies, because they will not know; they are operating on intelligence and on whistleblowing. It is completely impractical, as far as Amendment 16 is concerned, that they be employees of the authority. In that respect, I just do not understand it. It is only outsiders who have the information, and they will not be employees of the authority.

I fully accept that there are consequentials. If I heard the noble Lord, Lord Anderson, correctly, by the way, he wants to accept Amendment 34, so I think Amendments 33 and 34 are a package. I do not want to repeat my speech from Committee when I made the same points and emphasised the impracticality of some of the suggestions about prior judicial review. I am certainly prepared to support Amendment 33; it is the practical solution. We can legislate all we like about the principles and what we would like to see happen, but it is about practical operation and what will work. The Government would be very wise to accept it. From reading it and comparing it to the amendment in Committee, I can see that the parliamentary draftsmen have been involved.

I was very grateful to take up the Minister's offer of a phone conversation with some of the specialists in this area. I pointed out to them that they needed to give better practical examples from real life for us non-lawyers and those legislators not directly involved in this, so that there could be an understanding of the practicalities. In a way, that is what has happened with the case studies. Very few Peers have referred to the case studies, but I hope they will be studied.

There is one final thing I would like to knock on the head and that is the constant references to "any crime". I do not understand this. With some of what has been said, I have wished we had ordinary rules of debate because I would like to have intervened. Some of the things I have seen written by noble Lords are absolutely outrageous. The fact is that the notification of the authorisation of a covert human intelligence source must comply, unqualified, with the European Convention on Human Rights. That is the reality. It rules out any crime. The Bill does not allow the legalisation of any crime. For Peers, who are legislators and opinion formers, to say this—frankly, I do not understand it. It is deliberately misleading the public and others. I think they should stop it and go back and read the reality of what we have been provided with.

Lord Mann (Non-Afl) [V]: My Lords, I very much agree with the detail and the general sentiment in the excellent contribution of the noble Lord, Lord Rooker. The word "practical", which he used several times, is a vital word, to which I would add "mundane", which I think he used once, referring to the mundanity of many of the orders, and the potential volume of those mundane orders. I speak not as any legal expert, but as

[LORD MANN]
someone who was on the receiving end of precisely this. I was on the Economic League blacklist, undoubtedly because of the infiltration of the anti-apartheid movement by an agent of the state.

My concern is about the competence of the state. A book was written at the time by an extremist, a Stalinist and supporter of the Soviet Union called Denver Walker. The book is called *Quite Right, Mr Trotsky!* and it was released in the same year that I was having those problems. In it, he starts by saying that this could be Special Branch or MI5 in terms of what he is doing. He exposes every Trotskyist organisation in the country, naming names, citing examples and explaining ideology in minute detail. At the same time all the organisations he named, bar two, were infiltrated. That is now on the public record. The state was spending resources and putting a priority on infiltrating irrelevant, tiny organisations. The Revolutionary Communist Group, one of the two not infiltrated, is described in the book as being presumed by everyone on the ultra-left to be run by Special Branch. That is actually in his book.

Competence is critical. If we are trying to intervene in, for example, terrorist organisations or organised crime, competence is absolute and fundamental. Yet we have this history, in the 1970s and 1980s, of the most appalling incompetence. We had the targeting of irrelevant people, creating consequences for people who were on the side of the state in precisely the terms on which the state was infiltrating these organisations. What conclusions would I draw from that?

I draw the conclusion that the noble Lord, Lord Blunkett, whom I normally agree with, is fundamentally wrong to suggest that the judiciary has the wrong skill set for assessing and authorising such decisions in advance. I would say exactly the opposite. The judiciary has exactly the right skill set, not to know anything about extremist organisations or extremists but to hear and evaluate a coherent case—or an incoherent case, and turn that down if it is—when put forward by one of the agencies to or for which we are giving, clarifying or maintaining powers with the Bill.

If you are incapable, as intelligence services, the police or one of the other agencies, of putting a coherent case together for why you need authorisation, it would seem that the authorisation you need has a rather weak case. If that had happened in the 1970s and 1980s, a lot of that nonsense and wrong priorities would never have got past stage 1. They were based not even on a hunch, but on an irrelevance. If we are to have efficiency in getting into terrorist groups and organised crime, having a system that forces those who wish to do so to explain their rationale for what they plan to do, and why, and having someone able to assess whether that rationale is coherent, seems the right approach. The last people who should do it, therefore, are politicians.

The practicalities and mundanity are what we should be determining these decisions on. Of course there will be cases that are far from mundane in their application, but that does not mean that the same principles are not required in getting an agreement. It therefore seems to me that those amendments which push the Government in that direction should be welcomed by the Government, and those that do not should be rejected—not just by the Government, of course, but by the House.

Lord Carlile of Berriew (CB) [V]: My Lords, the interesting lesson from the noble Lord, Lord Mann, on the history of the left—it is a pleasure to follow him—has shown exactly why the Government are right to make a root-and-branch reform, and introduce a structure based on statute for the handling of covert human intelligence sources. We have heard a lot about what happened in the past, but an awful lot has changed since the 1970s, the 1980s and the 1990s. The major changes in this kind of policing started after 9/11, which was like a massive electric shock to the whole system of detecting various serious crimes, because of the arrival of large-scale terrorism on the streets of Europe and in many other countries. An awful lot has happened, too, since 9/11. The methodology has been sophisticated quite enormously, hence the large amount of legislation since the events of 9/11.

I listened with particular interest, because I agreed with what they said, to my noble friends Lord Anderson and Lord Butler and the noble and learned Lord, Lord Mackay. I am a great believer in the theory of Occam's razor, that entities should not be multiplied unnecessarily or, as it is sometimes put, "Keep it as simple as you can". To start with, this is an operational issue. In the decision to make someone a CHIS, there is usually a very long period of assessment, a decision by management in consultation with the proposed CHIS handler and sometimes, as I said in an earlier debate, some behavioural analysis. This is an operational matter.

7.30 pm

I hold my noble and learned friend Lord Thomas of Cwmgiedd in enormous regard, as I am sure he knows, but I fear that on this occasion I disagree with him, and I hope he will forgive me. Judges are not designed for, or trained, or experienced in the operational disciplines of running CHIS. The enormous and genuine skill of judges, which is very different, by the way, from the skills that they had in the 1970s, 1980s and 1990s, is to review and assess what has been done in the name of the state. The enormous development of judicial review, in which my noble and learned friend has played a distinguished part over the years, is a clear illustration of the role of judges in this kind of setting—to review the behaviour of public authorities. If we hand over the authorisation to the judges so that they make the operational decision, who is going to judge the judges? Contrary to Occam's razor, are we going to set up another entity, so that there will be a multiplication of the entities we already have?

It seems to me that the framework set out in Amendments 33, 34, 37, 44 and 46, to which I believe—we will hear later—the Minister is broadly sympathetic, provides the right structure. I am shocked that in this debate too, just as in the previous debate, until I raised it, the code of practice has not been mentioned. The code of practice makes it absolutely clear that arbitrary decisions cannot be made; if they are, that is a breach of duty and possibly misconduct in a public office.

Let us keep the structure straightforward, with the operational people properly ruled by a legally enforceable code making the operational decision, with the judiciary

carrying out its proper role in reviewing what has been done, and with the courts if necessary intervening at a later stage.

Baroness McIntosh of Pickering (Con) [V]: My Lords, I preface my remarks with a very straightforward point, by noting that judicial commissioners, appointed under the Investigatory Powers Act 2016, carry out a prior approval function in relation to other covert investigatory activities. While the function of judicial commissioners could be extended to cover the grant of CCAs, I understand why the noble Lords, Lord Anderson, Lord Rosser and Lord Butler, and my noble and learned friend Lord Mackay, who have proposed Amendment 33, have sought to bring in not pre-authorisation but notification in real time. Why is there a lesser test with regard to the powers under this Bill than there is that extend to other activities covered by prior judicial approval?

Having said that, I entirely endorse and support what the noble Lord, Lord Anderson of Ipswich, Lord Rosser and Lord Butler of Brockwell, and my noble and learned friend Lord Mackay of Clashfern have put forward in Amendment 33. The question that we seek to answer here is about what degree of oversight is required and the level of independence that that oversight should enjoy. I have come to the conclusion that it is better to have judicial oversight as envisaged in Amendment 33 than that to be exercised by a Secretary of State, for the multiple reasons given by many noble Lords who addressed the House earlier this evening.

I would like to see authorisations in real time being sought by such a notification as set out in Amendment 33. I entirely support and endorse the remarks made by the noble Lords, Lord Anderson of Ipswich and Lord Butler of Brockwell, and my noble and learned friend Lord Mackay of Clashfern. There would have to be a very good reason why the Government would not seek to introduce this, especially as, with all the provisions that have been set out in the debate, there should be no reduction in the ability to act swiftly, and therefore that flexibility will not be compromised.

There are very powerful arguments for Amendment 33 and the related amendments, although I am less supportive of Amendment 34 and others in this group. I hope that my noble friend will explain to what extent she can support Amendment 33 and related amendments put forward by its authors.

Lord Judd (Lab) [V]: My Lords, I want to make it perfectly plain that I totally disagree with the arguments put forward by the noble Lord, Lord Carlile of Berriew. Of course, a lot of skilled, professional, operational work has gone in to whatever is being planned. But part of that operational skill, which is professionally done, should be taking full account of what is challengeable under the rule of law. If there is nothing to fear on that front, then there is nothing to fear in terms of the proposal of the noble and learned Lord, Lord Thomas of Cwmgiedd.

If I were asked to pick one amendment from this group that had particularly cheered me, it would be that of the noble and learned Lord, Lord Thomas of Cwmgiedd; it seemed to me that he was bringing muscle to bear on the theory and operation of the rule of law. We can all talk about the rule of law, and it is nice to think that in a civilised society we have it, but how can it act in time? We all know what can happen in operations of this kind: so much momentum and impetus build up that one thing leads to another, and it becomes very difficult to reverse. I applaud the amendment tabled by the noble and learned Lord, Lord Thomas of Cwmgiedd.

My support has gone to Amendment 7, because the work that we are discussing should not become a matter of convenience in the operation of government. It has to be serious, and if we are making the rule of law essential to our concerns, it has to be dealing with serious crime.

I am also very glad to be associated with Amendment 17 on the relevance of the Investigatory Powers Commissioner. It may not be everybody's immediate cup of tea, but I am very glad to see Amendment 43, with its provisions for the review of authorisations over a period of time. In a democracy, we have to keep a political and active eye on what trend seems to be being established if there are trends, and what they might be.

The amendments in this group dealing with the rule of law and judicial approval, which is crucial, have all been encouraging. I cannot have more respect than I do for some of those who were involved in tabling Amendment 46, and I am sorry, because I respect them, but I hope that they have some time for my concern as a layman.

I am doubtful about the whole concept of special arrangements for the appointment of judicial commissioners in this way. How can we be cast-iron certain that this does not become open to manipulation by the Executive? Either people are judicial commissioners, or they are not. We should keep our minds very much on that principle. This is a terribly important group of amendments, and I wish most of them well.

Lord Morris of Aberavon (Lab) [V]: My Lords, I intervene briefly to support Amendments 5 and 16. The experience of so many noble Lords in this debate has been salutary. In Committee I expressed my views on the need for supervision of authorising conduct under the Bill prior to the event—I emphasise "prior"—preferably by judicial authority. I will not elaborate on what I have already said, save to repeat that from the highest level of the judiciary down, it has been my experience that there is always availability, 24 hours a day, seven days a week. I have never had to make an application in the course of advocation as counsel, but I have had to make emergency applications and judges have always been available. In my experience—limited as it was as a law officer not directly involved—I never had any anxiety that there were no judges available to take decisions.

The noble Lord, Lord Anderson of Ipswich, with his great experience, queried the use of the judiciary, as I understand his speech. I see no difficulty in the Lord Chief Justice selecting a number of High Court judges who, despite the views of the noble Lord, Lord Blunkett, would have had the necessary skills to adjudicate on these matters. They are probably

[Lord Morris of Aberavon]
unsurpassed in the range of decision that they must take: quite a few of them are life or death matters, which I will not elaborate on. Members of the judiciary from the highest to the lowest level must make difficult decisions well beyond their training and well beyond what they had thought that they might have to adjudicate on.

This has been a fascinating debate. At this hour I will not go on, save to say that authorising conduct of this kind is a very serious matter. Trying to square authorising breaches of the law with the rule of law is mind-boggling. I shall not attempt it. All I will say is that I support Amendments 5 and 16.

