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PARLIAMENTARY DEBATES
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HOUSE OF LORDS

OFFICIAL REPORT

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

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House of Lords

Tuesday 12 June 2018

2.30 pm

Prayers—read by the Lord Bishop of Derby.

NHS: Overseas Doctors

Question

2.36 pm

Asked by **Baroness Hayman**

To ask Her Majesty's Government what plans they have to review the Tier 2 visa system to ensure that overseas doctors recruited by the National Health Service are able to take up their positions.

Baroness Hayman (CB): I beg leave to ask the Question standing in my name on the Order Paper, and remind the House of my interest as a member of the General Medical Council.

The Earl of Courtown (Con): My Lords, the Government are committed to keeping the operation of the immigration system under review to ensure that it operates in the national interest. As my right honourable friend the Home Secretary has indicated, we are looking urgently at this issue.

Baroness Hayman: I thank the Minister for that reply, but I have to say that I am disappointed. Although the word "urgency" was used, we have not seen a great deal of urgency in action. Does he not agree that it is ludicrous and, frankly, shameful that patient care in this country is being compromised every day by the shortage of doctors and yet, every day, doctors from overseas recruited to positions in the NHS are being turned away and refused visas by the Home Office?

Yesterday, we learned that 2,360 such doctors have been refused visas. We learned that through a Freedom of Information request, not in response to my Question four weeks ago, when the Minister at the Dispatch Box did not give me the numbers. That is in the past six months. Is it not time that the Government took urgent action and ended this damaging and dogmatic policy?

The Earl of Courtown: My Lords, the noble Baroness is quite right: this issue needs to be looked at seriously. That is why my right honourable friends the Home Secretary and the Prime Minister have been discussing it. As I said, progress will be made in the very near future.

Lord Clark of Windermere (Lab): My Lords, given that we are tens of thousands of doctors short, will the Minister explain to the House and, through this House to the British people, why the Government are prepared to put the British people's health at risk by refusing thousands upon thousands of doctors who have been recruited the right to come into this country?

The Earl of Courtown: My Lords, as the noble Lord will be aware, we have made it a priority to increase doctor numbers in this country. A record number of undergraduates will begin medical training by 2020, with 1,500 new funded places and five new medical schools—

Noble Lords: Oh!

The Earl of Courtown: Noble Lords may jest, but this is a very serious matter. The fact is that where the Migration Advisory Committee has recognised that there has been a shortage in the UK, visas are given priority on the SOL, and no one in these specialisms has been refused a visa.

Baroness Redfern (Con): My Lords, while adding child and adolescent psychiatrists to the shortage occupation list, as the Government have done with the other health specialties, does my noble friend agree that any removal of the tier 2 visa cap should apply to all health professionals in both physical and mental health specialisms, in accordance with the principle of parity of esteem?

The Earl of Courtown: My Lords, my noble friend mentions mental health issues, and as she will be aware, Her Majesty's Government have published a Green Paper setting out proposals to transform mental health provision for children. As for shortages, these factors are taken into account when different specialist areas are put on the shortage occupation list.

Baroness Walmsley (LD): My Lords, is it not true that the current situation is quite deliberate? The Conservative Party manifesto last year promised to double the cost of employing someone from outside the EEA. The head of business immigration at law firm Kingsley Napley believes that the cost of employing much-needed staff from other parts of the world will be £14,174 a year more than employing EU staff. So, as EU staff leave the NHS in the face of Brexit, how will the Government's proposals help NHS budgets, even if it can get visas for the staff it desperately needs?

The Earl of Courtown: My Lords, I do not recognise the noble Baroness's figures but as she and the House will be aware, the quotas have been exceeded and a large increase in the number of doctors from outside the EEA have been applying to come to this country. These are highly qualified doctors who do an excellent job.

Lord Kennedy of Southwark (Lab Co-op): My Lords, why will the Government not urgently announce that where there are job shortages, such applicants will be exempt from this rule? To stall repeatedly on this issue is a serious error of judgment and directly damages patient care. How does the noble Earl reconcile that position with working in the national interest, as he said in his first response to the Question?

The Earl of Courtown: My Lords, the noble Lord accuses Her Majesty's Government of stalling on this issue; we are not stalling. It is being taken extremely seriously, as I said, by my right honourable friends the Home Secretary and the Prime Minister, and we will hear news on it shortly.

Lord Patel (CB): My Lords, can we first agree that the doctors coming out of the new medical schools that are planned will not be available for service for at least eight to 10 years? Having accepted that, can we find a solution to the visa cap that has been put on doctors? One solution might be to include them in the same category as those who do not qualify for the cap—those earning more than £159,600. That would not in any way jeopardise the Conservative manifesto or other plans. It would just shift a category and therefore remove them from the cap.

The Earl of Courtown: My Lords, we are looking at all issues relating to this at the moment. The noble Lord says that the qualifying period is seven to eight years before new doctors are fully qualified. However, I should add that graduate entry medical students—I declare an interest as my daughter has just qualified—qualify in four years. The daughter of a noble Lord opposite is on the same course, but as he is not in his place I shall not mention his name.

Baroness McIntosh of Pickering (Con): My Lords, does my noble friend agree that a proper procedure should be in place to ensure that such doctors have the same qualifications as those EU doctors? They should be properly qualified, have a full knowledge of and proficiency in English and be registered to practise medicine in the country from which they come.

The Earl of Courtown: My Lords, the doctors applying, particularly those from the Indian continent, are some of the best qualified who operate in this country. There is an exceedingly high bar for employment, and all have to meet standards on the English language.

Lord Davies of Stamford (Lab): My Lords, there is an aspect to this issue that has not been properly debated and discussed. There is no difficulty in hiring medical professionals from other EU countries, but will the Government be very cautious and careful in trying to recruit medical professionals from third-world countries—poor countries that often have very few doctors and nurses per thousand, or per million, of population? It is the most appalling act of selfishness to deprive those countries of their scarce medical resources.

The Earl of Courtown: The noble Lord is quite right. It is appropriate to take doctors only from countries that have their own very effective medical systems. To take them from third-world and developing countries is not acceptable.

Carers: Health and Well-being

Question

2.44 pm

Asked by ***Baroness Pitkeathley***

To ask Her Majesty's Government, in the light of the results of the 2011 Census that showed that those caring for 50 hours per week or more are twice as likely to be in poor health as non-carers, what steps they are taking to improve the mental and physical health and well-being of carers.

Baroness Pitkeathley (Lab): I beg leave to ask the Question standing in my name on the Order Paper. In doing so, I draw attention to my interests in the register.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, the Government recognise and value the work that carers do and are committed to supporting carers so that they can provide care without compromising their own health and well-being. That is why, on 5 June, my department published a carers action plan, setting out a cross-government programme of support for carers. Furthermore, there will be a clear focus on carers in the forthcoming social care Green Paper.

Baroness Pitkeathley: I thank the Minister for that reply and for the action plan. The process was a bit protracted, as he will remember, but I am glad that the department managed to get it out in time for Carers Week. However, by its own admission it is a short-term plan only to bridge the issue of carers in the run-up to the social care Green Paper. In new research published for Carers Week, 70% of carers said that their own mental health had been adversely affected, while 60% said that their physical health had worsened, and two out of five said that they doubted their ability to go on caring unless they had more support. Given that that care is valued at £130-odd billion a year, that is a time bomb that must be addressed in the Green Paper. Can the Minister reassure the House that the needs of carers will be central to any plans for social care reform? Will he also understand that, as well as the moral imperative for supporting carers, to which I know he is personally committed, there is a very sound economic case for doing so?

Lord O'Shaughnessy: I thank the noble Baroness for her question and for her tenacity in pursuing me on this topic. I am glad that we were able to publish the action plan. It is appropriate during Carers Week to pay tribute to the amazing work that carers do. Yesterday, I had the opportunity to meet carers who were struggling, often against their own health needs, to care for those they love.

The action plan that we published is a two-year plan. It has some immediate actions but is not purely short-term and contains some actions for the medium term. I highlight one of those, which is important, particularly given these concerns about carers' health and well-being: a commitment to creating equality standards for carer-friendly GPs. Carers mentioned to me yesterday how important it is for GPs to validate the fact that they are carers and signpost them in the direction of care. I can confirm that carers and support for carers will have prominence in the Green Paper.

Lord Mackay of Clashfern (Con): My Lords, one of the most exciting experiences I ever had in my life was to go to a children's hospice providing respite care for the parents of children facing an early death as a result of the onset of permanent illness. What sort of provision do we make for that?

Lord O'Shaughnessy: The importance of respite care is agreed by everybody. I point my noble friend to the better care fund, which provides around £130 million

a year to support respite care and carers' breaks, building on the commitment made in the Care Act 2014.

Baroness Tyler of Enfield (LD): My Lords, the action plan contains a number of generalised statements about the need for health and social care professionals to have improved understanding and awareness of the needs of carers. What specific plans do the Government have to ensure that social worker training—both initial training and later professional development—contains practical guidance on how to identify carer fatigue and distress and ensure that carers receive the support to which they are entitled?

Lord O'Shaughnessy: The noble Baroness makes a very important point. Indeed, in the carers action plan there is a specific commitment from the department to work with local authorities to improve social work guidance in terms of spotting carers, many of whom are not even aware that they are formally designated as carers, and signposting them to the right support. There will also be an awareness-raising campaign among social workers so that they understand their duties.

Baroness Finlay of Llandaff (CB): Will the Government's action plan have a specific focus on children and adolescents who are carers, often of a single parent who may have physical and/or mental health problems? The child often carries the whole responsibility, and is sometimes also responsible for their siblings. When they have an adverse experience, such as coming home and finding their parent deteriorated or dead, they need an enormous amount of support. Therefore, the education system also needs to be involved in any strategy looking at children.

Lord O'Shaughnessy: The noble Baroness is quite right; it is hard to imagine what the burden must be on those young carers who are looking after parents and siblings. Young carers are explicitly mentioned in the action plan; again, I point to two commitments in that. First, there is a young carers identification project, which is working with Carers UK to make sure that we can find young carers. Secondly, the DfE has committed in its children in need review to make sure that young carers are getting the educational support they need in school and out of school to make sure that their educational outcomes do not suffer.

Lord Touhig (Lab): My Lords, almost 50,000 babies, children and young people need palliative care, yet children's hospices receive less statutory funding than adult hospices, and the lack of collaboration between support services is a major challenge. Carers and those they care for would benefit if we had a children's palliative care strategy that was family-centred and had a holistic focus on health, education and social care. Does the Minister agree with that?