Lord Naseby (Con) [V]: My Lords, I speak briefly to a number of amendments. First, on Amendment 5, I do not believe whatever I have heard, even from my noble friend who spoke before me, that there is sufficient experience and competence on this kind of activity in a judicial world for a clear decision to be made. Therefore, I do not support having judicial approval.

7.45 pm

It is slightly different with a Secretary of State if the issue is clearly one of life or death, or major security. However, even then, as one or two colleagues have said, I am not at all sure that, when the Secretary of State at the time is rung up in the middle of the night on something as vital as this issue, they should have to make an immediate decision. I do see it as perfectly possible, as is suggested in Amendment 20, that the Secretary of State should be informed that something has happened so that he is at least kept in the loop.

I have a couple more points to make. In Amendment 23, proposed new paragraph (4) seems hugely restrictive, while paragraph (5) is no more than double-guessing and should be rejected. Basically, we come down to the points made by the noble Lords, Lord Butler and Lord Carlile. The noble Lord, Lord Carlile, is absolutely right: we live now in a different world from that of the recent past; 9/11 was a watershed. Many of my colleagues will know that I am deeply involved in South Asia, where there is a huge problem of potential terrorism lingering underneath the surface; it is a real problem. We have a similar problem here in the United Kingdom; yes, we have proscribed a fair number of terrorist activities but we should not believe the terrorists have gone away. They are active here, working away. They may find some means of pretending to be interested in democracy, but they are not—they are terrorists.

We should listen to the noble Lord, Lord Butler. He suggested that we should have a better provision, a definition of how far an agent can go in terms of any criminal activity. We need to have control that is agile, that can move quickly and keep some kind of comprehensive check on things. You cannot do that in a structured system that is written into an Act of Parliament. I happen to live in Sandy; there is an airfield down the road from me at RAF Tempsford, which was known as "Churchill's most secret airfield". It was running all the behind-the-scenes flights into France and other areas, putting agents in; they would be getting up to nefarious activities, authorised in principle from the top, but controlled only at a local level. Nobody knew what they were doing other than a particular man at a fairly senior level who was keeping track.

I do not pretend that I see an answer in any particular amendment before us this evening. I know only that this work is absolutely vital to the security of this country. I have faith in my friend on the Front Bench, I believe that there have been discussions, and I look forward to listening to her and hearing how we solve this conundrum.

Baroness Kennedy of The Shaws (Lab) [V]: My Lords, there are obvious flaws in any authorisation procedure in which the main safeguard against a public body carrying out unjustified surveillance, for example, or committing serious crime, is a senior official from the same organisation. It just does not make good sense. Even the most diligent individual would struggle to remain objective, particularly if the organisation was under pressure to meet targets, to achieve results or to get the job done. I remember all too painfully as a counsel in the Guildford Four appeal when there was undoubted pressure on the police to produce results and this led to misconduct and very bad judgments.

The Government and supporters of the Bill put forward an argument that prioritises operational need over independent assessment. It is not convincing. I remind the House that there is a significant difference with regard to authorising a CHIS—a covert person in place—who has worked in a factory, as was suggested, and who might have seen unlawful activity or whatever, whistle-blows but stays to give a better account of his or her observations to the authorities. That observing of criminal activities and then reporting on them is very different from the situation where someone is actively involved in criminal activity but is turned by the authorities and made into an agent on their behalf inside a criminal organisation. They may be proactively involved in criminal acts and involved in planning and encouraging them. It is a marked, simple movement for them to cross that line and to go out and commit crimes with other members of the gang. This is a clear, profound and immensely qualitative difference, for which the Government have yet to account.

Some Members have proposed that a form of retrospective authorisation might suffice, and I want to explain why this does not work in practice. Unlike other covert powers, such as bugging a property, the potential harm caused in those circumstances is difficult, if not impossible, to undo. Some harms are difficult to undo once they have been done. If you place a listening device, it can be removed. If you have unlawfully recorded private conversations, they can be destroyed.

But let us think of the example of somebody who is in a county lines drugs gang, pushing heroin into the hands of the young. That heroin is sometimes of the purest form, which will be highly damaging, potentially to someone's life, or it is contaminated, so that it goes further and makes more money for the criminal gangs, with substances that can be noxious and lethal. Suppose those drugs get into the hands of a vulnerable teenager who ends up dead. It is not a happy thought, but that is what criminal actions are about when you are involved in gang activity.

What if somebody is involved on the periphery of terrorist activities and is informing, but is required to secure items that might be used in the creation of an explosive device—a bomb? How does that make Members of this House feel? How does one undo the damage to innocent individuals, often vulnerable victims who might come into the firing line of gang members or terrorist groups who are armed with a criminal conduct authorisation, as the Bill proposes? What can we say to them if they have their synagogue blown up, or their child physically harmed, or, heaven forbid, people lose their lives? I say to the noble and learned Lord, Lord Mackay: when does that kind of crime stop being a crime?

It is regrettable to me that the Government are persisting with this policy, but given that they want to go ahead it is vital that independent, prior judicial approval is built into the process to avoid and to mitigate the potential for tragic mistakes or abuses of power. I was very moved and affected by what the noble and learned Lord, Lord Thomas, said. His view as an experienced senior judge is that, in the end, they will have to come back to prior judicial oversight. His preference, like mine, is for prior judicial approval. I do not agree with the noble Lords, Lord Hain or Lord Blunkett, that the appropriate people are Ministers. My preference would be for it to be the judges. I echo what the noble Baroness, Lady McIntosh, said: if the judges who are dealing with other covert activities are considered good enough for that, what is so special about this?

I therefore urge this House to stick with the amendments that have been put forward. I will go with any of the collection of them that involve prior judicial authority. Of course, as a secondary position, I will support the noble Lord, Lord Anderson, and the noble and learned Lord, Lord Thomas, with his add-on amendment, which would ensure that it is done in real time. However, my preference is that it is done beforehand. Nothing else will make police officers and those who seek to do this kind of work with people embedded in organisations think carefully about the arguments for doing so.

I laugh when I hear my noble friend Lord Blunkett reiterating something that he has held true, which is his suspicion that the judiciary do not know how the real world works. Today we have a judiciary that is very different from the old one that operated. Happily, it is a different kind of judiciary, which is well aware of the problems and is used to making judgments in these kinds of cases.

What is being suggested in having judicial oversight is not radical but common sense. The European Court of Human Rights in many instances has spoken to the necessity of prior judicial authorisation. In one case, the court held that it offers

"the best guarantees of independence, impartiality and a proper procedure."

This is particularly pertinent with surveillance, which, according to the court, was a field where "abuses are potentially easy" in individual cases to the extent that it

"could have harmful consequences for democratic society".

The court concluded that

"it is in principle desirable to entrust supervisory control to"

the judiciary. I will say only that as a practitioner I can speak to the quality and speed with which our judges can handle time-sensitive and critical cases. Like other noble Lords who have mentioned it, I have had on occasion to make applications to judges late into the night, and our judges are well capable of making decisions in that way.

We have to get this right. It is incumbent on us to consider the gravity of the powers that Parliament is being asked to create, and we have to strive to ensure that they are exercised responsibly and with sufficient checks and balances. I therefore commend to your Lordships the amendments, which require prior judicial authorisation.

Lord Thomas of Gresford (LD) [V]: My Lords, it is always a delight to follow my friend, the noble Baroness, Lady Kennedy of The Shaws.

There are three sides to this argument. What makes this debate so interesting is that they cross party boundaries. The noble Lord, Lord Dubs, argues the powerful JCHR case for prior authorisation by a judge, while on the other hand the noble Lord, Lord Anderson, is of the view that a judge or a Secretary of State does not have the expertise to task or to supervise a CHIS, a sentiment echoed by my noble friend Lord Carlile and argued more stringently by the noble Lord, Lord Naseby.

The noble Lord, Lord Anderson, supports post-authorisation notification. My criticism of that process, as I advanced it in Committee, was that this was a solution without teeth, an argument adopted in an excoriating speech by the noble and learned Lord, Lord Thomas of Cwmgiedd, in support of his Amendment 34. If the commissioner says on a post-the-event inquiry, "This should not have happened", what then? The authorisation must stop. But what about any crime that has been committed before that judgement is given? The noble Lord, Lord Rosser, made that point.

What in the Bill as it stands would prevent the authorising officer on the ground from simply shrugging his shoulders? He might ask, "Why should the judge have greater expertise post the event than he had before?" But can the authoriser be acting lawfully if he goes on in the face of a decision deploring the deployment of the CHIS? Does the commissioner's adverse view of the department have to be disclosed at trial? That is very important. Suppose the CHIS is a witness at a trial and gives crucial evidence in person, or, more likely, evidence which he has obtained by committing a crime is relied on. The prosecutor would have to disclose the decision of the commissioner that he should never have been deployed to get that evidence in the first place.

The noble Lord, Lord Anderson, suggests that prior judicial authorisation does not match the operational requirements. He argues that it lacks agility, in the words of the noble Lord, Lord Butler. But is his solution practical—the test of the noble Lord, Lord Rooker?

8 pm

The third argument is advanced by my noble friend Lord Paddick, and I am pleased it has the support of the noble Lord, Lord Rosser, on behalf of Her Majesty's Opposition. Operational uncertainties make it difficult

[Lord Thomas of Gresford]
for a judge to authorise the specific crime the CHIS may commit. In any event, it may seem distasteful to make the judge a knowing party to a specific crime before it is committed. The noble and learned Lord, Lord Mackay, expressed his reservations as to whether the rule of law is breached.

In the known or anticipated circumstances in which the commission of a crime is authorised, the question really is: what are the necessary or proportional limits to that authorisation? Who decides those limits? Just the authoriser on his own, without any check? When things go wrong, my family motto always comes into play: ar bwy mae'r bai—who can we blame? If the CHIS goes rogue, the Government's solution is to let the blame rest on the authoriser who has taken the decision to deploy him on his own. The authoriser's judgment alone will carry the can. To change the metaphor, he can be hung out to dry. Certainly, the Government have certainly evinced no urgency to accept civil liability to compensate anybody who finds themselves in harm's way as a result of the CHIS's activities, authorised or not.

We have had the very considerable benefit of personal experience from the noble Baroness, Lady Jones, and the noble Lord, Lord Hain, in these discussions. They have been involved in different protest movements with such success that they drew the attention of the security services. In each of their cases, were the crimes involved—such as breaking into their property to plant a listening device or infiltrating their organisation unlawfully—an intrusion into their private lives that was proportionate and necessary to the danger their protest movements posed?

I prefer my noble friend Lord Paddick's solution. The whole purpose is to ensure that these decisions to authorise crime are judged, dispassionately and independently and not by an official actively involved in the operation in question, to be proportionate to the threat. The nature, purpose and breadth of the operation and its potential risks should be disclosed to the commissioner on an application being made. My noble friend Lord Paddick pointed out that a main risk is that the activities of a CHIS can be volatile in the changing and dynamic circumstances he finds himself in. A commissioner can decide impartially whether the means to secure an objective in the operation—namely, by the commission of crime, including the anticipated type of crime—are proportionate and justified. What sort of a warhead is being deployed on the covert agent's head? Balancing the objective sought—the operational dividend—against the extent of the means likely to be employed, and their risks, is a proper judicial function for which judges are trained and have the right experience to decide.

Amendment 43, in the names of my noble friends Lord Paddick and Lady Hamwee, provides for a system of review. It is the forum for hindsight. It could answer the question of whether the authorisation was necessary and whether the safeguards were adequate. Lessons could be learned. I urge the Minister to consult her colleagues and accept Amendments 17 and 43 on the basis that they are the best and most accountable way for dealing with the difficult and ethical problem of state sanction for criminal acts.

The Deputy Speaker (Lord McNicol of West Kilbride) (Lab): The noble Lord, Lord King of Bridgwater, is unavailable, so I call the noble Baroness, Lady Manningham-Buller.

Baroness Manningham-Buller (CB) [V]: I was expecting to follow the former chair of the ISC from when I was there, but I am delighted to follow the noble Lord, Lord Thomas of Gresford. I do not intend to repeat what I said in Committee, but I want to make a few points—although I realise it is late and we have a lot more to get through.

If the noble Baroness, Lady Kennedy of The Shaws, is right that judges have changed over the years, so have MI5 and the police. Since I left MI5 13 years ago, oversight, which is the first thing I want to talk about, has strengthened. The double lock now exists: you cannot get a warrant for a telephone intercept or a microphone operation without a judicial signature, as well as that of the Secretary of State. IPCO has assumed a very important and vital role and I read with great interest its recent report, which is very comprehensive and thorough.