Lord O'Shaughnessy: Children's hospices do an extraordinary job. They get less statutory funding as a percentage of their total; there are good reasons for that, both historically and to do with the type of care they provide. The Government are providing £11 million of support in 2018-19 through the children's hospices grant to support them, in addition to funding from local clinical commissioning groups. But I will take his proposal for a palliative care strategy back to my right honourable friend the Minister for Care. I know that she is very interested in this issue.

Baroness Brinton (LD): My Lords, the advice for local authorities on short breaks for carers of disabled children says on page 7 that short breaks should not just be there for those at crisis point. Given that many short break centres are now being closed across the country, removing help even at a crisis point, what are the Government doing to ensure that short breaks for children and their carers—for our most vulnerable and disabled children—will be guaranteed for the future?

Lord O'Shaughnessy: In addition to the £130 million in the better care fund, there is a commitment in the carers action plan to develop examples of best practice that can be spread around local authorities to make sure they all reach the highest standards. At the moment, unfortunately, only some of them are doing so.

BBC Persian Staff

Question

2.51 pm

Asked by ***Lord Grade of Yarmouth***

To ask Her Majesty's Government what action they are taking to prevent the harassment of BBC Persian staff by the Iranian authorities.

The Minister of State, Foreign and Commonwealth Office (Lord Ahmad of Wimbledon) (Con): My Lords, we are concerned by the charges and the wider activity against BBC Persian staff in Iran. We expressed our concern about this at the UN Human Rights Council on 12 March, and both the Foreign Secretary and the Minister for the Middle East have raised the issue with their Iranian counterparts on several occasions. I assure noble Lords that we will continue to raise the treatment of BBC Persian staff and their families with the Iranian Government.

Lord Grade of Yarmouth (Con): I thank my noble friend for that Answer. BBC World Service staff working on the Persian service, which is a vital source of impartial news in that area, continue to be harassed and targeted by the Iranian authorities. While I know that the Foreign Secretary has raised this at the highest levels with the Iranian Government in recent times, what assurance can we have from the Government that they will continue to worry about this? This is a serious state of affairs for the BBC World Service.

Lord Ahmad of Wimbledon: I assure my noble friend that we will continue to raise this. The latest example of this was when my right honourable friend Alistair Burt, the Minister of State for the region, visited on 29 April and raised this directly. My noble friend is also quite right that in July 2017 a criminal investigation was opened into the activities of all BBC Persian staff, which includes alleging that their work constituted a crime against Iran's national security. The result has been great hardship, the freezing of

[Lord Ahmad of Wimbledon]
assets, and 152 named individuals linked to the BBC Persian service have been captured by this. We continue to implore the Iranian authorities to treat the situation in such a way as to ensure the freedom of the press in Iran, and we will continue to press for such.

Lord Clarke of Hampstead (Lab): My Lords, obviously the House wishes the Minister well in his attempts to get this situation put right for BBC staff. But given the track record of Rouhani and his Government on dealing with the human rights of his own people, I would not hold your breath about them changing their minds very quickly. What will Her Majesty's Government do to make sure that we get better treatment for the BBC staff than we got for the unfortunate lady from Hampstead, who is still incarcerated after repeated attempts by this Government to get her released?

Lord Ahmad of Wimbledon: The noble Lord is right. The human rights situation—I speak as the Human Rights Minister—is dire not just for the people of other nationalities or joint nationality, as the case that he has pointed to illustrates, but for Iranians themselves. We have seen the persecution of minority communities, including Christians and Baha'is, continuing in Iran. Our attitude, which I think is the right one, is that we will persevere with our bilateral exchanges directly with the Iranians and we will continue to raise this matter through international fora, including the Human Rights Council, as I have done most recently.

Baroness Northover (LD): My Lords, many in the BBC Persian service are dual nationals. The noble Lord made very brief reference to Nazanin Zaghari-Ratcliffe, who has dual nationality. She has now been in prison for 800 days, and yesterday marked her daughter's fourth birthday. Can the noble Lord be a bit more expansive about what the Government are doing to seek her release, especially after the flurry of activity in various directions last year by the Foreign Secretary?

Lord Ahmad of Wimbledon: I am sure that I speak for all noble Lords——I speak as a parent, too—when I say that our hearts go out to a young child whose parent was absent for a notable birthday, and our compassion goes out to the family. Many sensitivities are associated with the case that the noble Baroness raises and other consular cases, but I reassure her that we regularly raise the case of Nazanin Zaghari-Ratcliffe, as well as other cases, and we will continue to do so. The issue of dual nationals is pertinent because Iran does not recognise dual nationality.

Viscount Colville of Culross (CB): My Lords, I declare an interest as a series producer working at CNN. Last year, the Government gave an extra £85 million to the BBC World Service, which helped set up 12 new BBC language services in areas where free speech is oppressed. That funding has a commitment for two years. What are the Government's plans for funding these services beyond 2020?

Lord Ahmad of Wimbledon: The Government have indicated their commitment through the funding that the noble Viscount has alluded to. In terms of longer-term funding, we believe strongly in the BBC World Service, most notably in its provision of impartial news and support to various populations across the world. I will write to the noble Viscount about funding beyond 2020.

Lord Cormack (Con): My Lords, why does the Foreign Secretary not summon the Iranian ambassador to the Foreign Office every day until Mrs Zaghari-Ratcliffe is released?

Lord Ahmad of Wimbledon: I am sure that my right honourable friend will take note of my noble friend's suggestion. However, I say to my noble friend that we do not miss any opportunity to raise consular cases. This is not just about the ambassador; let us be clear that, when it comes to the Iranian Administration, these calls are made in Tehran. We make these issues known not just to Foreign Minister Zarif but to President Rouhani, and there is also great influence in these cases from Ayatollah Khamenei, the spiritual leader in Iran. I do not believe that summoning the ambassador every single day would result in the release of Mrs Zaghari-Ratcliffe or the outcome that we desire.

Lord Collins of Highbury (Lab): My Lords, the fact is that this issue has global implications. The BBC World Service has a well-deserved reputation, certainly in going to parts of the world where freedom of speech is denied. The noble Lord has spelled out what we are doing to raise the issue with the Iranian authorities, but can he spell out in more detail how we are building alliances with other countries, particularly with our allies in the EU, to tackle this problem?

Lord Ahmad of Wimbledon: The noble Lord raises an important point. This morning I attended a meeting of UN counterparts within the EU family. The important message that I conveyed was that we will continue to work co-operatively and collaboratively with our EU partners when we leave the European Union. As we saw on a different matter relating to Iran—the JCPOA—concerted action demonstrated unity. The fact that Chancellor Merkel, President Macron and Prime Minister May acted together ensured that that deal stayed on the table. That important collaboration should be a key focus of our continued co-operation with our European partners.

Burma

Question

2.59 pm

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

To ask Her Majesty's Government what assessment they have made of recent reports of the Burmese military attacking Christians in Kachin, and other ethnic minorities in Burma; what representations they have made to the government of Burma about these reports; and what consideration they have given to the case for referring the government of Burma to the International Criminal Court.

The Minister of State, Foreign and Commonwealth Office (Lord Ahmad of Wimbledon) (Con): My Lords, the Government have expressed their deep concern at the surge of fighting in Kachin since April. We have called upon the Burmese military and all parties to cease hostilities and allow the humanitarian access that is required to be provided to displaced people. Turning to Rakhine, the Burmese authorities must show that the commission of inquiry can deliver accountability for the perpetrators of atrocities. If not, the Government will consider supporting international routes to justice.

Lord Alton of Liverpool (CB): I am grateful to the Minister for that reply. Those responsible have been emboldened by the ethnic cleansing of 750,000 Rohingya Muslims, the destruction of villages and killings, torture and rape. What practical things do we intend to do in response to the United Nations estimate that fighting in Kachin and Shan states has now driven a further 120,000 people into 167 inaccessible displacement camps? How are we responding to the prosecutor of the International Criminal Court's request that these unconscionable war crimes and crimes against humanity be referred to her court? Is not it high time that senior members of the Burmese military such as General Min Aung Hlaing are targeted with sanctions and brought to justice?

Lord Ahmad of Wimbledon: On the noble Lord's final point, of course we have exercised the tool of sanctions against several members of the military, and continue to use that tool. On his more specific point on the displacement of people in Kachin, there has been an emboldening. Not only has the Rohingya community suffered immensely following its displacement—with almost 1 million in Bangladesh, if you take it over a longer period—but so too have specific communities in Kachin, predominantly Christian minority communities. There has been internal displacement, and quite often the full extent of that displacement has not been revealed because of lack of access. There is a glimmer of hope from the civilian Administration in that, for the first time, we have seen Burma sign an MoU with the UN agencies concerned—the UNHCR and the UNDP—which took place on 7 June. In a recent conversation with the civilian leader, Aung San Suu Kyi, my right honourable friend the Foreign Secretary reiterated the importance of ensuring the full return of all refugees, be they from Rakhine or from Kachin.

Lord Morris of Aberavon (Lab): My Lords, remembering the role that the late Robin Cook played as Labour Foreign Secretary in his advocacy of the International Criminal Court, have the Government ever referred anyone to that court?

Lord Ahmad of Wimbledon: In terms of how many times there have been actual referrals, I will have to write to the noble and learned Lord. I assure him that the Government are fully supportive of the ICC and its efforts in this regard. We support all mechanisms in bringing the perpetrators of crime to justice.

Baroness Cox (CB): My Lords, is the Minister aware that the last time I was in Kachin state I visited a village where I was told of how a local woman was abducted by the Burmese army, tied to a post in the army camp in full view of her family, repeatedly dragged away presumably for rape or other maltreatment, and eventually disappeared? A recent statement from the Kachin global network claims that:

> "There have also been ongoing abductions, deaths, and injuries by landmine explosion, torture and subsequent health problems, and mortar shells exploding on civilians' houses".

Will Her Majesty's Government raise as a priority with the Burmese Government the issue of the atrocities and violations of human rights perpetrated with impunity by the Burmese army?

Lord Ahmad of Wimbledon: Let me assure the noble Baroness that we are doing just that. We have all been horrified, first by what we saw in the Rohingya crisis, and now by the situation we see unravelling in Kachin. I assure her and all noble Lords that we will continue to implore the Burmese authorities, and that includes bilateral visits such as those made by my right honourable friends the Foreign Secretary and the Minister of State for Asia, Mark Field. We will continue to raise this through international fora, both at the UN and at the Human Rights Council.

The Lord Bishop of St Albans: My Lords, the reported atrocities against the Rohingya have been described as crimes against humanity, ethnic cleansing and genocide. What assessment have Her Majesty's Government made as to whether the human rights violations in Kachin and Shan states meet the criteria of at least crimes against humanity and war crimes?

Lord Ahmad of Wimbledon: The right reverend Prelate is correct on the issue of the Rohingya, and as a Government we think that ethnic cleansing has taken place. Indeed, that is self-evident because of the number of refugees we have seen pour into Bangladesh. As I said in response to an earlier question, the situation in Kachin is of deep concern, but because of the lack of access for international agencies it is difficult to determine the issue of genocide more specifically. As regards judicial opinion, we will be guided appropriately, but we have certainly seen ethnic cleansing take place in Rakhine state—there is no better term for it. In Kachin, too, what we are seeing is very troubling, but a full assessment cannot be made because of the lack of access.

Baroness Berridge (Con): My Lords, 32% of Burma's population are from ethnic minorities, so we are seeing the systematic persecution of people spread from one group like the Rohingya to another like those in Rakhine state. Can my noble friend the Minister please outline whether this systematic persecution has had any impact on the ability of the UK Government to employ people from the Burmese ethnic-minority population in our embassy in Rangoon? I understand that around 70% of the embassy's staff are normally recruited locally. Can he confirm that we are not restricted in who we can recruit by virtue of this persecution?

Lord Ahmad of Wimbledon: Our recruitment policy reflects the impartiality we would employ in any circumstances. It would be beneficial for all noble Lords to know the exact numbers and I will look into that. My noble friend, who speaks from great experience,

[LORD AHMAD OF WIMBLEDON]
makes an important point; namely, that we need to ensure that we demonstrate the inclusive nature of our operations in all our actions, including the efforts we are making on the ground in Rangoon. As I have said, there is a degree of hope, in that for the first time the United Nations is now gaining access to parts of Burma. We will continue to impress on both the civilian and military authorities for that access to be applicable universally across the country.

Communications Committee

Constitution Committee

European Union Committee

Joint Committee on Human Rights

Regenerating Seaside Towns and Communities Committee

Services Committee
Membership Motions

3.06 pm

Moved by ***The Senior Deputy Speaker***

Communications Committee

That Baroness Chisholm of Owlpen be appointed a member of the Select Committee in the place of Baroness Stowell of Beeston, resigned.

Constitution Committee

That Lord Wallace of Tankerness be appointed a member of the Select Committee in the place of Lord Maclennan of Rogart, resigned.

European Union Committee

That Baroness Noakes and Lord Risby be appointed as members of the Select Committee in the place of Lord Selkirk of Douglas and Baroness Wilcox, resigned.

Joint Committee on Human Rights

That Baroness Nicholson of Winterbourne be appointed a member of the Joint Committee in the place of Baroness O'Cathain, resigned.

Regenerating Seaside Towns and Communities Committee

That Lord Pendry be appointed a member of the Select Committee in the place of Lord Cashman, resigned.

Services Committee

That Lord Borwick and Lord Stoneham of Droxford be appointed as members of the Select Committee in the place of the Earl of Shrewsbury and Baroness Humphreys, resigned.

Motions agreed.

International Relations
Membership Motion

3.06 pm

Moved by ***The Senior Deputy Speaker***

That Baroness Anelay of St Johns be appointed a member of the Select Committee in the place of Lord Balfe, resigned.

Lord Balfe (Con): My Lords, allow me to fill in a little background. First, the Order Paper should not say,

"in place of Lord Balfe, resigned".

Rather, it should say, "In place of Lord Balfe, sacked by the Whips' Office despite his protests".

Last year, I was asked by the Whips' Office to serve on the International Relations Committee and was told that it was a three-year appointment. At that time I pointed out that, as a member of the Council of Europe, I could bring a different perspective to the committee but would have to miss a small number of meetings when the committee clashed with meetings of the Council of Europe. This was specifically accepted by the Whips.

On 14 May this year, I was asked to see the Whip and presented with some attendance figures which purported to show that my attendance was not very good. I challenged the figures and they were later proved woefully wrong by the committee secretariat. In fact, I was the joint second-best Conservative attender, and some way ahead of the lowest-attending Conservative. On 16 May, two days later, I saw the Deputy Chief Whip and asked him to review the decision in view of the new evidence. Not only did he refuse, but it was clear to me that the decision to sack me had been taken and the attendance figures were just an excuse.

It is true that I have voted against the Government on a handful of occasions and, rather like those removed from committees last year, it seems that I am now to be the subject of this sort of "punishment beating" for stepping out of line on just a few issues: namely, Leveson and a couple of times on the EU votes.

I put it to the House that this type of arbitrary behaviour by the Whips has to cease. As Members, we must have the right to exercise our judgment and not be under constant threat that if we stray a little out of line we will be victimised. This may play well with the *Daily Mail* and for the leader's reputation in No. 10, but it is no way to get loyalty or run a happy ship.

Before this happened, I suggested to the Senior Deputy Speaker that the appointment of committees and their chairs should be settled by the House and not by the current method. The Whips' behaviour is unacceptable and should not be allowed to continue. I was going to address the Leader of the House, but she is not here, so I invite the Deputy Leader to indicate that he would be happy for the Motion to be withdrawn while further consideration is given to the matter.

Lord Foulkes of Cumnock (Lab): My Lords, I wonder whether I can add something as a fellow rebel. The Order Paper is inaccurate. It is wrong to say that the

noble Lord, Lord Balfe, resigned. We have just heard that he did not, so the Motion is not correct. I address the Senior Deputy Speaker because he is moving the Motion. As the House heard last week, I have the greatest respect for him, sitting with him as I do on the Liaison Committee, which he chairs impeccably. I have known him for years in both this place and the other place. In all seriousness, I ask him to take this back. It would be a travesty and look very bad if this House passed something that, from what we have heard, is manifestly inaccurate. The Senior Deputy Speaker would do this House a service if he took the matter back to the committee.

Lord Davies of Stamford (Lab): My Lords, the House is grateful to the noble Lord, Lord Balfe, for putting us in the picture. Whatever our views on the subject may be, it is very important that we should at least know what is going on. It would be very bad for this country's confidence in its institutions if those who sit in the House of Lords did not know about several practices that were afoot which affected the way we work.

The present situation is clearly unsatisfactory. I do not blame the Chief Whip in any way. I think that the way he has been playing the system is the way that the system has been played by Chief Whips for generations. However, it is time for us to review the position. As we all know, the House of Commons in very similar circumstances recently took a decision that committee membership should no longer be a matter of patronage from the Whips' Office but of democratic election. That has been a very happy experiment at the other end of this building and we might all want to reflect on whether it would be appropriate for us to follow that example.

Lord Judd (Lab): My Lords, I have known the noble Lord, Lord Balfe, for many years. We do not always agree but I believe that he is one of the most distinguished Members of this House in the contributions he brings to deliberations on foreign affairs—and he is certainly one of the most respected members of the Parliamentary Assembly of the Council of Europe. The proposed amendment is clearly inaccurate and should be withdrawn.

Lord Cormack (Con): My Lords, I must support my noble friend Lord Balfe. Together with my noble friend the Duke of Wellington and others, I was one of a number of Members removed from our committees last year for voting twice on amendments to the Article 50 Bill. A Select Committee of either House must be able to operate without fear or favour. It must have no regard to the narrow, temporary issues of party politics but look at subjects in the round. We all know that committees carry much more influence—I speak from experience—when their reports are unanimous. This sort of behaviour is inimical to vigorous parliamentary democracy, and I join other noble Lords in saying that I hope we will not be asked to vote on this issue today.

The Senior Deputy Speaker (Lord McFall of Alcluith): My Lords, I should like to fill noble Lords in on my part in this and on the reason for the Motion. The noble Lord, Lord Balfe, mentioned figures. The figures that were circulated came from the committee secretariat. The appointment Motions before the House today are all casual vacancies. In the majority of cases they follow agreement by the Committee of Selection that, in light of the longer Session length, attendance statistics for all the House's committees, including domestic, should be circulated to the usual channels midway through the Session, and that this should inform their consideration of any changes they might want to propose to committee membership at that point. Such statistics are routinely circulated to the usual channels at the end of a Session, but, in light of the longer length of the Session, the committee considered that this would be a sensible course of action part way through the current Session. It also agreed that, where possible, the changes should be co-ordinated in order not to inconvenience the House.

I do not think it would be helpful or appropriate for me to comment on the consideration by the Whips of their committees' membership, except to underline that, in proposing these changes, they are acting in accordance with the approach agreed by the Committee of Selection. It is of course open to all noble Lords to discuss these matters with their Whip, which I believe has been done in this case, and ultimately, if they so wish, to test the opinion of the House. The noble Lord will also know that committee membership, including the process by which members are appointed and removed from committees, is something that has come up in the review of committees that the Liaison Committee which I chair is currently undertaking.

I thank the noble Lord, Lord Balfe, both for his letter of 4 May this year and for the meeting we had last week to discuss this issue, as well as wider issues regarding the review of committees. As I mentioned to the noble Lord at that meeting, I am prepared to take that away and include it in the review of committee consultations. When we met again last week at one of the weekly drop-in sessions I hold between 12.30 pm and 1.30 pm every Tuesday, I said I would take the issue further. Indeed, the noble Lord, Lord Cormack, in his appearance before the committee last week with the noble Lord, Lord Norton, made this very point, and the committee is very aware of it. With that information, I am quite happy to take this to the committee if Members feel that that is appropriate. I see someone getting up with alacrity.

Lord Foulkes of Cumnock: I am not clear, although I normally understand exactly what the noble Lord, Lord McFall, says. Is he saying he is going to take this Motion back and reconsider this appointment to the International Relations Committee? Is that going back to the committee?

The Senior Deputy Speaker: No, I hope I have been very clear. I am taking the issue that Members have brought up into the review of committees, not this particular Motion. This has resulted from the usual channels putting this forward to me, and in those circumstances I beg to move.

3.18 pm

Division on the Senior Deputy Speaker's Motion

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Motion agreed.

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Civil Liability Bill [HL]

Report

3.30 pm

Relevant documents: 22nd and 29th Reports from the Delegated Powers Committee

Clause 1: "Whiplash injury" etc

The Deputy Speaker (Lord Geddes) (Con): My Lords, before calling Amendment 1, I must advise the House that if Amendment 1 is agreed to I will not be able to call Amendment 1A due to pre-emption.