Since I left, there have been Independent Reviewers of Terrorism Legislation. I suggest to your Lordships that we are lucky to have in this House the noble Lords, Lord Anderson and Lord Carlile. They have deep inside knowledge of these issues and, unlike me, they cannot be accused of a conflict of interest. They came to these jobs and did them objectively.

I welcome this oversight. I am not somebody who feels that too much interference is tricky. It helps keep standards high, it gives confidence to the public and it gives clarity to my former colleagues, which they welcome. When I joined the Security Service there was no law at all governing what we did, and I can tell noble Lords that that was an extremely uncomfortable position.

I support the new clause proposed by Amendment 33, because it seems to be the ideal combination of independent oversight from IPCO and operational expertise—and I believe quite strongly that we should not muddle those two roles.

I had thought that I would try to resist defending covert human intelligence sources, but I cannot allow some of the comments made this evening to stand without my giving an alternative view. Of course I do not defend those involved in the murder of Finucane, and of course I regard the undercover police who grossly abused their trust as culpable. But I have met many undercover agents—as very few Members of your Lordships' House, apart from the noble Lord, Lord Paddick, have done. I have to say that my experience is different from the noble Lord's. Mine have not been engaged in activity regarded as undesirable. They have not been venal or self-interested, receiving brown envelopes of cash. So the earlier point about whether the legislation is right for all of us is interesting, but my experience is very different.

This is where I will repeat myself from Committee. I have met brave men and women who risked their lives—I underline that—to save other lives. Yes, they are occasionally authorised to commit crimes, but lesser crimes than the ones they seek to prevent. It is risible to suggest that they have carte blanche or

should be involved in setting bombs. They have saved thousands of lives. They will never get public recognition or thanks, but I take this opportunity to thank them. We have a moral obligation to respect them, protect them and keep them safe, because many of us depend on their work. I am also very reassured that a recent IPCO report said that the way MI5 ran covert human intelligence sources was "highly professional" and "mindful" of the ethical issues.

If the House will forgive me, I will take a slight deviation to tell noble Lords about one particular human source. A few years ago, the BBC "Today" programme asked me to guest-edit a Christmas programme, which I did. I asked my former colleagues in MI5 if they could produce an agent—a CHIS—to talk to the BBC home affairs editor, to be played by an actor, and explain why they were working for the authorities in this way. MI5 produced an agent who was a British Muslim, and he described what he was doing: reporting on ISIS and related terrorism. He was asked how he justified this to himself, and he said, "I look in the mirror every morning and I know I am doing Allah's work." I do not know what intelligence he produced or his name—I know nothing about him. But it was a very compelling interview.

On prior authorisation, whether judicial or political or, in today's terms, probably a combination of the two, I said in Committee that this is superficially attractive. I still think this; it would give confidence and reassurance to many. But I am afraid that I also share strongly the views of the noble Lord, Lord Anderson, that it is unfortunately not practical. Why?

The noble Lord, Lord Rooker, described—in some ways better than I have done—some of the complex aspects of running covert human intelligence sources. As I think the noble Baroness, Lady Chakrabarti, said, they are not robots. As I said a minute ago, we have an obligation to their safety first of all, under the ECHR and any other criteria. Running them is complex—there is the care for their welfare, and before they are taken on there is the involvement of in-house lawyers, security advisers and behavioural scientists. Some of them work for many years at great risk to themselves. It is quite different from microphone and interception operations, which can be switched on and off and the product from them retained or destroyed.

The handlers, who are not the people who authorise criminal activity, will have deep knowledge of the individual: their family; their history; their motivation, which will vary; their access; what intelligence they are going to get; what training they have had; what instructions they have been given; what limits have been put on what they do; what the agreed rules of their deployment are; their contacts for emergency; and if they need to be extracted. CHISs trust the handlers to protect their identity, possibly in perpetuity.

When I was head of MI5, I very rarely knew the name of a CHIS. I knew them by a number, and I knew what access they had. The authorisation for criminal activity is a small and rare part of a much broader relationship, often long-term, and running them deals with fast-moving and unpredictable circumstances. I am again reassured by IPCO's independent view that the handling of cases involving criminality has been proportionate and necessary, and I think some of the suggestions of what CHISs might be authorised to do are just unrealistic and alarming.

I would like to pick up on Amendment 34 in the name of the noble and learned Lord, Lord Thomas of Cwmgiedd. It is difficult for me to imagine that if a judicial commissioner raised a serious concern about an authorisation, it would continue. But it might not be able to stop immediately. There would have to be some discussion, because the safety of the covert human intelligence source would be paramount. Their right to life is as important as the right to life of the public who, in many cases, they seek to protect.

Lord King of Bridgwater (Con) [V]: I was expecting to follow the noble Lord, Lord Thomas of Gresford, but I am even more delighted, with no disrespect to him, to follow the noble Baroness, Lady Manningham-Buller. Obviously, I have had some personal involvement with her, and I can pay tribute to her huge experience in this field. I certainly endorse her final point, which is, of course, the issue about the security of people involved as covert intelligence sources.

8.15 pm

That is why I support the approach that has been taken by the noble Lords, Lord Anderson and Lord Butler, and others in trying to find the most sensible way through this difficult challenge. I make it quite clear that I am not in favour of pre-judicial authority. That is in no sense a criticism of the judges, or any suggestion that they are incapable—unable to master a brief or very quickly to bring themselves up-to-date with the various evidence and issues—but it is vital here to have a flexible, agile system. The noble Lord, Lord Butler, referred to operational agility, and that is a very good phrase.

Some have talked as though each intelligence source is a major political, international incident. I refer the noble Lord, Lord Paddick, who said that the Government have produced no information, to the speech of the Minister for Security, James Brokenshire, in the House, which I have quoted twice, about the amazing scale of crime. I make no apology for citing the figures again. The use of undercover resources, in London in one year alone, resulted in 3,500 arrests, the recovery of more than 100 firearms and 400 other weapons, the seizure of more than 400 kilograms of class A drugs and the recovery of more than £2.5 million in cash. If the judges are happy to get themselves involved in signing off every one of those activities, I do not think it is the most effective use of their time. Some of them may be on night duty—making themselves very available—but not so familiar with the approach needed for these cases.

I say to my noble friends who are members of the former Secretaries of State club who suggest that that is the right way to go that we may have a quiz question: if it comes to the Secretary of State, how many hands does it go through beforehand? If we want the tightest possible security and are worried about protecting people's lives and ensuring that they are not at risk, rather than thereby undermining the enthusiasm of others to contribute to this important work, limiting

[Lord King of Bridgwater]
the number of people who have access to the most secret information is obviously very important. Although it has been suggested that it must be in ministerial hands because it could affect the whole relationship of the United Kingdom with other states, so many of these cases are on a much lower level and would not possibly involve the need to consider such issues. In a properly constructed new arrangement for the authorisation of CCAs and the judicial commissioner, I hope that there would be a recognition by those authorised to issue CCAs that where there was some much wider international political relations issue, it would need to be referred and people would understand the balance of that.

After all of which, it is no secret to say that I do not support pre-judicial authority and I certainly do not support the Secretary of State being required to authorise every CCA, but I think we can all accept the practical experience of the noble Lord, Lord Anderson, who, we know, has previously worked extensively in this field, and his constructive approach, which has been much respected in our debate in your Lordships' House today. His amendments for a workable, effective system that still ensures that we can get the benefits of covert sources for law and order in this country and protection against terrorism and other organised crime are well worth supporting.

Baroness Hamwee (LD) [V]: My Lords, it speaks well of the House that there is such concern about safeguards to buttress criminal conduct authorisations while, on the whole, accepting their use. Noble Lords identify the need for external validation and the oversight of the activities of different agents—of course, here we are dealing only with criminal conduct authorisations, not the whole of what they do—who are not identical across all the "public authorities", as they are called, that fall within the Bill. We need to deal with all of them.

In most amendments, noble Lords identify the importance of someone with the authority of high judicial office, who therefore commands confidence, as well as the need to be practical, putting their arguments in the context of operational demands and realities, and paying attention to the timeframe. Of course, there are different proposals. I recall a discussion in a Select Committee a while ago about how, when you are a Minister, having to sign things off brings home to you that you are accountable—you have to answer for your decisions. We have heard from colleagues who have held high political office—of course, I have not had experience of this or judicial office. We support judicial authorisation.

The noble Lord, Lord Carlile, asked who judges the judges—but there is always that question, in the same way that there is always the question of who scrutinises the scrutineers. I have had the impression that the very experience of considering something after the event equips one for considering issues in advance, and commissioners are judges as well.

My noble friend spoke to all the amendments, including our Amendment 43, which is an outlier, not because it is inconsistent with the others—it is not—but because it is about a review of the regime rather than particular grants of CCAs. We do not suggest that the Investigatory Powers Commissioner is not alert to how CHIS may be used, but Amendment 43 would provide for a review of the regime—or the scheme, if you like—in the round, as distinct from tweaking legislation, which is what we are doing now, in response to court proceedings. As my noble friend said, it attempts to square the circle.

In their response to the JCHR, published this morning, the Government said on the issue of review that the current process

"provides for systemic review of all public authorities' use of the power and allows for continuous improvement"

and so on. I think that "systemic" is probably not a typo, but I wondered whether it meant "systematic"; maybe it means both. I think the noble Baroness, Lady Manningham-Buller, would say it means "systemic".

On Amendment 17, my noble friend stood back to consider the process as a whole; if he sets the grant of a CCA in the context of the deployment of the CHIS, it applies to agents used by the police and the intelligence services—not in exactly the same situations, of course—and provides for urgency.

We sought in Committee to answer the question of what follows with our own amendment to that of the noble Lord, Lord Anderson. Amendment 34, tabled by the noble and learned Lord, Lord Thomas of Cwmgiedd, addresses the need for an outcome. His amendment is clear about determination, and I think that the noble Lord, Lord Anderson, said he would accept it. I was interested in the point made by the noble and learned Lord, Lord Thomas, about how the matter might evolve. We do not oppose Amendments 33 and 34, but notification is not approval, as noble Lords have noted, so they are different issues, and the amendment of the noble Lord, Lord Anderson, and our amendment are compatible. My noble friend Lord Thomas of Gresford was very persuasive on the possible fallout if there is no prior notification. The breadth of his speech has spared me, and therefore your Lordships, having to wind up on that, so I am grateful to him.

In Committee, the noble Lord, Lord Carlile, spoke of

"operational practicality together with rigorous scrutiny."—[*Official Report*, 24/11/20; col. 210.]

I would summarise amendments on the subject of this debate as indicating that we prize independence, objectivity and respect for the rule of law—the protection of the citizen against the state as well as by it. We particularly support, of course, Amendment 5 and our Amendment 17.

Baroness Williams of Trafford (Con): My Lords, I thank all noble Lords who have spoken in this long but worthwhile debate. First, I pay tribute to the noble Lord, Lord Rooker. I could have just referred noble Lords to his speech then sat down, because he made his points so succinctly and brought out some case examples. My noble friend Lord King talked about the recent NCA operation that managed to yield so much thanks to undercover operatives.

I also echo for a moment the summary by the noble Baroness, Lady Manningham-Buller, and join her in thanking some of the undercover operatives who, as

she said, literally risk their lives. I do not know, as I have not met any of them, but she is an expert in this area and, if she says that, I join her in tribute to them. There are no motives ulterior to keeping the public safe. She talked pertinently about oversight combined with the expertise provided for by this Bill and made the point that, when she started, there was no law at all governing the framework of this activity. She also talked about the Independent Reviewers of Terrorism Legislation—the two that were in our House and have contributed so much to this Bill, the noble Lords, Lord Carlile and Lord Anderson—and made the true point that there can be no exact accusation of conflict of interest with them. She talked about the vital role of the IPC—the report he does on a regular basis and the independence of the role. She talked about the double lock and made the point that judges have changed over the years, as the noble Baroness, Lady Kennedy of The Shaws, said, but so have the police and MI5. Noble Lords—the noble Lord, Lord Hain, in particular—will talk about some of the things that happened that under our new legal framework would not be either necessary or proportionate and would be ruled as such.

I shall start with the Investigatory Powers Commissioner: I want to welcome his most recent annual report, which was published during the passage of this Bill. He already plays an important role in providing independent oversight of this activity. But I have always been clear that the Government are willing to listen to the concerns of noble Lords and consider amendments to strengthen the Bill, providing they do not have an adverse effect on the ability of public authorities to do their job and keep us safe.