Amendment 1

Moved by ***Baroness Vere of Norbiton***

1: Clause 1, page 1, line 5, leave out from "an" to end of line 7 and insert "injury of soft tissue in the neck, back or shoulder that is of a description falling within subsection (1A), but not including an injury excepted by subsection (1B).

(1A) An injury falls within this subsection if it is—

(a) a sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or

(b) an injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder.

(1B) An injury is excepted by this subsection if—

(a) it is an injury of soft tissue which is a part of or connected to another injury, and

(b) the other injury is not an injury of soft tissue in the neck, back or shoulder of a description falling within subsection (1A)."

Baroness Vere of Norbiton (Con): My Lords, I shall speak to all the government amendments in the name of my noble and learned friend Lord Keen in this group. These amendments concern putting the full definition of "whiplash injury", to which the measures in Part 1 will apply, in the Bill. Amendment 4 introduces a limited power to amend the full definition of whiplash injuries by means of affirmative regulations.

The Government have carefully considered the view of the Delegated Powers and Regulatory Reform Committee that it is important, in order to get a full understanding of the Bill, for "whiplash injury" to be defined in full in the Bill rather than in regulations. We have also reflected on the similar views put forward by noble Lords during recent debates in this House. We agree with the merit of these arguments, and as a result I now bring forward amendments to achieve this.

The Government's proposed full definition is focused on soft tissue injuries to the neck, back and shoulder. It is particularly important to ensure that claims for soft tissue injuries to the shoulder, which are already routinely included in many current whiplash claims, will also be covered. The detailed definition provides clarity and certainty for both claimants and defendants. We have listened to experts and also broadened the definition to injuries to the shoulder to mitigate against claims displacement. It is consistent with the Bill's aim of bringing into scope all relevant claims and injuries so we can effectively tackle the continuing high number of whiplash claims which so impact on the cost of insurance premiums for ordinary motorists.

As many noble Lords recognised in previous debates, it is essential that the full definition can be adapted so it can respond to future medical developments or changes in the behaviour of the claims market. If it cannot be amended promptly it could have an adverse impact on genuinely injured claimants and insured motorists. We therefore propose a further amendment to introduce a limited power to amend the definition by regulations. We have discussed this issue in detail with noble Lords from across the House in recent weeks and believe that many in this Chamber agree that this is necessary. Amendment 4 would therefore permit the Lord Chancellor to amend, by regulations, the definition of "whiplash injury" to include other soft tissue injuries to the neck, back or shoulder or to exclude or refine the description of soft tissue injuries to the neck, back or shoulder.

The power to amend the definition the Government are seeking is limited. No changes can be made for three years to ensure the current definition has time to bed in. Before making any changes, the Lord Chancellor must first undertake a review of the current definition and publish a report including the decision about whether to amend it. Any amendments must also be subject to consultation with the statutory consultees set out in the Bill, which are the Lord Chief Justice, the Chief Medical Officers for England and Wales, the Bar Council and the Law Society, among others. The power could not be used within three years of the previous review. I believe that the definition and power to amend, as proposed in the government amendments, reflects the will of the House. They are clear, reasonable and proportionate to the problem. I beg to move.

Amendment 1 agreed.

Amendment 1A not moved.

Amendment 2

Moved by ***Baroness Vere of Norbiton***

2: Clause 1, page 1, line 8, leave out subsection (2)

Amendment 2 agreed.

Amendment 2A

Moved by ***Lord Berkeley***

2A: Clause 1, page 1, line 17, leave out second "the person" and insert "that person"

Lord Berkeley (Lab): Amendment 2A is in my name and that of my noble friend Lord Young of Norwood Green who, sadly, cannot be here today. It is the result of a lot of discussion in Committee about how to avoid what is otherwise a very useful Bill having an adverse effect on vulnerable road users, who could be defined as cyclists, pedestrians, motor cyclists—those who can sometimes suffer most from injuries such as this. I am also grateful to the Minister for agreeing to see us a few weeks ago, when we had a useful discussion.

We were able to table this amendment only yesterday because we struggled to come up with wording that does not affect the main Bill but that protects vulnerable road users and allows them to continue, if they need to, to get legal aid under the present arrangements, rather than increasing the minimum figure to £5,000. We concluded that, as the Minister and many other noble Lords have said, this Bill is about whiplash and nothing else. As I understand it—I hope the Minister will confirm this when she responds—it is only about whiplash and nothing to do with any other kind of legal aid claim that might be needed for other issues, road traffic or otherwise.

[LORD BERKELEY]

I had a long discussion with the clerks on this issue, as well, and it seemed to me that what was needed was something that would exclude vulnerable road users from the particular issue we are talking about—raising the legal aid limit—if they suffer whiplash. One might ask how a pedestrian or a cyclist is going to suffer whiplash if they are not in a car, but they probably could, for whatever reason, if they are hit by a car.

We then looked at Clause 1(3) and I, as a non-lawyer, started to get a bit confused as to who the phrase "the person" referred to. Is it the person who suffered injury, or the person who might be alleged to have caused the injury? It seemed to me that there is a reasonably elegant solution—which I am sure my legal friends will say does not work—that clarifies what is meant by "the person" in subsection (3). If the amendment were accepted, it would be clear that:

"For the purposes of this Part a person suffers a whiplash injury because of driver negligence if … when the person suffers the injury",

that person,

"is using a motor vehicle other than a motor cycle on a road or other public place".

I think that this is quite an elegant solution, providing an exception to this Bill for vulnerable road users who are not in cars, and who therefore would not be included.

I hope that that short explanation is helpful. I look forward to other comments and in the meantime, I beg to move.

Baroness Vere of Norbiton: My Lords, I have listened carefully to the noble Lord and appreciate the change he would like to make. In our view, however, the existing clause already makes it sufficiently clear that the person who suffers a whiplash injury because of driver negligence is the person who is either using the motor vehicle or who is a passenger in the motor vehicle at the time of the accident. The amendment therefore seems to add no practical difference to the construction of the clause.

In relation to vulnerable road users, I reassure the House that the clauses of the Bill relating to whiplash do not extend to cyclists, passers-by or pedestrians outside the vehicle or vehicles involved in the accident. However, I am aware that such road users remain captured by the Government's non-Bill measure to increase the small-claims limit for road-traffic-accident-related claims to £5,000. We will deal with this issue in more detail a little later today, but I can say that we are sympathetic to the arguments made in relation to vulnerable road users and will continue to consider the matter. For the reasons that I have set out, I urge the noble Lord, Lord Berkeley, to withdraw his amendment.

Lord Berkeley: My Lords, I am grateful to the Minister for that explanation. One of the reasons for tabling the amendment was to probe her response. I will read it very carefully but in the meantime I beg leave to withdraw the amendment.

Amendment 2A withdrawn.

Amendment 3

Moved by ***Baroness Vere of Norbiton***

3: Clause 1, page 2, line 10, leave out subsection (5)

Amendment 3 agreed.

Amendment 4

Moved by ***Baroness Vere of Norbiton***

4: After Clause 1, insert the following new Clause—

"Power to amend section 1

(1) The Lord Chancellor may by regulations amend the definition of "whiplash injury" in section 1, but not so as to include an injury of soft tissue other than soft tissue in the neck, back or shoulder.

(2) Before making regulations under subsection (1), the Lord Chancellor must—

(a) review the definition of "whiplash injury" in section 1,

(b) as part of the review, consider whether to amend section 1,

(c) prepare and publish a report of the review, including a decision whether or not to amend section 1 and the reasons for the decision, and

(d) lay a copy of the report before Parliament.

(3) After laying the copy of the report before Parliament and before making regulations under subsection (1), the Lord Chancellor must consult—

(a) the Lord Chief Justice;

(b) the General Council of the Bar;

(c) the Law Society;

(d) the Chief Medical Officer of the Department of Health and Social Care;

(e) the member of staff of the Welsh Government designated by the Welsh Ministers as the Chief Medical Officer for Wales;

(f) such other persons or bodies as the Lord Chancellor considers appropriate.

(4) The Lord Chancellor may not carry out the first review under subsection (2) before the end of the period of three years beginning with the day on which section 1 comes into force.

(5) After the first review, the Lord Chancellor may not carry out a review under subsection (2) before the end of the period of three years beginning with—

(a) if regulations under subsection (1) were made following the previous review, the day on which those regulations came into force, or

(b) if no regulations under subsection (1) were made following the previous review, the day on which a copy of the report of the previous review was laid before Parliament.

(6) A statutory instrument containing regulations under this section is subject to affirmative resolution procedure."

Amendment 4 agreed.

Clause 2: Damages for whiplash injuries

Amendment 5

Moved by ***Baroness Vere of Norbiton***

5: Clause 2, page 2, line 29, after "injury" insert "or any of the whiplash injuries suffered on that occasion"

Amendment 5 agreed.

Amendment 6

Moved by ***Lord Woolf***

6: Clause 2, page 2, line 30, leave out “two years” and insert “twelve months”

Lord Woolf (CB): My Lords, I thank the noble Baroness, Lady Chakrabarti, and the noble Lords, Lord Beecham and Lord Marks, for allowing me to speak first to this amendment, which also relates to Amendments 17B, 18 and 30. I also record my gratitude to the Minister for the courteous manner in which he has promoted the Bill and for being prepared to discuss its contents with me.

I draw attention to my interest in the register. I also disclose that I have a son who is a QC practising in clinical negligence. What is most relevant so far as my own career is concerned is having chaired the access to justice inquiry and helped with the implementation of its recommendations, in my then capacity as Master of the Rolls. The recommendations included different tracks and procedures for disposing of civil claims.

The one that we are concerned with today is the disposal of small claims by what is known as a small claims court. As noble Lords would expect, this was designed to provide speedy and simple justice for litigants who are not usually represented. The assessment by a court of damages has always been accepted as a purely judicial responsibility in England and Wales, as far as I know, and that responsibility has been reflected in many decisions of the courts. The Personal Injury Bar Association published a paper that referred in this regard to the speech of Lord Blackburn in Livingstone v Rawyards Coal, 5 App Cas 25, at page 39—a decision as long ago as 1880. Lord Blackburn said:

“I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”.

Another well-established legal principle is that, if you are wrongfully injured, the wrongdoer has to take the victim as he finds them. The effect of whiplash injuries, with which we are concerned, can vary substantially according to the physical and mental sturdiness of the victim. This means that the appropriate amount of damages for a whiplash injury can vary substantially when applying the rule to which I referred. I suggest that they are not suited to a fixed cap, as proposed by the Government.

3.45 pm

Another principle of justice is that the court’s award should appear to be fair and just between different litigants. To assist in this, for some time now, the judiciary, through the Judicial College, has issued guidelines quoting levels of damages for different injuries. These guidelines are of great value in the task of assessing the appropriate level of compensation. Establishing the right level of damages is therefore a highly complex process of a judicial nature. The quality of the guidelines explains their acceptance by the judiciary and the profession as a whole, and why they have been hugely important in the resolution of personal injury claims. There is a difference between guidelines and what the Government propose here. Guidelines are flexible and are, as the name suggests, only a guide. The Judicial College regularly revises the guidelines: the most recent issue is the 14th edition of 2017.

Turning to the amendments with which I am concerned, the most important is Amendment 18, which would delete Clause 2 and will be the focus of my attention. If the House is with me on the amendment, many of the other amendments will not be viable.

My contention is that the clause is an undesirable change from practice hitherto. It removes the judicial responsibility for the assessment of damages, and it imposes a fixed cap in place of flexible guidelines. It is unlikely that the cap will succeed in its commendable objective of preventing fraud, but will interfere with the small claims court process if tackled in the way proposed. It is being introduced before other steps have been taken or had time to demonstrate their worth. It offends an important principle of justice, because it reduces the damages that will be received by an honest litigant because of the activities of dishonest litigants.

Other initiatives in the Bill will assist and do not involve intervention in the role of the judiciary and, subject to what happens in today’s debate, I would support them. Here, the Lord Chancellor, without the accumulated experience of the Judicial College, proposes substantially to interfere with the Judicial College guidelines by substituting tariffs or a cap, which lack the flexibility of the guidelines.

Furthermore, he is motivated, at least in part, not by the normal principles of justice as I understand them but by saving insurers money, in the belief that this will result in a reduction in premiums for motorists who are insured when they come to pay for their insurance. It has to be borne in mind that if the Lord Chancellor interferes with part of the guidelines, as he now proposes, that can affect the integrity of the whole of the guidelines, because the guidelines for each injury contribute to the establishment of the whole. Here, the scale of the interference is significant.

My less important target is Clause 3. This will be necessary only if my complaints as to Clause 2 are not accepted by the House. Clause 3 proposes that the Lord Chancellor, by regulation, should have power to make regulations enabling a judge to lift the tariff under Clause 2 if the degree of pain and loss of amenity suffered by the victim of whiplash are exceptional. This device has been used elsewhere in an attempt to give relief against harsh statutory provisions. It failed elsewhere, including in the LASPO legislation. What are and are not exceptional circumstances can be very difficult to determine, and this can give rise to issues that are entirely unsuited to resolution through the limited procedures of the small claims court. Its exercise is to be subject to regulations and a permanent uplift is, I understand, likely to be limited to 20% of the cap.

The extent of the Government’s ambitions appear in a letter circulated recently by the Minister. For me, it demonstrates the extent of the proposed takeover of the normal role of the judiciary. The most relevant passage states:

"It is … the Government's view that is wholly appropriate that regulations are used to set and amend the new tariff, and that it is the Lord Chancellor who retains control over the level of damages paid in whiplash claims … It is right that the Lord Chancellor should take control of the compensation process, and set tariffs which continue to provide a proportional amount of compensation, but which also act to dis-incentivise unmeritorious claims and reduce the costs associated with these claims for all motorists".

There is no precedent for this intervention in the assessment of damages in civil proceedings. It may be suggested that this has happened in relation to criminal injury compensation, but this scheme is operated by an Executive agency and not the courts. I question whether the Lord Chancellor should be given the power he now seeks, and whether the department is qualified to perform this task. I challenge the validity of the statement that the guidelines are too high.

Sir Rupert Jackson, shortly before he retired recently from the Court of Appeal, was asked to review some of the issues I had previously considered in my Access to Justice report. His response to the proposals, as far as it is relevant, is:

"It is the function of judges (not Parliament) to set the tariffs for pain, suffering and loss of amenities in respect of different categories of personal injuries".

Here, it is proposed that the Lord Chancellor, not Parliament, should do so. He continued:

"When, a few years ago, I recommended raising the level of general damages by 10%, it was judges—not Parliament—which gave effect to that recommendation".

I accept that there is a problem with exaggerated claims being made, particularly for whiplash injuries. However, this can happen in a multitude of different proceedings that come before the courts. Whiplash is far from unique. As examples, I refer to holiday claims, industrial deafness claims, and so on. Steps are already being taken to try to deal with the specific problems relating to whiplash injuries. I suggest that in those cases, alternative methods should be given the chance to achieve what they can, before intervention of the sort proposed here, which, as I have described, is without precedent and would involve setting a precedent.

What is unfortunate is the publicity given to the steps that have been taken. The public need to be aware that fraudulent activities in seeking damages are harmful to their fellow citizens, whose insurance premiums can be increased. The courts have been using the powers they now have when fraud is detected to bring criminal proceedings and even punish by imprisonment those who seek to benefit in this way. The present legislation contains, as I have already indicated, other steps to which I raise no objection. I take as an example Clauses 4 and 5, which require a medical report to be obtained before settling a claim. That seems a simple and helpful suggestion which could be beneficial. I refer also to the Financial Conduct Authority, which is given power to intervene to enforce compliance by other bodies such as claims managers, whom I regard as possibly being part of the problem with the issues we are discussing.

In addition, the present proposals have the defect that they are unlikely to deter a dishonest claimant from making a false claim. All that he needs to do to achieve that purpose is to make a false claim that is outside the limits of the damages now proposed. Therefore, the proposal will provide no assistance. Surely, before seeking to interfere with the normal role of the judiciary, we should await the information to which I have referred. The same is true of the Government's intention to raise the limits of small claims—but I shall not deal with that matter today.

In any event, matters of legitimate concern cannot justify fixing damages in a manner which departs from that normally adopted in assessing the damages to which a claimant is entitled. Even when the amount involved appears to be modest, claimants are entitled to have the damages to which they would normally be entitled. To deprive them of this involves discrimination against legitimate claimants, irrespective of their means. The consequence is that they do not receive the compensation to which they would be entitled if the same pain or suffering was not caused by whiplash. This is not what a system of justice should do. Simply, it is unjust to do this—and for these reasons, I beg to move.

Lord Marks of Henley-on-Thames (LD): My Lords, we share the Government's objective of reducing fraudulent whiplash claims, but we do not agree that the proposed arbitrary reduction in damages for all claimants, fraudulent or genuine, coupled with removing judges from the assessment of damages, is a proper way in which to address it. For that reason, I shall concentrate on supporting Amendment 18, so eloquently and comprehensively spoken to by the noble and learned Lord, Lord Woolf, with his strong appeals to principle.

We welcome banning cold calling, whether by claims management companies, car hire companies, car repair companies, solicitors or anyone running a calling operation for any of them. Section 35 of the Financial Guidance and Claims Act makes a start in banning cold calling, but its main weakness is that it does not outlaw the use in this country of information obtained by cold calling, often from abroad, and the definition of claims management services in that Act looks to me insufficiently broad. By amendments in the fourth group, we try to address the use of information from cold calling.

We welcome prohibiting settlement of whiplash claims without medical reports from properly accredited clinicians. So those provisions on cold calling and medical reports are targeted on reducing or eliminating fraud. However, the proposed radical reduction in the level of damages to the Government's very low tariff is a blunt instrument that would indiscriminately cut to the bone compensation for genuine claimants as well as for fraudulent ones. The purpose of general damages in personal injury cases has, as the noble and learned Lord, Lord Woolf, explained, always been to compensate claimants, so far as money can, for the injuries they have suffered as a result of the negligence of defendants. Clause 2 abandons that principle in whiplash cases. If Amendment 18 is carried, Clause 3 would be meaningless, so we would expect the Government to accept Amendment 30 in the name of the noble and learned Lord, Lord Woolf.

4 pm

For the Government, the Minister has more or less accepted in the past that the Bill discriminates against genuine whiplash claimants covered by the Bill in favour of the Government's proposal to cut fraudulent

whiplash claims. Genuine claimants would lose out as against road accident claimants with other injuries; or as against claimants who sustain whiplash injuries in accidents not covered by the Bill, such as cyclists and motorcyclists; or as against claimants who suffer injuries of whatever type in other circumstances—for example, as a result of the negligence of their employers or local authorities. This is not just, fair or principled.

The Government have simply not established the evidence base for such a radical departure from principled law-making. There is insufficient evidence of the incidence of fraudulent as against genuine claims, and there is no evidence on the comparative effectiveness of reducing all damages as against banning cold calling or insisting on credible medical reports before settlements. Little or no pressure has been put on insurers to get tougher on claimants rather than settling low claims about which they may have suspicions with scant inquiry, because such claims are cheaper to settle than to contest.

To take an example, imagine a non-negligent driver and her partner, who have both been injured in an accident. The driver has a painful whiplash, which is likely to last just short of six months. On the Government's proposed tariff, her damages would be £470. Her partner, the passenger, who was not wearing a seatbelt in this case, fractures his wrist as he hits the dashboard—a relatively minor injury, the effects of which will last for only a short period. His damages will be in the range of £2,300 to £3,125, and even after docking them 25% for his own contributory negligence in not wearing a seatbelt, he recovers between three and a half and five times his partner's damages. Where is the justification for that?

These results, proposed to address an inadequately defined problem on questionable evidence, are offensive to justice. The proper ways to address fraudulent claims are to stamp out cold calling, to enforce a requirement for genuine medical reports, to encourage insurers to test the validity of claims before they settle them, and to come down hard on those caught making fraudulent claims, not to abandon basic principles of fairness and justice.

I will speak briefly to two of the other amendments in this group, particularly our Amendment 10, which proposes a tariff that would represent the damages actually awarded by the courts, based on Judicial College guidance. That, and other amendments, are alternatives, tabled in case the principled amendment in the name of the noble and learned Lord, Lord Woolf, does not succeed.

I make only one further point. The provision in the Government's proposals for an uplift in exceptional circumstances only, and limited to 20%, is far too restrictive. Exceptional circumstances have been regularly held by the courts to require a set of circumstances that takes a case well outside the norm—

Viscount Hailsham (Con): Will the noble Lord also observe that this clause is only permissive and does not require the Lord Chancellor to make an uplift?

Lord Marks of Henley-on-Thames: My Lords, I am very grateful for that intervention, which is absolutely right. The point about an uplift is that, if it is just, it should be given. We say that there may be a whole range of circumstances where it is clear that an award greater than the tariff figure is justified. We would regard it as far better than insisting on a finding of exceptional circumstances to permit the courts, as per our Amendment 20, to increase a tariff award where satisfied simply that it would be in the interests of justice to do so. Were Amendment 18 not carried so that Clause 2 survived, we would propose to pursue that amendment to improve Clause 3, which would then remain.