8.30 pm

The amendment from the noble Lord, Lord Anderson, which will require all authorisations to be notified to the IPCO as soon as reasonably practicable and within seven days, strikes this balance well, as many noble Lords have already articulated. It provides for greater oversight by the IPC, by making it close to real time, but keeps the authorising role in the hands of the authorising officer, who is best able to consider the specifics of the CHIS and the live environment when making what can be very urgent decisions. My noble friend Lord King, the noble Lord, Lord Butler, and my noble and learned friend Lord Mackay referred to the agile capabilities that they require. The Government will therefore support this amendment. I thank the noble Lord, Lord Anderson, for his contributions to this and all preceding debates, as well as all others who supported this approach, including the Opposition Front Bench.

This amendment will mean that judicial commissioners will be able to consider each authorisation very soon after it has been granted. This will enable independent commissioners to ensure that every case complies with the wide range of other safeguards attached to this power, including the Human Rights Act and the necessity and proportionality considerations. They will also be able to ensure that any low users of the power are suitably trained and taking necessary and proportionate decisions. Where a commissioner has any comments on that authorisation, the authorising officer will take them into account. As noble Lords might expect, serious weight is given to the views of a judicial commissioner.

Noble Lords are familiar with the reasons why the Government cannot support Amendments 5 and 23, which require prior judicial approval of authorisations, and Amendments 16 and 20, which require involvement of the Secretary of State in the authorisation process. The authorising officer is best placed to make these decisions, which are very specific to each CHIS, based on their strengths and weaknesses, their experience and the particular environment in which they operate. As I have said, humans are different from machines and we do not have the luxury of remaking any of these decisions.

We must also ensure that we create a process that is workable for our operational partners; for example, sending all authorisations to the Secretary of State would be problematic in urgent situations. My noble friend Lord King outlined some of the issues there. These operational decisions are best made by those with operational experience. That is not to say that oversight by the Secretary of State is absent from the Bill.

I was pleased to meet the noble Lords, Lord Hain and Lord Blunkett, for the chance to discuss this the other day—by Zoom, my noble friend Lord Cormack will be pleased to know. The nub of the issue is that they want some political sighting of exactly what is going on operationally to have a regular view of whether the power is working as intended. I promised the noble Lords that I would go back, and I confirm that the Home Secretary and the Prime Minister will consider both the open and closed parts of the annual report from the IPC, which will include information about criminal conduct authorisation. If that identifies any issues that the Ministers feel are important to address, I reassure the noble Lords, Lord Hain and Lord Blunkett, that they would look to address them.

Section 232 of the Investigatory Powers Act also provides judicial commissioners with the power to provide information to any person on the matters for which they are responsible. This provides another route, closer to real time, for any issues to be referred to the Secretary of State, as appropriate. I hope that this provides reassurance that political oversight of the overall regime will exist under this Bill.

IPCO also has an important independent oversight function, which would be strengthened by the amendment from the noble Lord, Lord Anderson, and we think this is the right approach.

I note the call from my noble friend Lord Cormack to get all the proponents of the different amendments together and agree a way through. The Opposition Front Bench proposes prior approval by judicial commissioners and then those same commissioners reviewing the conduct they have just authorised, together tonight with a third type of oversight as proposed by the noble Lord, Lord Paddick. It may be because I am a simple soul, but I would be grateful for clarification from noble Lords of how they think a regime of notification and prior judicial approval and a division of authorisations would work in practice, as this approach

[BARONESS WILLIAMS OF TRAFFORD]
seems incompatible. I would say, in short, that it fails the Occam's razor test that the noble Lord, Lord Carlile, posed to us.

I encourage noble Lords in the Opposition, who clearly see the merit in judicial notification, to support that amendment, which I think a majority of the House agree is a good approach. We are fortunate to have such experienced practitioners in this House, and to have those words from the noble Lords, Lord Anderson and Lord Carlile, as well as the noble Baroness, Lady Manningham-Buller—the list is quite extensive, and includes the my noble friend Lord King and the noble Lord, Lord Butler. I take their points very seriously.

I turn to the amendment suggested by the noble Lord, Lord Paddick, who proposes an alternative solution, which would divide authorisation into two distinct components: the necessity and proportionality of participation in criminal conduct, and the specific and tactical tasking and deployment of the CHIS, with the judicial commissioner approving only the former.

The two components, however, influence each other to such a degree that they cannot be separated. You cannot disentangle decisions about operational dividend, which can be intrinsically tied up with details about the CHIS's specific role in a terrorist or criminal group, from specific details about the CHIS or the crime that they are being authorised to commit. It is also not clear what benefit such a proposal would have; it seems to suggest that authorising from a judicial commissioner would be very broad. That was how I understood it the other day, when I spoke to the noble Lord, Lord Paddick. We want to avoid this becoming a carte blanche for criminal conduct to be undertaken rather than the very specific authorisations that are given by authorising officers.

The proposal also seems to expose the Investigatory Powers Commissioner and the authorising officer to legal risk by splitting the proposal in such a way that they are responsible for different aspects of the authorisation. Furthermore, I fear that judicial commissioners could easily find themselves in a position of having agreed in some general sense that an authorisation should proceed, but then disagreeing with the actual conduct when they see it after the fact. That should give us some pause for thought. It would then be compromised, because the authorising officer would rightly say that they had proceeded only on the basis that the commissioner already approved the legality of the proposals. For those reasons—and they are very strong reasons—the Government cannot support the amendment.

I would hope that the fact that a senior and independent judge will have oversight of all authorisations soon after they have been granted will offer reassurance to those noble Lords who have suggested alternative forms of oversight.

I turn to the amendment proposed by the noble and learned Lord, Lord Thomas of Cwmgiedd. The Government have considered the workability of providing judicial commissioners with a formal power to quash an authorisation. The same issues that apply to prior judicial approval are also relevant here; the authorising officer is best placed to consider the specifics of the authorisation, including the live operational environment and the safety of the CHIS. We therefore consider that judicial commissioners are also not best suited to decide that an authorisation must be quashed and, in particular, which aspects of an authorisation should continue. The considerations, especially for CHIS safety and safety of the public, are the same. Of course, authorising officers will take into account any views or concerns that a judicial commissioner expressed and they would work together to resolve any issues. We expect that instances of commissioners disagreeing with an authorisation will be very rare, and the evidence from the existing notification regime for the deployment of undercover law enforcement officers supports this.

I should like to set out how I expect the process to work in practice. If a judicial commissioner expressed concerns with an authorisation, they could then flag these to the authorising officer on receiving the notification of an authorisation's grant. In all instances, regardless of whether the activity has commenced or not, the authorising officer must take into account any concerns raised by a judicial commissioner and would work with the commissioner to address them.

The best course of action would depend on the specifics of the case. Appropriate action could include further information being provided to the judicial commissioner or, if the CHIS is not considered to be safe, stopping the activity and safely extracting the CHIS from that situation. The judicial commissioner's views on the validity of the CCA will be taken extremely seriously. However, there may be times when the authority has competing responsibilities under the ECHR, for example to protect life, that do not bind the judicial commissioner. In these circumstances, the public authority will, under our Bill, be able to take lawful steps to protect life.

Where the activity has started, the authorising officer must take into account any concerns that have been raised and they will continue to discuss this with the judicial commissioner. The judicial commissioner may advise the authorising officer that the activity should be reported to the relevant authority, for example a law enforcement body or prosecutors. It would then be for prosecutors and a court to determine whether the authorisation was lawful. While the primary responsibility for making that report rests with the public authority, judicial commissioners are also able to refer matters directly to the relevant authorities, as set out in Section 232 of the Investigatory Powers Act 2016. This confirms the assertion of my noble and learned friend Lord Mackay.

Let me again give the reassurance that a public authority would not simply ignore feedback from the IPCO. This is a collaborative process and the views of the commissioners carry serious weight. I hope that for these reasons I can reassure the noble and learned Lord, Lord Thomas, that the existing process is the correct one.

Amendments 43, 47 and 48 would require review by a senior judge of the use of criminal conduct authorisations. Senior judges will be considering each authorisation soon after they have been granted, and I hope that this reassures the noble Lord that the amendment is not necessary.

I hope I have provided reassurance throughout these debates that there are robust safeguards in place to prevent the misuse of this power. Independent oversight is just one example, but it is very important. Recognising this, and the strength of feeling in this debate, I encourage noble Lords to support the amendment in the name of the expert noble Lord, Lord Anderson, if he pushes it to a vote.

The Deputy Speaker (Lord McNicol of West Kilbride) (Lab): I have received two requests to ask short questions from the noble Lords, Lord Blunkett and Lord Hain, who I will call and then call the Minister. I call the noble Lord, Lord Blunkett.

Lord Blunkett (Lab) [V]: I congratulate the Minister on her tenacity and her grasp of detail, which is reassuring and refreshing. Would she consider providing a regular quarterly update to the Home Secretary in addition to the annual report to which she has referred—part of which is redacted and part of which is on public record? In that way, there is at least some responsibility in the political arena as an ongoing feature of the new pattern, which is clearly going to involve Amendment 33 and the consequentials.

8.45 pm

Baroness Williams of Trafford (Con): While I have the opportunity, I thank the noble Lord for the conversation we had the other day—it was very helpful in allowing me to know exactly what both noble Lords required. I cannot give that undertaking at the Dispatch Box but I can go back and ascertain just how often the Home Secretary receives these reports and whether the Investigatory Powers Commissioner might be thinking of making more regular reports in future if necessary, or indeed spot reports as and when required. I can certainly undertake to do that.

Lord Hain (Lab): I too thank the Minister for her reply and for her engagement. It is clear from the balance of the debate that there is no point in my pressing Amendment 16, and therefore when the time comes, I will not seek to divide the House on it.

However, to follow up on the question of my noble friend Lord Blunkett, will the Minister give an assurance that the Home Secretary will take a particular interest in the most politically sensitive deployment of a CHIS, which is the area that has given rise to real worry? Whether that is in the form of a quarterly report or regular interactions with the head of the Metropolitan Police, other chief constables and the head of the security services is a matter for consideration, but there should be some hands-on authority by the Home Secretary and regular interest in deployments in politically sensitive areas.

Baroness Williams of Trafford (Con): It was very good for us to have a chat the other day because we could discuss things that clearly we cannot discuss on the Floor of the House. I completely understood the sensitivity between some very nuanced situations and the purely operational role of the deployment of CHIS for criminal conduct. I will most certainly go back and put those points. Again, I thank the noble Lord for the time he took to discuss his concerns with me.

Lord Dubs (Lab) [V]: My Lords, the Minister has already been congratulated on her mastery of the detail. I congratulate her also on her physical and intellectual stamina. It has been quite a tour de force, particularly as I know what other business she has this week and on most days.

As someone who has had no security experience, I have found this a fascinating debate. I had very limited experience when I was a Minister in Northern Ireland. When I first got there, we had to sign extensions to hold people in detention under the terrorism legislation, although that was quickly handed over to judges. That was my primary direct experience, but it gave me an understanding of the security situation in Northern Ireland before and after the ceasefire. However, I bow to the greater experience of those who have strong security experience and indeed those who have strong experience of having—[*Inaudible.*].

I still believe that there is quite a strong thread of support in the debate for prior judicial authorisation. The "prior" bit has not really been hit on the head, despite the merits of some of the other arguments relating to other amendments. In the circumstances, and without my going through all the arguments—it is much too late for that—I would like to test the opinion of the House.

8.49 pm

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9.03 pm

The Deputy Speaker (Baroness Garden of Frognal) (LD): My Lords, we now come to the group beginning with Amendment 6 and I remind noble Lords that Members other than the mover and the Minister may speak only once and that short questions of elucidation are discouraged. Anyone wishing to press this amendment or anything else in this group to a Division must make that clear in debate.

Amendment 6

Moved by ***Baroness Hamwee***

6: Clause 1, page 2, line 17, after "person" insert "reasonably"

Member's explanatory statement

This amendment would insert a requirement that belief in the necessity and proportionality of a criminal conduct authorisation, and in the existence of satisfactory arrangements, be reasonably held.

Baroness Hamwee (LD) [V]: My Lords, we have Amendments 6, 18 and 36 in this group. Under new Section 29B, the person granting a criminal conduct authorisation must believe that the authorisation is necessary on one of three specific grounds, including that it must be

"proportionate to what is sought to be achieved"

and that the requirements imposed by the Home Secretary will be satisfied—which we have had confirmed as being restrictive rather than loosening safeguards. Amendment 36 is the Scottish equivalent of Amendment 6.