Viscount Hailsham: My Lords, I shall comment on an amendment that has not been spoken to—Amendment 12, which I think will be articulated by the noble and learned Lord, Lord Judge—and, more precisely, on the proposed new clauses, spoken to so admirably by the noble and learned Lord, Lord Woolf.

Amendment 12 seems manifestly sensible. Of course the Lord Chief Justice should be consulted by the Lord Chancellor. That is particularly important when one bears in mind that many Lord Chancellors nowadays are not lawyers and will therefore be entirely dependent on the advice of their officials, who might themselves not be lawyers. Therefore, it seems admirable that we should put into statute a requirement that the Lord Chief Justice be consulted. If the Minister says, "But of course he will be", all I can say is that Ministers sometimes have a curious habit of forgetting the obvious and their obligations. For example, I was rather surprised about three weeks ago when the noble Lord, Lord Callanan, during the debate on Brexit, said that Ministers had never used the phrase "meaningful vote". That was a curious lapse of mind, and it may well be that Lord Chancellors will forget the obligation to consult the Lord Chief Justice. Therefore, I am all in favour of the amendment and I hope the Government will concede the point.

Perhaps I may move more directly to the proposed new clause in the name of the noble and learned Lord, Lord Woolf, and Amendment 18. I do not have the experience of the noble and learned Lord but for many years I practised as a personal injury lawyer. I do not do so any more, so there is no need for me to identify an interest, but I used to do a lot of work in personal injury law. Indeed, I was instructed by my noble friend Lord Hunt and I was very grateful for the briefs in those days. Back then, we were informed about the level of damages by the guidance of the Court of Appeal and by the reports, which in those days were available in the current law citator. There really was no difficulty in operating within the parameters set by the judiciary.

That takes me to my objections to what the Government are proposing. The first is a very deep-seated reluctance to see the Executive or Parliament interfering with essentially judicial positions. I am bound to say that that informed my real reservations about the determination of Parliament to impose tariffs in homicide cases, set out in a schedule to the Act. I deprecated that. This is another example which we should be very cautious about. We need to ask ourselves what the essential characteristic of justice is. It is to respond to the individual and varied cases that appear before the courts. The effect of imposing a cap of this kind is to

[VISCOUNT HAILSHAM]
prevent the trial judge being able to respond to the particular aspects of the case in front of him or her, and in my view that is, by definition, unfair.

There is a further point that I venture to intrude on the observations of the noble Lord, Lord Marks. It is perfectly true that the Bill provides for an uplift, but the uplift requirement is discretionary on the Lord Chancellor; it is not mandatory. The Lord Chancellor may provide for an uplift in regulations but he or she does not have to do so.

I am sorry to be pedantic about this, but your Lordships will know that on many occasions I have spoken in pretty derogatory terms about the statutory instrument process that we have. This is another example. Let me acknowledge at once that we are doing it by the affirmative procedure, which is a lot better than doing it by the negative procedure, but the cap will be determined by statutory instrument. Who, pray, is going to set the cap? I can tell you: it will be officials. Unless the Minister of the day is particularly well informed and/or intrusive, the cap will be determined by officials without interference. I am bound to say that I find that a very unpleasing prospect.

If, therefore, the noble and learned Lord, Lord Woolf, is minded to press his amendment and his proposed new clause and to test the opinion of the House, unless my noble and learned friend is even more persuasive than he customarily is, I anticipate that I will support the noble and learned Lord.

Lord Judge (CB): My Lords, it is a great comfort to hear the noble Viscount, Lord Hailsham, say that he agrees with what I am going to say before he has heard it. Now, perhaps he will not mind hearing it.

We have to face the reality that there are a huge number of fraudulent claims for damages arising from alleged whiplash injuries sustained in road traffic accidents—far too many of them. We also have to remember that a large number of perfectly honest claims are made as a result of injuries suffered in road traffic accidents. We have to find a pragmatic solution to the problem of fraudulent claims, given that the cost of contesting them in court tends hugely to outweigh the amount of money that is at stake if the claim is not substantial. Whiplash injury cases, in the way that will now be defined in the Bill, are not cases that attract vast sums of money in damages. I particularly welcome the requirement of medical evidence, which provides some level of protection against the fraudulent. I welcome also the prohibition on cold calling, and I think there is something in the provision for uplift.

Can we be clear, though, that some claims absolutely reek of fraud? I suspect many of us know, for example, of a case where, at traffic lights with two cars in a line and none behind, the front car moves forward across the junction, not too fast, and is followed by the second car. Then, suddenly, the front car slams on its breaks for absolutely no reason, resulting in an impact. I am certainly aware of at least one case—perhaps we all are. It was not a case in court but was narrated to me by a friend, who was rather mortified to find that, after a small accident, the recipient of the injuries in the other car came out of the car saying, "Whiplash, whiplash!", and had no other word of English to speak. He then found that his insurance company had received claims for no less than four people, when there was only one person in the car. As I say, these cases reek of dishonesty.

I hope that, if this part of the Bill is enacted, insurance companies will continue to remember that before a claim can be made for whiplash injuries, there has to be a claim and the claim should be contested as and when there is evidence of fraud. They cannot just sit back, otherwise they will find themselves paying out more and more. Some cases reek of fraud and they should be contested, and the easy way of doing nothing much more than that should be avoided. The police should be informed and the evidence should be handed to them so that at least they can investigate. I know that they have many other things to do, but a few knocks on doors and the word would go around the fraudulent area of this particular universe saying, "Hang on, there's something going on here". That too might discourage the odd dishonest claim.

What I cannot accept is a solution which means that a dishonest claim is handled in exactly the same way as an honest one. We cannot have dishonesty informing the way in which those who have suffered genuine injuries are dealt with. That is simply not justice. There should not be any idea that an honest claim for a whiplash injury made by the victim of a car accident should be less well compensated than an identical injury suffered by someone at work. There are all sorts of ways in which injuries can be caused; indeed, a slip in the street or a fall down the stairs can result in a whiplash injury, so there are many perfectly ordinary ways in which these injuries can be sustained. We need a process that produces the same result for the same victim who has honestly suffered the same consequences.

4.15 pm

The remedial system proposed in this draft is founded on regulation-making powers vested in the Lord Chancellor. I see the noble and learned Lord, Lord Irvine, is in his place. As far as one can see, today and for ever, not only will the Lord Chancellor have no judicial function, but he or she is most unlikely to have any relevant experience of this particular area of work. In exercising his responsibilities, he will be dependent on his officials. You can almost sense the way the tariff is currently being proposed—it is still only a proposal—in that there is an understandable anxiety to limit fraudulent claims, and the error will be to reduce the tariff level to cover all claims, including the genuine ones. I respectfully suggest to the House that some form of judicial involvement in the fixing of the tariff for whiplash injuries is essential.

The Bill already acknowledges the value—I would say the need—of direct judicial input into the process, as set out in Clause 3(5). The proposed new Section 2 specifically involves the Lord Chief Justice as a consultee in any processes for increasing the tariff. Perhaps I may say that it is absolutely obvious that the very least that should be provided is that the Lord Chief Justice of the day should be consulted about the level of the tariff. Of course he will take advice and make whatever recommendations he thinks right, and the ultimate decision will be for the Lord Chancellor, but it is fair

to say that it would hardly be wise for a Lord Chancellor simply to take the judicial expertise on board, say that he has considered it, and then ignore it. If he were to do so, I suspect that either the other place or this House might actually awaken from our slumberous non-scrutiny of regulation making.

The Earl of Kinnoull (CB): My Lords, I declare my interests as set out in the register, particularly those in respect of the insurance industry. The 2017 Conservative manifesto provides an interesting lens through which I feel one ought to consider various amendments in this group. It states the following in a section entitled, "Cutting the cost of living":

"We will reduce insurance costs for ordinary motorists by cracking down on exaggerated and fraudulent whiplash claims".

At a high level, the Bill seeks to do that principally by dictating how whiplash claims procedures will work in the future; that is, through the use of a tariff. Several amendments in this group seek to interfere with the principle of a tariff either by removing it or by making it rather more generous than market forces allow today. Both of these approaches seem to fly directly in the face of that express manifesto commitment. I remain very much of the view that any tariff should be set out in the Bill, just as the Delegated Powers and Regulatory Reform Committee has recommended.

We are in extraordinary and difficult circumstances here, with around 1% of the population of the UK annually successfully concluding a whiplash claim. I submit that a social and political necessity trumps jurisprudential purity, such as that advanced by my noble and learned friend Lord Woolf, even before considering the manifesto commitment point that I made earlier.

A tariff will bring benefits in terms of certainty and the potential for ordinary citizens to file claims online easily, without the need for external professional help. Any reduction in hassle and the costs of processing a claim will inevitably benefit everyone. Indeed, we heard at Second Reading how a tariff system seemed to work well in Spain. Deleting Clause 2 would deny those benefits. It would certainly deny the Government the ability to deliver on their manifesto commitment because the hugely unsatisfactory status quo would simply continue, with a numerous minority of our fellow citizens continuing to abuse the current environment to their financial advantage. Therefore, I strongly oppose Amendment 18.

Turning to the quantum in the tariff table, I accept that the issue is rather a Goldilocks one. If the quantum is too generous, the problem of exaggeration and fraud will persist. If it is not generous enough, the genuinely injured will be badly dealt with. The Government have attempted to walk this line in their draft statutory instrument; I make no comment on the numbers it contains. The structure of the Bill allows the Lord Chancellor to vary the tariff with suitable safeguards.

I fear that Amendments 10 and 17B are too generous because they depend on the Judicial College numbers, which are derived from cases heard. The numbers are actually above where the market—if I may call it that—is today because the cases that tend to get to court tend to have non-standard features, such as being more complex or involving psychological issues. Therefore, I fear that if either of these amendments were adopted, there would be no saving per the impact assessment—possibly even a negative saving—and thus they too defeat the Government's manifesto commitment. Accordingly, I oppose them.

In turning to Amendment 30, I start by expressing my support for Amendment 12, which restores constitutional balance in a very elegant way. Indeed, I congratulate the noble and learned Lord, Lord Judge, on his excellent speech. Amendment 12 goes some way to addressing the issues that were set out well by the noble and learned Lord, Lord Woolf, in introducing Amendment 30. However, Clause 3 is not only a fully important part of a package to frustrate the designs of the claims industry but an important part of a strategy to deliver the manifesto commitment. On that basis, I feel that this amendment should also be resisted.

Lord Pannick (CB): My noble friend Lord Kinnoull referred to "jurisprudential purity". I would prefer to describe it as the essential role of the judiciary in deciding what compensation is appropriate. I would be very grateful if the Minister would tell the House whether there is any precedent for a Minister, rather than judges, deciding on the appropriate level of compensation for a civil claimant when that compensation is being paid not by the state—I recognise that that may be a different matter—but by a private wrongdoer or, more accurately, their insurance company. I suggest that either there is no precedent or this is rare, for a very good reason: put simply, judges, not Ministers—or their civil servants, more accurately—have expertise and independence in this area. For those reasons, I strongly support the speech made by my noble and learned friend Lord Woolf.

Lord Brown of Eaton-under-Heywood (CB): My Lords, I confess to having found this group of amendments rather difficult. As I observed in Committee, the real question as I see it in Part 1 is whether it is right to fix especially low awards for whiplash injuries suffered in road accidents, to deter the disproportionate number of false claims which undoubtedly are made following such accidents. That is what Clause 2 does: it seems to me impossible to escape that conclusion. Obviously and inevitably its effect, therefore, would be to penalise those who genuinely claim for such injuries sustained in that way. They are to pay the price of the policy underlying Clause 2, the policy of deterring the dishonest. Obviously, one regrets that.

Whether to pursue that policy and, if so, to what extent and how vigorously—in other words, how far to reduce the awards so as to make the making of a false claim less attractive—is, it seems to me, par excellence a political question. It is purely a political question and therefore I, for my part, see no particular point in involving the judiciary as Amendment 12 would do. We know what the judiciary regards as the appropriate level of damages for honest claims of this sort: the Judicial College guidelines clearly tell us that. Therefore I do not support Amendment 12.

To my mind, the real question is the altogether more fundamental question raised by my noble and learned friend Lord Woolf's Amendment 18 and that is the one I confess that I find the more difficult. I

[LORD BROWN OF EATON-UNDER-HEYWOOD]
flagged up my concerns about this and about the whole of the Part 1 policy in Committee. My noble and learned friend suggests that the proposal will create an undesirable precedent and introduce injustice into the system. Of course, I recognise the force of these criticisms and to a degree I share his doubts as to whether the incidence of false claims remains grave enough to justify this wholly exceptional measure. However, at the end of the day I am reluctantly persuaded that this provision is justified: it is surely intolerable that we are known as the whiplash capital of the world, so I have concluded that it is open to government, as a matter of policy, to seek to deter dishonest claims in this way.

I do not suggest that there are any exact analogies between the law of compensating injuries negligently caused and what is here proposed. I accept that the criminal injuries compensation scheme, to which in effect my noble friend Lord Pannick and the Minister referred—statutory awards for injuries criminally caused—is a very different creature, but it should be recognised that broad questions of policy can and on occasion do have a part to play in this area of our law. For example, the courts have held, under what lawyers here will recognise as the Caparo principle, that in certain circumstances claims are barred altogether, not just restricted. In short, there is no duty of care held to arise, even when injury follows on from what otherwise would be plain negligence, where it is held, for whatever reason, that it would not be fair, just and reasonable to compensate in those circumstances. For example, years ago in the case of the Yorkshire Ripper, the police were held exempt from claims despite their failure to apprehend the killer, which manifestly they should have done, and, as we all recall, a series of subsequent women died.

On balance, my conclusion is that there is a sufficient policy reason here for restricting damages in this case. With some hesitation, I shall not feel able to support the amendment tabled by the noble and learned Lord, Lord Woolf.

4.30 pm

Lord Hunt of Wirral (Con): My Lords, this group contains 18 amendments, of varying importance. I declare my interest as having been a partner for 50 years—this year—in the global commercial law firm DAC Beachcroft LLP. I was so pleased to see the noble Lord, Lord Morris of Handsworth, in his place earlier because for many years I had the honour to act for the Transport and General Workers' Union when, on the instructions of Mr Albert Blyghton, I went into battle to recover substantial damages where people had been seriously injured.

In supporting the words of the noble and learned Lord, Lord Brown of Eaton-under-Heywood, and the noble Earl, Lord Kinnoull, I remind the House that here we are dealing with a racket, as described by the noble Lord, Lord Blencathra, which has grown up in this country thanks to what is termed the compensation culture, encouraging not just fraudulent but spurious—I think that is a better description—claims, which have now made us the global whiplash capital. I greatly regret that.

After all, in this group of amendments we are talking about only minor injuries. As has been pointed out by the noble and learned Lord, Lord Brown, there has been a political decision. I remind noble Lords that in the Red Book in 2015, the then Chancellor of the Exchequer, Mr George Osborne, said:

> "The government will bring forward measures to reduce the excessive costs arising from unnecessary whiplash claims … including by … removing the right to general damages for minor soft tissue injuries".

I am not sure everyone here was present when we had a debate—and we have had a number of subsequent debates—about the need to tackle this whiplash culture.

Not everything George Osborne said in that Autumn Statement was received with universal acclamation but I well remember that that particular announcement was welcomed on all sides of the House. "At last", we said, "we're going to get rid of the whiplash culture". There was a clear consensus in this House that the law and the courts had allowed a racket to flourish, leading to a manifest and substantial injustice—the injustice of millions of law-abiding insurance policyholders having to pay over the odds to fund this mass of bogus claims. We can point the finger at the insurance industry, perhaps, for allowing too many but we are talking not just about insurance-funded claims but about a whole range of minor claims, and we have to decide as a House whether we intend to fulfil what I understood we had agreed to do about this racket.

I congratulate my noble and learned friend the Minister on the determination he has shown to end this racket and to end the injustice. We have identified an injustice and we have promised to act to end it.

There is a judicious balance in the Bill, as one would expect, and those with genuine minor injuries have nothing at all to fear from it. The option of doing what George Osborne initially recommended, namely to remove general damages completely from soft tissue claims, has perhaps wisely been abandoned in favour of the proposed tariff. In Amendment 1, as we have already heard, the Government have further answered their critics in this House by putting a clearer definition into the Bill. It is not perfect but it is a lot better than the previous one in the draft regulations. It comes closer to capturing the scale of the problem.

I thought we had a consensus in this Chamber in July last year, when we debated the need to tackle the regulation of claims farmers during the passage of the then Financial Guidance and Claims Bill. I highlighted at the time the work of Carol Brady, in her excellent report in 2015, and the need to follow the money. Noble colleagues on all sides of the House agreed in that debate that these were important measures; now, we have to tackle the money itself, in the form of damages and solicitors' fees, and we are of course suddenly beset by an enormous number of last-minute amendments. I must share with the House that, following the then Chancellor of the Exchequer's announcement, I was told: "Don't think for a moment that this will ever pass, because the jobs of thousands of those employed in the claims management industry will be lost. They will fight hard to stop the Government's action".

Why should the noble and learned Lord, Lord Woolf, of all people, be challenging the Government's stated intent here? I have already heard the depressing rallying call of access to justice. In truth, I worry about some of the briefings that we have received in preparing for this debate. They really seek to delay what action the Government are taking. I know that the noble and learned Lord, together with many other Members of this House, has received instructions from me personally in the past and I have huge respect for him. We must surely recognise, as the noble Earl, Lord Kinnoull, reminded us, that the Government committed in the manifesto at the last election to tackle the rampant compensation culture around whiplash claims—the same culture which pays the bills for those who continually text and call us with offers of money for nothing. We must not allow our eye to be taken off that ball.

The noble and learned Lord, Lord Woolf, referred to the Judicial College guidelines. Amendments 11, 17A and 17B propose sagely that those guidelines are the cure of all ills, but they are really not the answer to the question we have to address. I do not know the guidelines off by heart but I know this particular section, because it reminds us that,

"the figures … merely represent what other judges have been awarding for similar injuries".

That is all the guidelines do. They also say:

"The figures in this new edition recognise that … the general increase in RPI … since … 2015 has been 4.8%".

With respect to the good work that the Judicial College does to make awards consistent, the guidelines simply record the numbers previously thought of by other judges over the years and then uprate them for inflation. These and other amendments proposed by the noble and learned Lord, Lord Woolf, in fact oppose the entire substance of Part 1. They ask us to agree to leave the problem to the judges to sort out.

I respectfully answer that the courts have had many years to contain the problem but I have yet to see any conspicuous success. The assessment of damages by judges is based on a ratchet effect; it can go up but it can never slip back, as the Judicial College guidelines themselves admit. Judges do not redress the balance at any time. On one recent occasion when they had the opportunity to do so—the noble and learned Lord may recall Heil v Rankin in 2000—the judges increased damages for all but minor injuries and left the damages for those alone, so the control effect is simply absent. That is why it is now up to Parliament to do what needs to be done.

I conclude by reminding colleagues that a graphic illustration of leaving such matters solely to the discretion of judges can be found in a High Court appeal case last month, Molodi v Aviva Insurance. A whiplash claim was initially accepted by the county court judge, even though Mr Molodi had lied on a number of aspects of his case. The High Court judge in Manchester, Mr Justice Spencer, threw the claim out and issued a salutary warning to the judiciary,

"it is also pertinent to recognise the problem that fraudulent or exaggerated whiplash claims have presented for the insurance industry and the courts. This was recognised in March 2018 when the Ministry of Justice published a Civil Liability Bill … proposing new, fixed caps on claims … The problem of fraudulent and exaggerated whiplash claims is well recognised and should, in my judgment, cause judges in the County Court to approach such claims with a degree of caution, if not suspicion".

The need to issue such a general warning to fellow judges belies the suggestion that we can safely leave this issue for judges to control. The tariff is sorely needed. It applies the brake, which only the Government can apply, not the courts.

Lord Faulks (Con): My Lords, I repeat my declaration of interests made at previous stages of the Bill. The noble and learned Lord, Lord Woolf, and others have advanced powerful arguments in favour of protecting the entitlement of those genuinely injured who seek compensation for whiplash. Coming from such a distinguished source, these arguments clearly demand a great deal of respect around the House. It is therefore—to adopt a phrase used by judges—my misfortune not to agree with the noble and learned Lord's amendment. The noble and learned Lord, Lord Brown, referred to the fact that judges from time to time decide matters of policy and relied on the case of Caparo and the fair, just and reasonable test. It is of course for Parliament to decide fairness, justice and reasonableness, and it should approach this problem with that in mind.