The noble Lord, Lord Anderson, had this amendment in Committee and I am grateful to him and the noble and learned Lord, Lord Thomas of Cwmgiedd, for adding their names to it. As party politicians, my noble friend Lord Paddick and I could be thought of as political troublemakers, which is not what we set out to be. However, the noble Lord and the noble and learned Lord who also signed this amendment apply their measured, informed objectivity. The Bar Council has also been in touch with me to give its support.

[Baroness Hamwee]

Belief is subjective, informed or misinformed by background, experience and personality. Some people are naturally more inclined to be that bit more optimistic; I want to avoid judgmental terms such as "casual". Necessity and proportionality are rightly required criteria, but they lose their force as safeguards unless there is a degree of objectivity in their assessment. "Reasonable" is so usual a term in legislation that its omission itself assumes some significance.

I do not think we have heard an argument that a belief must be reasonable to be a belief, but I anticipate that. I reject that it is implied, because there is no reason to omit the term—and anyway, we should not work on the basis of what may be implied by long usage, as distinct from precedent.

In Committee, the Advocate-General said that under section 3.10 of the draft code of practice,

"the person granting the authorisation should hold a reasonable belief that it is necessary and proportionate."—[*Official Report*, 1/12/20; col. 667.]

Section 3.10 is within the section on general rules on authorisation of someone to take on the role of CHIS. The paragraph specifically on criminal conduct authorisations says that

"it is expected that the person granting the authorisation should hold a reasonable belief that the authorisation is necessary and proportionate."

The noble and learned Lord told the Committee that new Section 29B was

"drafted to align with the existing Section 29",

and that the amendment would

"cast doubt on the test to be applied for other authorisations";—[*Official Report*, 1/12/20; col. 667.]

it would be inconsistent. The engagement of a CHIS is of huge significance, as we have heard this evening and on previous occasions, but it is of a lesser order than a criminal conduct authorisation. In any event, I rather take the view that the Section 29 powers should require a reasonable belief that they are necessary and proportionate to be exercised, and that that should be in the Bill. If the Government accept Amendments 6 and 36, we will not challenge such an amendment to Section 29 if they bring that forward at Third Reading.

The noble and learned Lord, Lord Stewart, said he would clarify this by way of letter. I have not seen that, although I have seen a Home Office email, which went not to me but was passed on, referring to a requirement for a reasonable belief. But I do not think it is a matter of clarification; it should be in the Bill. The government response to the JCHR this morning repeats what the Minister said in Committee. I am worried about inconsistency between the Bill and the draft code of practice. To be clear, I am not suggesting the word should be taken out of the code.

Amendment 18 has found its way into this group, which is perhaps no bad thing given the length of the previous group. It is the seriousness of a CCA that prompted that amendment. It provides that a CCA would expire after four months, although it could be renewed. In Committee, the Minister argued for consistency with Section 29 authorisations, which are for a period of 12 months, and referred to the code of practice, which says that the CCA should be

"relied upon for as short a duration as possible."

The power should remain "operationally workable"; I think four months fulfils that.

The CCA takes us to an even more serious place than infiltration. As my noble friend pointed out, on the Government's logic we would not need a Bill to authorise CHIS to commit a crime because it is just the same as deploying a CHIS. This amendment has dropped the monthly review of CCA, which was in our Amendment 49 in Committee, in an attempt to meet the Government part way. Surely it is good practice to have a very clear and fairly frequent timetable laid down; four months is not that often. In many situations it is good practice to have a very clear checklist. This is one of them.

To return to Amendments 6 and 36, as the noble and learned Lord, Lord Thomas, said so succinctly in Committee, anything other than a belief held on an objective basis would be quite exceptional. The Bill ought to be clear, with no room for ambiguity or argument if the matter ever comes before the court. This is such an important point that, in the absence of the Government's agreement, I will seek the opinion of the House. I beg to move.

Lord Anderson of Ipswich (CB) [V]: My Lords, I have signed Amendments 6 and 36, having tabled similar amendments myself in Committee. At this stage, I am a little mystified by the Government's position. They seem to accept that the relevant belief of authorising officers should be reasonable to the point where they have made an amendment along these lines to the code of practice at paragraph 6.4. Yet they refuse to make the equivalent amendment to the Bill.

The noble and learned Lord the Advocate-General defended the Government's position in Committee, as the noble Baroness, Lady Hamwee, said, on the basis that it would promote consistency between different parts of the Regulation of Investigatory Powers Act. I suggest that is an argument of little force, given the unique nature of the power conferred by the Bill.

In fact, it is the Government's position that results in a greater and more damaging inconsistency between the terms of the Bill and the associated parts of the code of practice. If the test is to be reasonable belief, it needs to be stated in the law. We are offered a code of practice now amended so that paragraph 6.4 provides that

"it is expected that the person granting the authorisation should hold a reasonable belief that the authorisation is necessary and proportionate."

A code of practice is not the same as the law and "it is expected" is not even the language of legal obligation; it is the language of a dress code.

This is not just playing with words. On the basis of our first debate, it seems to be common ground that criminal responsibility for incorrect authorisations is dependent, at least in part, on a court having found the authorisation to be a nullity, presumably because the necessity or proportionality criteria were not satisfied. If the legal standard set out in the Act is one of "reasonable" belief, the court will scrutinise whether the officer's belief was reasonable. If that word is not

in the Act, a court will be invited to proceed on the basis of a test of subjective belief or, at most, the relatively undemanding test or public law rationality.

These apparently inconsequential amendments go to the issue of immunity, reflected in my Amendment 21 and in the amendments and speeches of many other noble Lords. That issue is at the heart of the Bill. I hope the Minister will accept Amendments 6 and 36, because she appears to agree with their substance, but if the noble Baroness, Lady Hamwee, presses them to a vote she will have my support.

Lord Thomas of Cwmgiedd (CB) [V]: I can add very little to what has been so ably said in support of the amendment, to which I put my name. I support what is a very small change to the Bill because it is important that we hold the services, particularly the officers who will give these authorisations without any prior approval, to a very high standard. If they do not have high standards and things go wrong, the damage to the service concerned will be very serious.

9.15 pm

For that first reason, it is very important to make sure that the language of the statute is clear. Nothing could be less desirable than the language of paragraph 6.4 of the code using the words "it is expected" about the person; that really is a decline in the standards, traditionally, of the common law—that edifice of England, Wales, Scotland and Northern Ireland that has been so important to our liberties.

Secondly, we really ought to make the legislation clear. We are going to put forward a detailed set of requirements in the Bill, and certainly there should be no exceptionalism by leaving out the requirement of reasonableness.

Baroness Chakrabarti (Lab) [V]: My Lords, the request here is very modest and I am sure that the Minister will want to accept the word "reasonable" into the belief required of those authorising this criminal conduct. It must be an objective test. Let us remember that this is about the authorisation, not about a person acting in the moment subject to an authorisation. This is about the calm, rational mind that we are supposed to trust in who is authorising this on the basis that it is necessary and proportionate. It is an incredibly modest request.

In his eloquent remarks, the noble Lord, Lord Anderson of Ipswich, points out, very importantly, the distinction between a code of practice and hard, statutory law. Codes of practice have been prayed in aid, not least by the noble Lord, Lord Carlile of Berriew, who will follow me. Codes of practice are no substitute for the statute itself, particularly if they are using language such as "it is expected." I urge the Minister to accept the word "reasonable"; it does no violence whatever to her stated policy and scheme.

The four months proposed in Amendment 18 seems very uncontroversial, too. Surely, an authorisation of this gravity should not be sitting around to be employed and activated after many months or years. I shall leave it at that.

Lord Carlile of Berriew (CB) [V]: My Lords, on the narrow point just made very clearly by the noble Baroness, Lady Chakrabarti, I would question the way in which she diminishes the importance of codes of practice, which have the force of law. One example of a code of practice that has had the most incredible effect on the fairness of trials is Code C under the Police and Criminal Evidence Act 1984, which in many ways has been the formidable weapon in the hands of the defence advocate, and sometimes in the hands of the prosecution advocate too, to ensure that justice is done.

That said, I have no objection whatever to what is intended by Amendments 6 and 36. I suspect that the Minister would want to refer to the code, at least generally, which is peppered with words such as "reasonable", "proportionate", et cetera, and would say that reasonableness is imported in any event. However, I agree with the view that in a Bill of this kind, adding the word "reasonable" into the statute as suggested may be comforting and safe, and will make it a better statute.

I disagree with Amendment 18, which is in this group, and a time limit of four months. Running a CHIS is often very arduous and complicated, and many CHIS are run for much, much longer than four months. The noble Lord, Lord McCrea, in an earlier part of this evening's debate, referred to the information that was obtained concerning the Real IRA, as it was called, which led to the conviction of a number of its operatives. I do not know anything about the facts of that case, but I suspect that in an operation of that kind, many CHIS were run for long periods, and for very good reasons. As the noble Baroness, Lady Manningham-Buller, said very eloquently, those who are running the CHIS are, in any event, these days, doing an extremely good job in great difficulty, and we do not want to add to their bureaucratic burden; they and their CHIS have great difficulties to face. They do not want to be faced with the necessity of reapplying every four months; it is just far too short a period.

Lord Thomas of Gresford (LD) [V]: My Lords, I have little to add to what has gone before. I often wonder whether the Government are concerned about judicial review when they resist placing the test of a decision on a reasonable basis in any legislation. If the test in any case is simply the subjective belief of the official—the government agent involved—it might be hoped that a trip to the divisional court and an application for judicial review would be avoided. The noble Lord, Lord Anderson, did indeed refer to public law tests. The Wednesbury test of reasonableness is now more than 70 years old and it is sometimes forgotten that it was the local picture house that took the town's corporation to court because the licence it gave prevented children under 15 attending the cinema on a Sunday, whether accompanied by an adult or not—one's mind flips back to the dim and distant past. That was the factual basis of a very important principle of law.

When considering reasonableness in this context, there are two limbs. In the context the House is discussing, the question would be whether the authoriser had taken into account all the wider implications of

[Lord Thomas of Gresford]
the authorisation, including its effect on prospective victims of the crime being committed. He would obviously have to follow the code, which, as the noble Lord, Lord Carlile, has just said, is peppered with instructions, having the force of law, to act reasonably. If the authorisers get beyond the first limb of the test, the second limb is whether the decision they have taken is so outrageous and irrational that, as Lord Diplock put it in a later case, it is

"so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Needless to say, cases challenging a decision tend to succeed on the first limb, but I do not see why we have to go to that position. I have been trying to check *Hansard*, but I think that the Minister referred, in reply to the first group of amendments today, to the decision being reasonable. I cannot see any reason why it would not be reasonable to put "reasonable" on the face of the Bill. I support these amendments.

The Deputy Speaker (Baroness Garden of Frognal) (LD): My Lords, the noble Baroness, Lady McIntosh of Pickering, has withdrawn. I call the noble Lord, Lord Rosser.

Lord Rosser (Lab) [V]: Before I comment on these amendments, I am told that there was a tweet earlier today from the Commons Minister on this Bill, James Brokenshire, saying that he has had a recurrence of a tumour in part of his lung and that he is taking leave for curative surgery. I am sure that I am not alone in wanting to extend best wishes to him for a full recovery.

I will be brief, because everything that needs to be said on Amendment 6 has already been said. It requires a person authorising a criminal conduct authorisation to reasonably believe that the tests for authorisation are met and are necessary and proportionate. In Committee, the noble Lord, Lord Anderson of Ipswich, referred to what the Solicitor-General had said at Second Reading in the Commons, to the effect that the code of practice sets out that there does need to be a reasonable belief that an authorisation is necessary and proportionate. As we have heard, there is wording in part of the code of practice that is not—let us say—quite as strong as the words of the Solicitor-General in the Commons.

Crucially, once again, as the noble Lord, Lord Anderson of Ipswich, said in Committee, the notion of reasonableness is completely absent from the Bill, which the courts would treat as the authoritative source. Like others, I see no reason why the Government are not prepared to put the word "reasonable" in the Bill. We certainly support Amendment 6.

Baroness Williams of Trafford (Con): My Lords, I echo the words of the noble Lord, Lord Rosser. I heard earlier today that my right honourable friend James Brokenshire had to go in for some more surgery; I pay tribute to him. He is one of the most decent people in politics and an extraordinarily capable Minister. He has never been far from my mind this afternoon, as not only has he mentored me but we discussed and worked closely on every aspect of the Bill. I wish him a very speedy recovery.

The noble Baroness, Lady Hamwee, seeks to add an explicit requirement for an authorising officer's belief that the conduct is both necessary and proportionate to be a reasonable one. I have already explained why the Government cannot support this proposal. In fact, the noble Lord, Lord Anderson, almost spelled out the reasons I was going to give, which are a bit of a repetition and with which I am not sure he will be entirely satisfied. However, since Committee I have updated the CHIS code of practice to make it clearer that it is expected that the belief should be a reasonable one.

I caution against an amendment seeking to include this wording in the Bill, as it would cast doubt on the test that is expected to apply to other authorisations. In particular, it could have unintended consequences for a Section 29 use and conduct authorisation under the Regulation of Investigatory Powers Act. Including the need for a reasonable belief here, creating an inconsistency in the legislation, would create uncertainty over whether the same requirement exists for the underlying Section 29 authorisation. As I mentioned earlier, as a matter of public law, a decision made subject to a discretionary power must be reasonable; that is, the decision must be rationally open to a reasonable decision-maker in possession of the facts in the case.

The noble Baroness, Lady Hamwee, has also called for the length of authorisations to be reduced from 12 months to four months, with a formal requirement for a monthly review of the authorisation. As I have said, the current authorisation period of 12 months is consistent with the authorisation for the use and conduct of CHIS, which will need to be in place before criminal conduct can be authorised. Keeping the Bill consistent with the powers laid out in Section 29 will ensure that this power remains operationally workable for the public authorities using it.

While the code of practice is clear that an authorisation must be relied on for as short a duration as possible, and in many cases an authorisation will not last longer than four months, reducing the maximum length risks unintended consequences; for example, a shorter duration could mean that activity is rushed through in a shorter period of time, to avoid renewal or to demonstrate the value of a deployment to support a renewal. This clearly may not be the most effective or safest way of carrying out that conduct. I therefore hope that the noble Baroness is sufficiently reassured to withdraw her amendment.

The Deputy Speaker (Baroness Garden of Frognal) (LD): My Lords, I gather that the noble and learned Lord, Lord Mackay of Clashfern, would like to speak after the Minister.

Lord Mackay of Clashfern (Con) [V]: I think there is a question of consistency; if in one statute you have the word "reasonable", while in other statutes of similar import you do not, that tends to create a difficulty. The statement the Minister made, that it is part of

being a statement of this kind in an Act that the belief must be reasonable, is a reasonable explanation for not having it here.

9.30 pm

The Deputy Speaker (Baroness Garden of Frognal) (LD): Does the Minister wish to reply?

Baroness Williams of Trafford (Con): I will use the opportunity because the noble Lord, Lord Carlile, talked about the codes of practice, as he has done consistently; I would just like to raise those again.

The Deputy Speaker (Baroness Garden of Frognal) (LD): I now call the noble Baroness, Lady Hamwee.

Baroness Hamwee (LD) [V]: My Lords, I am sorry to hear the news about James Brokenshire, whom I have known for a very long time. If the Minister is able, I hope she will pass on our best wishes to him.

She said that we would cause uncertainty about Section 29 and referred to a rational basis for decisions. That seems to suggest that we would never need to use the word "reasonable", but it is used both in codes of practice and in statutes. I am grateful to the noble Lord, Lord Anderson, and the noble and learned Lord, Lord Thomas. The House is very lucky to have their expertise, and their clear explanations of the importance of what looks like a small amendment but is actually rather significant, based on how these things are applied by the courts.

The statutory code of practice—I accept that it is statutory—is indeed peppered with the term "reasonable". It is also peppered with the terms "necessary" and "proportionate", and of course they will be in the Act when the Bill becomes one. However, to say that something is expected—that it is expected that there should be a reasonable belief—reduces the value of what is in the code of practice.

On Amendment 18, briefly, the four months are extendable; it is late, however, and I do not want to go much further with that. However, I do want to come back to Amendment 6. We have not heard an adequate explanation of the Government's resistance to this, if I may put it that way. I would like to test the opinion of the House.

9.33 pm

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9.45 pm

The Deputy Speaker (Baroness Garden of Frognal) (LD): My Lords, we now come to the group beginning with Amendment 7. I remind noble Lords that Members other than the mover and the Minister may speak only once and that short questions of elucidation are discouraged. Anyone wishing to press this or anything else in the group to a Division must make that clear in debate.

Amendment 7

Moved by ***Lord Paddick***

7: Clause 1, page 2, line 27, after "detecting" insert "serious"

Member's explanatory statement

This amendment will limit the crime whose prevention or detection is the basis of a criminal conduct authorisation to serious crime.

Lord Paddick (LD) [V]: My Lords, in moving Amendment 7, I will speak also to Amendments 8, 9 and 10 in my name and that of my noble friend Lady Hamwee, and Amendment 11 in the name of the noble Baroness, Lady Chakrabarti.

The primary force of this Bill comes from inserting a new clause into the Regulation of Investigatory Powers Act 2000. Section 5 of the Regulation of Investigatory Powers Act 2000 deals with the interception of communication warrants that have to be issued by a Secretary of State. It states that the Secretary of State shall not issue an interception warrant unless she believes it is necessary, and it goes on to define "necessary" in subsection (3):

"Subject to the following provisions of this section, a warrant is necessary on grounds falling within this subsection if it is necessary—(a) in the interests of national security; (b) for the purpose of preventing or detecting serious crime; (c) for the purpose of safeguarding the economic well-being of the United Kingdom".

There is a paragraph (d), but it is not relevant today. This definition of "necessary" appears at other places in the 2000 Act, including Section 32, on the "Authorisation of intrusive surveillance".

Section 81 deals with general interpretations and subsection (3) sets out the tests, either of which need to be satisfied if a crime is to be considered a "serious" crime, and they are:

"(a) that the offence or one of the offences that is or would be constituted by the conduct is an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more; (b) that the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose."

In previous groups, we have set out why we believe covert human intelligence sources committing crimes is more serious than other forms of intrusive surveillance. Agents or informants are difficult to pull out of a situation if it suddenly changes, whereas listening devices can be switched off. Agents or informants are often placed at continuing personal risk in a way that technicians deploying listening devices are not. Listening devices are deployed against serious criminals, but innocent bystanders are more likely to be caught up in the criminal activity of agents or informants.

The list goes on, and yet this Bill allows criminal conduct authorisations to be granted in order to tackle any sort of crime and any level of disorder. Of course, CCAs have to be necessary and proportionate, but so does the deployment of listening devices, the interception of communication and the interference of equipment as set out in the other parts of the Regulation of Investigatory Powers Act 2000. But in those cases, in addition to being necessary and proportionate, they also have to target "serious" crime.

The Government make great play of the fact that these new provisions should be consistent with existing provisions in this area. In that case, they should agree to our Amendments 7 and 10, which limit the granting of criminal conduct authorisations to serious crime as defined by the 2000 Act. Preventing disorder is not mentioned in any of the existing provisions of the 2000 Act. We believe that a clear distinction needs to be made between, say, lawful protests, marches and demonstrations, and serious disorder. Our Amendment 8 seeks to achieve this.

Amendment 9 takes a slightly different approach, as things have moved on from when the 2000 Act was drafted. The issue of the interests of the economic well-being of the United Kingdom has been considered by this House more recently. In the Investigatory Powers Act 2016, in various places—including subsection (2)(c)

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of Section 20, which deals with the grounds on which targeted interception warrants are granted—the necessary grounds include it being

"in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security".

The same definition applies to obtaining communications data, bulk interception warrants, bulk equipment interference warrants and, in fact, every provision for the granting of authorisations in the 2016 Act.

This House considered the same issue in relation to the powers granted to border security officers to stop, question and detain under the Counter-Terrorism and Border Security Act 2019. Under part 1 of Schedule 3, an "act" is defined in paragraph 1(6) as hostile if, among other things, it

"threatens the economic well-being of the United Kingdom in a way relevant to the interests of national security".

The same definition, including the additional phrase

"in a way relevant to the interests of national security",

appears in relation to the power to make and retain copies of articles.

We had exactly the same discussions when it came to those Bills, which post-date the 2000 Act, as we are having now: that the economic well-being of the United Kingdom needs to be qualified to include where that is relevant to the interests of national security. In relation to the 2016 and 2019 Acts, the Government accepted those arguments and changed the legislation. In case the Minister raises it, the definition of "serious" crime in the 2016 and 2019 Acts is almost identical to that in the 2000 Act.

The Minister will have to come up with a convincing argument as to why this Bill is different from both the Investigatory Powers Act 2016 and the Counter-Terrorism and Border Security Act 2019. Quite clearly, consistency with the 2000 Act was not accepted as a good enough reason when it came to the 2016 and 2019 Acts. If the Minister fails to produce a compelling reason not to accept our Amendment 9, I intend to test the opinion of the House.

On Amendment 11 in the name of the noble Baroness, Lady Chakrabarti, I simply repeat what I said in Committee. For as long as I can remember, the use of an agent provocateur was explicitly prohibited in police guidance on participating informants, and yet it appears nowhere in this Bill, nor in the draft statutory codes of practice.

The only argument that the Minister came up with against this amendment in Committee was that Article 6 of the European Convention on Human Rights protects the right to a fair trial, an existing principle of English and Scottish law, and that the use of agents provocateurs could affect a fair trial. He also pointed out that Section 78 of the Police and Criminal Evidence Act 1984 allows a court to consider and exclude such evidence. However, as the noble Baroness, Lady Chakrabarti, convincingly responded to the Minister in Committee, agents provocateurs may be used in circumstances where there is no trial. For example, agents provocateurs may provoke a legitimate organisation to do or say something that undermines its credibility in the eyes of the public, short of a criminal offence, or they may provoke criminal offences that would otherwise not have been committed where no one is arrested or charged. The Government's argument appears to be that agents provocateurs are acceptable provided that no one faces trial.

Amendment 11 is necessary, and we will support it if the noble Baroness divides the House. I beg to move Amendment 7.

Baroness Chakrabarti (Lab) [V]: My Lords, I am grateful to the noble Lord, Lord Paddick, for putting the argument for my Amendment 11, which is supported by him and the noble Baronesses, Lady Ritchie of Downpatrick and Lady Jones of Moulsecoomb. I intend to press that amendment.

Forgive me, but I am not being rhetorical here: I do not think this amendment should be controversial in substance. I think the only difference between the Minister and me on this issue will be on whether the amendment is necessary to deliver my intention or whether the protection already exists in the legislation.

I shall briefly make the argument to the Minister. One of the grounds for authorising criminal conduct in what will become Section 29B is

"in the interests of the economic well-being of the United Kingdom".

We have just said that that belief must now be reasonable. Let us say that I work for one of the security agencies or indeed a police force, and I take the view that a particular environmental movement proposes the most extreme measures in the fight against climate change and that the agenda promoted by this organisation—perhaps not today but in five years' time—is so extreme a green position that it will severely damage the economic interests of the United Kingdom. I also perhaps believe that, while that movement is yet to become extreme in its direct action, that may well happen in future, and I believe that it is in the economic and possibly even the national security interests of the United Kingdom to head this movement off at the pass and discredit it in the public eye before the damage is done.

Therefore I authorise an agent—a CHIS—to commit crime, not because it is necessary to keep their cover but to discredit the organisation, which to date has not been involved in violence or anything that is actually criminal. As the noble Lord, Lord Paddick, put it, I then authorise a crime. The agent commits a crime, and the undercover agent is the only person in that group who has committed a crime, but the crime has such consequences that it discredits that peaceful protest movement in the eyes of the media, the public and the Government. It possibly justifies if not a criminal prosecution then perhaps the banning of that organisation. Article 6, and criminal court rules against entrapment and so on, will not help because there is no trial.

It seems to me that currently in the Bill there is nothing to prevent an agent provocateur who is used to incriminate peaceful protest. This is not an academic issue; it is an issue of grave concern to trade unions, the environmental movement, the Black Lives Matter movement and others involved in peaceful dissent. This has been a problem in our country and elsewhere in the world throughout the history of peaceful protest, so I urge the Minister to consider accepting the

amendment. It would do no violence to the stated intentions of her policy or the legislative scheme that she is intending to pass.

Finally, I echo the kind words of my noble friend Lord Rosser towards James Brokenshire, who may be in the other House but whom I have experience of being in very heated debates with for the media. He is a kind and gentle man worthy of this House who could teach a lot of us a few things about tone and civility. I am sure that I join the whole House, remote and present, in sending thoughts and prayers and every possible good wish for his speedy and complete recovery.

10 pm

The Deputy Speaker (Baroness Garden of Frognal) (LD): My Lords, the noble Baroness, Lady Ritchie of Downpatrick, has withdrawn, so I call the noble Baroness, Lady Jones of Moulsecoomb.

Baroness Jones of Moulsecoomb (GP): It is a pleasure to follow the noble Baroness, Lady Chakrabarti. She mentioned complacency in the speeches of a few noble Lords, and it seems that people are missing the point of the measures in this Bill. The Government make a great play of "This is all to catch paedophiles and terrorists", whom obviously we all want to catch, but they ignore the human rights legislation that will inevitably be transgressed. We know the long history of abuses by undercover police, and the thought that humans can change is absolutely ludicrous, in the sense that human nature will always involve a group of people who think that they can get away with doing things that the rest of us should not. I am afraid that in the past officers have been allowed unlawfully by senior officers to do things, and this does not mean that they will not do it again: they will do it again. For example, the undercover inquiry has taken years to reach a point at which there is a judge in control—one who, I would argue, is not doing a very good job. The progress is incredibly slow and survivors of this sort of abuse should not have to wait so long for justice.

This group contains important amendments on two issues: ensuring that these powers are used only against serious offending and ensuring that they are not used to encourage offending. I have signed only one amendment in this group, but they are all sound. I wish that I could trust the Government and the authorities enough to make Amendment 11 an absurdity, but history shows that this state can and does misuse power in order to undermine and stifle dissent and opposition. The face of the Bill should make clear beyond any doubt that agent provocateur conduct is illegal and can never be authorised, otherwise we can be sure that sooner or later this power will be used for that purpose.

Lord West of Spithead (Lab) [V]: My Lords, I join in passing best wishes on to James Brokenshire. The noble Baroness, Lady Chakrabarti, talked about the calmness of debate with him. We have been talking now for some hours on an issue which a lot of us feel very strongly about in all sorts of directions, and it is rather good that it is carried out in such a sane and balanced way, with people putting very strong points of view without storming buildings—but enough of that.

I wish to speak to Amendments 8, 9 and 11. These would impose limits, albeit somewhat vague ones, on the types of criminal conduct and activity that could be authorised. The Intelligence and Security Committee supports the Government's decision not to place limits on criminal conduct or on the activity which can be authorised on the face of the Bill, as this would undermine the effectiveness of future operations and put agents' lives at risk.

It is unsurprising that there is speculation about the more serious forms of criminality and calls for curbs to the power and for limits to be put in the Bill—I understand that. However, there are clearly concerns, and the committee strongly supports the Government's decision not to put them in the Bill—although, of course, this places an even greater emphasis on the need for robust safeguards, which we were talking about and voting on earlier this evening.

As a member of the ISC, I can offer some reassurance by saying that we have had full briefings on how MI5, for example, uses these authorisations at a very secure, secretive level, and we are reassured and satisfied that it uses them appropriately. I can also point to the European Convention on Human Rights: all public authorities, including those covered by this Bill, are bound by the Human Rights Act, which commits them to adhere to the ECHR, which includes the right to life and the prohibition of torture. The Bill is clear that all authorisations will be compliant with the ECHR and that the activity being authorised will be "necessary" and "proportionate" to the criminality it is seeking to prevent. On that basis, I will vote against the amendment.

Lord Beith (LD) [V]: My Lords, I add my thoughts for James Brokenshire, who was a member of the Justice Committee when I chaired it; I respect him and hold him in the highest regard, and I wish him well, as others have.

It is pleasure to follow the noble Lord, Lord West; I recall taking evidence from him when I was a member of the Intelligence and Security Committee. Now that he has gone from poacher to gamekeeper, I hope he is applying similar zeal to the scrutiny and examination of these very issues. I hope that the ISC will take a continuing interest in this legislation when it is on the statute book.

During my time on the Intelligence and Security Committee, I was concerned about the unspecific and broad nature of the "economic well-being" justification as a basis for approving various forms of action. Of course, that was in relation to intrusive surveillance powers, not the sanctioning of criminal acts, which we are discussing today; indeed, since that time, the economic well-being justification has been qualified in the same terms as those which Amendment 9 uses.

I raised my concerns in Committee on 3 December, and they echo the concerns expressed by the Constitution Committee, of which I am a member, in its report on the Bill. It was disappointing that, on 3 December, the Minister's reply did not answer or even refer to the

[LORD BEITH]

concerns I had raised. She had had a long day, and she has had an even longer one today, but I hope that I can provoke her to make some things clearer.

In that debate, I said that there are obviously threats to the economic well-being of the United Kingdom that are as serious as physical threats to that security. I included

"action by a hostile state or a terrorist ... group to destroy or disrupt key elements of our critical national infrastructure, energy supply, transport or banking and financial transaction systems"—[*Official Report*, 3/12/20; col. 870.]

as well as government communications and many forms of cyberattack.

I will suggest three other areas which might involve action by hostile states or extremists and might be candidates for authorisation. I do this simply to illustrate how broad the concept of economic well-being is. The current pandemic is, undoubtedly, a threat to the economic well-being of the United Kingdom. Could there be a future pandemic situation in which we believed that the reckless behaviour of other countries or deliberate action by extremists was making the spread of the pandemic significantly more dangerous? Would that qualify if some form of participation by an agent or human intelligence source seemed likely to help us fight the threat? I think it probably would.

I will give another example. The way the Brexit future relationship agreement is implemented could certainly affect the economic well-being of the United Kingdom. Could that justify deploying intelligence resources, including covert human intelligence, involving themselves in criminal acts? That is not quite so clear.

I offer a third example—that of a major overseas defence and civil engineering contract, affecting perhaps as many as 10,000 jobs in Britain, where there are fears of bribery, corruption and money-laundering, and of those distorting the outcome. What if a different British company is involved in the rival bid for this contract—these bids normally come from consortia involving companies from several countries—and that company considers that it would be very adversely affected by action which might have been begun by someone qualified through this legislation? The economic well-being justification is clearly not a simple matter in such a situation.

I am not asking the Minister to comment on those three hypothetical examples individually. What I want her to consider is, first, whether the economic well-being justification should be so broad. Secondly, if it is not to be qualified by reference to national security, as Amendment 9 in the name of my noble friend Lord Paddick requires, how else can we be confident that it is not inappropriately used? The use of this justification for serious criminal action has not really been the subject of much ministerial comment, and its scope will depend heavily on how future CCAs will be viewed in retrospect by the Investigatory Powers Tribunal and by the commissioners. This approach does not give us much confidence that applications to authorise criminal conduct in relation to economic well-being issues will be considered by authorising officers against a well-understood test of what is justifiable. We have to bear in mind that these authorising officers are in a wide variety of organisations, some of which have long experience of intelligence work and some a great deal less.

The Constitution Committee said in its report:

"While we recognise that threats to the 'economic well-being of the United Kingdom' may justify a security response, we are concerned about the use of such a broad concept to authorise serious criminal conduct. The House may wish to consider whether the authorisation of criminal conduct should require more specific justification than a general invocation of the need to protect economic well-being."

That is what we are doing in this short debate tonight. I would like to hear a clear statement from the Minister on how we might establish clear principles against which to test whether authorising criminal action under so broad and vague a headline as "economic well-being" will, in any future instance, be proportionate and justifiable. Would it need to be a threat to economic well-being of a kind that would, in effect, be a threat to the security of the United Kingdom? That is really what the amendment suggests.

Lord Carlile of Berriew (CB) [V]: My Lords, I join in the good wishes to James Brokenshire. He has been a superb Minister over many years and never appears to be partisan, whatever he feels inside. He is one of the best listeners among Ministers I have ever seen. He has played a very important part in some significant policy areas, so we hope that he will be much better soon and back in a very senior position.

It is always an enormous personal pleasure for me to follow the noble Lord, Lord Beith. I have admired him in politics for decades. He is one of the best parliamentary debaters that we have, as he has illustrated in the last few minutes.

I want to speak on Amendments 9 and 11. Like the noble Lord, Lord Beith, I was looking for examples and thought I would ask myself whether I had done any cases as a QC that involved serious economic crime that did not fall within the realms of national security, or clearly so. I was immediately able to think of two examples. One was a money-counterfeiting case in which a ring of forgers was forging very substantial quantities of notes, many of which passed into currency circulation. The other was a fraud relating to the activities of the London Metal Exchange in which over £1 billion-worth of fraud was committed by the simple task of forging bills of lading that referred to metals passing around the world, when the only ones that were really passing around the world were a few containers of pig iron—not the much more valuable metals referred to on the forged bills of lading.

Neither of those cases, obviously, would have any direct relevance to or interest in national security, but they are undoubtedly very serious crimes. I do not know, for I was the defence counsel in both those cases, whether any CHIS were involved in those cases, but it would not surprise me if they were, because there were obvious parts that they could have played. It seems to me that the use of CHIS in those circumstances of economic crime is entirely legitimate and that Amendment 9 is therefore inappropriate and too limiting.

10.15 pm

As for Amendment 11, I absolutely understand what is being aimed at, which was made particularly clear by the noble Baroness, Lady Chakrabarti. If

those who tabled the amendment intend that the words should be the extent to which they wish to press their amendment, I fear that it does not work, because it includes "assisting" the commission of an offence. Now if the CHIS is encouraged to assist the commission of an offence, the CHIS may be doing something very important which I think all right-thinking people would regard as legitimate.

For example, if there was a plot to bomb a public building and the explosives that were going to be part of a car or lorry bomb had to be moved from one place to another to prepare for the final event, for a CHIS to be encouraged to offer to drive those explosives across the country so that they could be intervened on in a safe and remote place by the authorities would be entirely in the public interest and exactly the kind of thing that CHIS are required for. The real importance of CHIS is often to do small things which they are tasked to do in order to prevent much greater crime than any that they will commit and to protect the public. So Amendments 9 and 11 are completely disproportionate, and I therefore share the opposition to them expressed by the noble Lord, Lord West of Spithead.

Lord Judd (Lab) [V]: My Lords, I am associated with Amendment 7 and shall speak in support of my noble friend Lady Chakrabarti's amendment on agents provocateurs. I am one of those who believes that however much, from an idealistic position, a Bill such as this should be unnecessary, in the reality of the world, what the Bill covers is desperately needed. That is why I am convinced that we should not inadvertently get into a position in which we are undermining public understanding and goodwill towards the need for the Bill and for those who courageously do the work to which we are referring.

I am therefore certain that Amendment 7 is highly relevant. I have already spoken on a previous group about the word "serious". We must not let this become seen as a convenient system at the disposal of the security services, and the rest. The gravity and seriousness of the work when it is necessary must be free from such misunderstandings and from having created situations in which people's anxieties can be exploited by those with whom we have nothing in common. Believe you me, there are people who are determined to exploit every opening to try to disprove the validity of the Bill and what it is about. For that reason, I believe it is not superficial to insist on the word "serious". It is extremely serious because it is key to keeping the maximum positive attitude.

On the amendment in the name of my noble friend Lady Chakrabarti, in the same way, we need to be very careful about counterproductivity. I cannot think of anything much more easily exploited for stirring up doubt and anxiety about what the security services are about and why legislation of this sort is necessary than to prevaricate on an issue such as agents provocateurs. It is all right to say "Well, it's covered in other aspects of the Bill"; it may well be, but I believe that the concept of agents provocateurs and the counter-productivity if misused makes it absolutely essential that we spell out that the activity of agents provocateurs is just not acceptable. The more we underline that, the better.

I am therefore firmly with my noble friend Lady Chakrabarti on this, and some of my colleagues who have carried responsibilities in this sphere and who see this from an administrative and top-down point of view have to understand the dynamics which are there in society and which work to undermine what they seek to achieve on our behalf. From that standpoint, the amendment is necessary and highly relevant.

Lord King of Bridgwater (Con) [V]: My Lords, I join so many noble Lords in paying a warm tribute to James Brokenshire and sending our best wishes to him. It is very sad to hear the news. I hope for a good and speedy recovery and to hear better news shortly.

My approach to these amendments is already pretty clear because we are setting up a completely new system. It is now on a statutory basis and has a new and I think generally respected code of practice. It has to report through the judicial commissioner and then the Investigatory Powers Commissioner, to the Prime Minister and Parliament, and to try at this stage to put in all sorts of qualifications seems quite unnecessary.

Take the issue about adding "serious" to "crime": it seems that in many cases when the police first get some source—some possible informer—they may not be at all clear how serious the crime may be. However, I think we would all feel pretty silly if later on, when very serious crimes were reviewed, they said, "We knew about that, but because we couldn't tell how serious it was going to be at that time, we never took any action." That would be pretty unforgivable. Therefore, I do not support adding "serious" to these issues.

I will not say any more about how the issue of economic well-being is linked to national security, as the noble Lord, Lord Carlile, covered the point admirably. There is no question that many things could happen, as the noble Lord, Lord Beith, addressed; he is a former member of the ISC, who took evidence with me. And the noble Lord, Lord West—poacher turned gamekeeper that he is—said that we now see a situation in which many extremely serious things could affect economic well-being. That could involve perhaps many people losing their jobs and significantly higher unemployment, but you could not claim that that is linked to national security.

With the confusions and uncertainties of the world at present, the cyberattacks and the data war that is going on, I would not wish to qualify, limit or restrict a properly set up and statutorily approved new system with too many qualifications, which may limit the effectiveness of its vital work.

Lord Kennedy of Southwark (Lab Co-op): My Lords, this is the first time I have spoken on the Bill on Report. First, I join others in sending my best wishes to James Brokenshire. I do not know Mr Brokenshire very well, but I dealt with him when he was Secretary of State for Housing, Communities and Local Government, and he was always very fair. I wish him well in his treatment and send him my best wishes, as other noble Lords have done.

Amendments 7, 8, 9 and 10 in this group are in the names of the noble Lord, Lord Paddick, and the noble Baroness, Lady Hamwee. I will comment on these first

[Lord Kennedy of Southwark]
and then come to Amendment 11, proposed by my noble friend Lady Chakrabarti, along with the noble Lord, Lord Paddick, the noble Baroness, Lady Jones of Moulsecoomb, and my noble friend Lady Ritchie of Downpatrick.

All issues in this group of amendments were discussed in Committee, on 3 December last year. Amendments 7 and 8 would insert the word "serious" after the words "detecting" and "preventing" in the Bill, thereby seeking to limit the use of a criminal conduct authorisation. I see the point that the noble Lord, Lord Paddick, is making and, while I have some sympathy with him, I am not convinced that these amendments are necessary.

Of course all authorisations must be necessary and proportionate, but, on reading through the revised code of practice, I thought it contained enough protection to render these amendments unnecessary, as I said earlier. On looking through the code, I saw one very important paragraph, which I read carefully. It said:

> "The authorisation … will not be proportionate if it is excessive in the overall circumstances of the case. Each action authorised should bring an expected benefit to the investigation or operation and should not be disproportionate or arbitrary. The fact that a suspected offence may be serious will not alone render the use or conduct of a CHIS proportionate. Similarly, an offence may be so minor that any deployment of a CHIS would be disproportionate. No activity should be considered proportionate if the information which is sought could reasonably be obtained by other less intrusive means."

That is fairly clear.

If votes are called on either of these two amendments, these Benches will not support them. I take a similar view that Amendment 10 is not necessary for the same reason. It is important to enable public authorities to have a reasonable suite of tools available to prevent crime and seek justice for victims.

When we discussed these matters before, the noble Baroness, Lady Williams of Trafford, used the example of out-of-date food being sold and consumed. On one level, you could ask what the big issue with a few dates is, but the reality is that it could lead to serious public health implications, with people consuming food that is not fit to be consumed by humans, leading to serious illness and even death, in certain circumstances. I can see circumstances in which, information having been assessed carefully using the guidance of the code, a CHIS would quite rightly be deployed. This is all about balance and proportionality, and I think we are probably in the right place.

Amendment 9 seeks to restrict issues around economic well-being to those linked to national security. The noble Lord, Lord Paddick, said that he intends to test the opinion of the House if he is not satisfied with the Government's response. I again tell the noble Lord that these Benches will not support him if he does. I have reservations about this amendment, which could unintentionally prevent a CHIS being deployed on some crimes where their deployment would otherwise be reasonable, proportionate and necessary. That could be to the detriment of our economic well-being as a country, if other tests have been met. This issue was discussed at length in Committee.

10.30 pm

What we need today is confirmation of the reassurances that the legitimate activities of all sorts of organisations will not be targeted. We particularly discussed trade unions when we last discussed this. It is absolutely right to say that they have been targeted in the past—quite disgracefully. We must know that will never ever happen again. We do need reassurances on that.

As I have said before, there is nothing that prevents you from being a trade unionist, standing up for yourself and your members to get better work, conditions and pay, and also loving your country and wanting to be successful economically and in other ways. The riddle about being a trade unionist is about strikes. In my view, when we have a strike, it is a failure of the ability to negotiate a reasonable settlement to the issues in question, but sometimes they are necessary. Anyone who opposes or supports all industrial action is equally wrong and they are part of the problem.

Amendment 11, in the name of my noble friend Lady Chakrabarti, is one that I do not believe is necessary. The Bill as it is drafted will prevent a CHIS authorisation with the intent to provoke an individual or organisation to commit crime and thereby seek to destroy or discredit them. It would not be allowed. It was good to hear from my noble friend Lord West of Spithead, who is a distinguished member of the Intelligence and Security Committee. I was reassured by his comments, as I was by the comments of the noble Lord, Lord Carlile of Berriew, in respects of Amendments 9 and 11.

This is the first time I have spoken on this Bill on Report. I am very grateful to and want to offer my sincere thanks to all the police officers, MI5 and MI6 officers and others who undertake very dangerous work to keep us safe. We need safeguards and protections in place and clear codes of practice. People must be held accountable to those, so that agents are clear what they can and cannot do and how they must behave when they are deployed. It is important we get that right with the necessary protections. Sometimes people are authorised to commit crimes in limited circumstances, but they are doing that to prevent much more serious crime taking place. In doing this dangerous work, they get some very dangerous people off our streets—be they terrorists, drug dealers, gun-runners, paedophiles, murderers or other dangerous criminals. I will not support any amendments in this group on which we are dividing today.

Baroness Williams of Trafford (Con): My Lords, I thank all noble Lords in this group who have paid their respects and tributes to my right honourable friend James Brokenshire. I will ensure that he gets all the comments in the form of a consolidated *Hansard,* so that he can see what kind things people have been saying about him.

I reassure noble Lords that the decisions taken when drafting this Bill have been informed by the input of operational partners. This includes the circumstances where it is necessary to authorise a CHIS to participate in criminal conduct to ultimately ensure that we can prevent terrorism, crime and harm to the public.

However, we have been robust in ensuring the power is only as broad as it is truly necessary to be. For that reason, we have restricted the public authorities able to authorise a CCA from those able to authorise a CHIS more broadly. It is also for that reason that we have reduced the statutory purposes for which a criminal conduct authorisation can be granted from the six that are available for a Section 29 CHIS use and conduct authorisation under RIPA. The remaining purposes have been included because there is operational evidence that they are required to keep us safe. I gave examples for each purpose in Committee and I am not going to repeat them all here, but I will highlight the impact this might have of the daily lives of the public.

The noble Lord, Lord Carlile, has given two examples. Another example, which the noble Lord, Lord Kennedy, alluded to is food crime—such as the extension of meat durability dates leading to out-of-date food being consumed. It is damaging and, as he said, it can be dangerous to public health, but it might not meet the serious crime threshold. I again offer reassurance, particularly to the noble Lord, Lord Beith, that the necessity and proportionality requirements apply for all authorisations. Activity could not be authorised if it was more serious than the activity it seeks to prevent and that is the test.

The noble Lord, Lord Kennedy, asked me about other forms of legitimate activity. Normal trade union activity would of course be perfectly outwith the test that I have just outlined.

I understand that the intention behind Amendment 11 is to prevent CHIS being authorised to act as agents provocateurs. However, the amendment as drafted goes much broader than that. It seeks to prohibit any CHIS from being authorised to encourage or assist in the commission of any offence. That would impose broad and clearly unintended constraints on criminal conduct authorisations.

I sought to provide reassurance on the issue of agents provocateurs in Committee, where I stressed the requirement for all CHIS authorisations to be given in line with the Human Rights Act. But perhaps I can be even clearer: CHIS cannot be used to entrap people in crimes in the manner suggested. Article 6 of the ECHR, which protects the right to a fair trial, prevents this happening. I also point noble Lords to the publicly available *Undercover Policing: Authorised Professional Practice*, which states in very clear terms that an undercover officer must not act as an agent provocateur. I understand that noble Lords may wish to test the opinion of the House, but I hope I have provided the necessary reassurance on this point.

The Deputy Speaker (Lord McNicol of West Kilbride) (Lab): I have received two requests to ask short questions, from the noble and learned Lord, Lord Mackay of Clashfern, and the noble Baroness, Lady Chakrabarti. I call the noble and learned Lord, Lord Mackay of Clashfern.

Okay—there is no Lord Mackay, so I call the noble Baroness, Lady Chakrabarti.

Baroness Chakrabarti (Lab) [V]: I am grateful to the Minister for her comments, but I fear that she has misread Amendment 11. It does not ban CHIS from encouraging or assisting crime, because of course they would have to do that very commonly as part of keeping their cover. If one looks at Amendment 11, one sees that it is about an authorisation, which cannot be "for the primary purpose of … encouraging" crime or "otherwise seeking to discredit" an organisation —that is, an organisation that is not actually committing crime in the first place. Of course, Article 6 will not help if there is no prosecution and trial, so I have yet to see a safeguard against agents provocateurs.

The Deputy Speaker (Lord McNicol of West Kilbride) (Lab): Does the Minister wish to reply? No? Okay—I call the noble Lord, Lord Paddick.

Lord Paddick (LD) [V]: My Lords, I thank all noble Lords for their contributions, but, first, I send my best wishes to the right honourable James Brokenshire. James and I have known each other for a very long time—since my policing days—and he is such a lovely guy. I really hope that he recovers completely from the terrible situation that he is in.

I particularly thank the noble Baroness, Lady Jones of Moulsecoomb, my noble friend Lord Beith and the noble Lord, Lord Judd, for their support. The noble Lord, Lord West of Spithead, gave no reason why the ISC did not want these powers limited to serious crime, when so many other aspects of the Regulation of Investigatory Powers Act are limited to serious crime, and arguably this is more serious than those powers.

I was a little confused by the noble Lord, Lord Carlile of Berriew, who gave two examples of very serious criminal offences, which are of course covered by those aspects of the power that refer to the prevention and detection of crime. We are talking here about something that has an impact on the economic well-being of the UK that is not a crime, because if it was a crime it would be covered by that other aspect. I am sure that they were very important cases, but they were cases of crime, not simply impacting the economic well-being of the United Kingdom.

It sounded as though the noble Lord, Lord King of Bridgwater, was talking about the deployment of covert human intelligence sources, rather than authorising those CHIS to commit crime. I do not understand this from what anyone has said, including the Minister: if something threatens the economic well-being of the UK but is not a crime—if it was it would be covered by one of the criteria of preventing or detecting crime—how can it be necessary and proportionate, unless it also involves an issue of national security, to authorise somebody to commit a crime to deal with something that is not a crime?

On that basis, because there has not been a satisfactory response, I wish to test the opinion of the House on Amendment 9. In the meantime, I beg leave to withdraw Amendment 7.

Amendment 7 withdrawn.

Amendment 8 not moved.

Amendment 9

Moved by ***Lord Paddick***

9: Clause 1, page 2, line 30, at end insert "so far as those interests are also relevant to the interests of national security."

Member's explanatory statement

This would allow a criminal conduct authorisation to be granted on economic grounds only if it is also relevant to the interests of national security, reflecting equivalent provisions in the Investigatory Powers Act 2016 and the Counter-Terrorism and Border Security Act 2019.

10.42 pm

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Naseby, L.
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O'Shaughnessy, L.
Pannick, L.
Parkinson of Whitley Bay , L.
Patel, L.
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Ricketts, L.
Ridley, V.
Robathan, L.
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Rogan, L.
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Sater, B.
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Stroud, B.
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True, L.
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Young of Graffham, L.
Younger of Leckie, V.

10.54 pm

Amendment 10 not moved.

Amendment 11

Moved by ***Baroness Chakrabarti (Lab)***

11: Clause 1, page 3, line 2, at end insert "; and

(d) is not carried out for the primary purpose of—

(i) encouraging or assisting, pursuant to sections 44 to 49 of the Serious Crime Act 2007, the commission of an offence by, or

(ii) otherwise seeking to discredit,

the person, people or group subject to the authorised surveillance operation."

Member's explanatory statement

This amendment would prohibit the authorisation of criminal conduct where the covert human intelligence source acts as an agent provocateur.

Baroness Chakrabarti (Lab) [V]: My Lords, as I indicated earlier, I would like to test the opinion of the House on this amendment. I beg to move.

10.55 pm

Division conducted remotely on Amendment 11

Contents 111; Not-Contents 255.

Amendment 11 disagreed.

Division No. 5

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Benjamin, B.
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Blower, B.
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Brown of Eaton-under-Heywood, L.
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Wyld, B.
Young of Cookham, L.
Young of Graffham, L.
Younger of Leckie, V.

Consideration on Report adjourned.

House adjourned at 11.08 pm.