It is undoubtedly true that some genuine claimants who have sustained whiplash injuries will be entitled to rather less than they would have been if the Bill becomes law, but we need to stand back and consider the policy driver behind these changes. At Second Reading, the Minister pointed out that there has been a 70% rise in 10 years in the number of road traffic accident-related personal injury claims. Of these, 85% are for whiplash-related injuries. In 2016-17, there were 670,000 whiplash claims—it is rather surprising that anybody gets into their car at all—yet we know that we have more of these injuries than any other European jurisdiction notwithstanding the considerable improvement in standards of road safety in this country and the adoption of neck restraints and the like. All this costs motorists and consumers a great deal, and the cost of premiums falls particularly harshly on those who live in rural communities and have to drive cars and on the young, who may find it difficult or impossible to pay premiums.

4.45 pm

Some of your Lordships may have suffered a whiplash injury. I declare an interest as having done so, many years ago. A car ran into the back of mine—I assure noble Lords that I was not part of any cash-for-crash scam. It caused considerable damage to the back of my car and some pain and discomfort in my neck for a few weeks, together with a little jumpiness in cars for about a month, particularly when I was stationary. There may be other noble Lords who have suffered whiplash injuries, but I suspect that almost none has escaped an invitation to take part in a claim, even though they have not in fact been involved in an accident. Such cold calling, by telephone or text, is a source of real irritation and I know that the Government are trying their best to stop it. Can there be any real doubt that there has been a widespread abuse of the system?

[LORD FAULKS]

My noble friend Lord Hunt referred to the Chancellor of the Exchequer, in an Autumn Statement, announcing the possibility of there being no damages at all for pain, suffering and loss of amenity in relation to whiplash. This Bill is more generous; it allows for a tariff. That is only for the conventional sum; there will still be compensation for loss of earnings and for any medical expenses. The intention behind the imposition of a tariff is to at least reduce the incentive for false claims, and increase the likelihood of settling these claims. As we will debate on subsequent amendments, insurance companies generally have welcomed these reforms and promised to reduce premiums. I agree that they should be kept to this promise. However, it would be wrong to regard the Bill simply as a sop to the insurance industry. It is frankly offensive to society as a whole that this sort of abuse is allowed to continue.

If there was to be a reduction for really serious injuries, I can imagine why noble Lords would baulk at the imposition of a tariff. However, we are for the most part talking about pain and discomfort of a relatively transient nature, such as might be occasioned in all sorts of sporting or domestic contexts without any compensation being involved at all. So these reforms—quite modest though they are—are a proper response to what I would describe as a racket. Simply to say that judges can sort these matters out and that some genuine claimants will be deprived of as much compensation as they would have got before does not take sufficient account of the nature and scale of the problem.

Is this an overreaction? Should the Government not have done more before proceeding to the tariff? These reforms do not come out of a clear blue sky. It was Jack Straw, of the party opposite, who first identified the problem with whiplash reforms. The LASPO Act, which the noble Lord, Lord McNally, will remember very well, attempted to get control of some aspects of the compensation culture. Then there was the fixing of the costs of whiplash medical reports and attempts to establish independence by the MedCo system. The Criminal Justice and Courts Act 2015 banned inducements and introduced the fundamental dishonesty test, which has been remarkably successful, although I remember that the noble Lord, Lord Beecham, disapproved of it at the time. We have heard the commitment in the Conservative manifesto to tackle fraudulent whiplash claims to reduce premiums.

These changes will not solve all the problems that exist in this unattractive field at a stroke. The Government have spoken of a response at a number of levels, including better regulation of claims management companies and further control of cold calling. However, if we exclude the bulk of the Bill, as these amendments will, we are not reflecting public disquiet. Insurance companies have done much more than they are given credit for, on fraud and following up fundamental dishonesty.

Other amendments in this group, particularly those suggested by the noble Lord, Lord Marks, seem, with great respect, to be the worst of all worlds. They seek to hard-wire the Judicial Studies Board guidelines into the Bill and then provide some exceptions. As the noble Earl, Lord Kinnoull, pointed out, they are not necessarily reflective of an average award, for the reasons that he gave. Indeed, they are guidelines—the clue is in the name—and they should not form the basis of a tariff.

Should we leave this to the judges? I have the greatest respect for judges—the noble and learned Lord, Lord Woolf cited what Lord Justice Jackson said about the role of judges—but one of the problems is that judges rarely see these cases. This is the murky world of grubby claims preyed on by a number of parasitic organisations which have created an industry. We can go on agreeing that there is a problem and restating the problem but these reforms will not drive it away—it will spring up elsewhere—but if we wreck this part of the Bill we will be failing to acknowledge the racket and walking by on the other side. Premiums for our children and grandchildren will continue to rise and our necks, collectively, will remain the weakest in Europe.

Lord Mackay of Clashfern (Con): My Lords—

Lord McNally (LD): My Lords, I have some trepidation in speaking before a former Lord Chancellor does, but perhaps what I have to say will help. I am grateful to the noble Lord, Lord Faulks, for reminding the House that I was the Minister who took through the LASPO Bill and I have been watching the Labour Front Bench nodding in unison at every word that could possibly embarrass the Government. However, the origins of what we are doing now lie with the last Labour Government, who shared then the growing cross-party consensus that we were becoming a more litigious society, driven by a compensation culture and a determination to have our day in court—the noble Lord, Lord Faulks, referred to Jack Straw's campaigning on whiplash—and the response to that was the setting up of the Jackson report under Sir Rupert Jackson.

It is interesting to note that one of the reasons for the setting up of the Jackson report under the Labour Government was that the costs in civil litigation were often disproportionate to the issues at stake. Lord Justice Jackson, who has just retired, spoke at the Cambridge law faculty on 5 March 2018 and, reflecting on his reforms, he said that the problem was that,

"Almost everyone perceives the public interest as residing in a state of affairs which coincides with their own commercial interests"—

he might have said professional interests as well.

My locus in this is not as a lawyer—I have told the House before that when I was a Minister I once said to a visiting distinguished American lawyer, "I must explain that I am not a lawyer", and he said, "Then I shall speak very slowly"—and, given the array of legal advice and talent we have already heard, I tiptoe into this with trepidation. This is based partly on a family experience of a whiplash, which was clearly fraudulent but the insurers thought that the cost of defending was greater than simply settling. That left me with the experience of not only a fraudulent claim but a fraudulent claim which was sustained by the obvious collusion of both the solicitors and the doctor concerned. Therefore, the noble Lord, Lord Hunt, is right to talk about a racket in which many respectable professions are involved. Those overseeing those professions have a duty of care to root out those who are complicit in these frauds.

As I have said, there was a growing cross-party consensus that something must be done. I confess that seven years ago I answered a Question from the Dispatch Box assuring the House of the urgency with which the Government were dealing with the issue of whiplash. I say to my Front Bench and to the noble and learned Lord, Lord Woolf, for whom the affection and respect I have is overwhelming, that I worry his amendment is just another one kicking the problem down the road when everybody else who speaks on it recognises that there is a problem. This has been said on a number of occasions: we are dealing with not the kind of catastrophic life-changing injuries that the noble Lord, Lord Faulks, often refers to when we discuss medical negligence, but the very lowest level of claims where, as the noble Lord again said, many people would not even think of claiming if they were not spurred on by the claims management industry out of its own self-interest.

I fully endorse what my noble friend Lord Marks said about the need for others to take responsibility, not least the industry itself, for fighting fraud and making attempted fraud not worth while. I worry that the legislation says that we need a medical certificate. Somebody said, maybe in a private briefing, that there was one doctor who had a kind of Roneo of letters that he just signed. If you are going to have a medical check in this, you have to make sure that it is not part of the fraud because in the past it has been.

Nevertheless, it is rather sad that we have this collection of amendments. I look forward to the usual forensic dissection of them by the noble and learned Lord, Lord Keen. There are some good and some not so good ideas in there, but I do not want us to see something that becomes a wrecking amendment when we have waited for far too long for this. Perhaps because I am not a lawyer I do not share the fear from the noble and learned Lord, Lord Woolf, that we are setting some terrible precedent that will weaken the role of the judiciary. I do not see that at this very low end of the process. I hope that, in our usual way in this House, we can extract some of the good ideas that have been put forward but not lose the sense of urgency with which the Bill, at last, tries to address a real problem in a practical way.

Lord Mackay of Clashfern: My Lords, I will speak primarily about the amendments that my noble and learned friend Lord Woolf has proposed. This part of the Bill is concerned only with claims for pain and suffering. It has nothing to do with any other form of loss. Other forms of loss are easily quantifiable, but loss arising from pain and suffering is a development of the law that has very little in the way of structure.

When I was a junior at the Scottish Bar long ago these matters were often the subject of jury claims. Pain and suffering was an element in a jury claim. The judges were warned against suggesting a figure to the jury. You can imagine how difficult it was to provide a summing up that dealt with that. I remember well that one of the senior judges that I knew had a formula in which he said, “This is a sum to mark your sense of the pain and suffering that the claimant has suffered”. That was done by juries; it was before the time that judges were involved in this, and therefore it was a jury question. It has all the character of a jury question in the sense that there are no rules that I know of—none has so far been quoted—to determine the amount to be given. How has that been done? As my noble friend has just quoted from the judicial guidance, it has been done by collecting what others have decided in other cases. There is nothing specifically judicial about that. I think almost any of us could manage to deal with that; you do not need to be a very experienced judge to do that kind of calculation.

5 pm

What the Bill does in this aspect is to make a system out of the situation in which there is a tariff to deal with this matter. The tariff is to be fixed by the Lord Chancellor. My noble and learned friend has suggested that this sort of thing is an innovation. In a sense it is an innovation, but it is an innovation that just works on the principle of the present system. The present system is one in which the judges look to what has been decided already in that particular type of case and try to make some kind of adjustment if that is seen to be necessary, because no two cases are absolutely the same. Therefore, in my submission to your Lordships, what is being proposed here is to have a system that reflects the nature of the award in a way that is derived from consultation, which of course includes the Judicial College’s findings.

So far as I understand the point, there is no suggestion that the awards need to be reduced beyond what is a reasonable figure for injuries of that type. The idea that judges fix these is really rather theoretical, because the number of cases that are involved is far beyond what the courts could accommodate. In fact, most of these cases are settled by negotiation. What is better to make a reasonably quick and cheap negotiation than to have a good sense of what the aim is? That is what the tariff does. In my submission, this is an excellent way of dealing with a practical problem that in no sense departs from the position that a judge should determine a matter that is really an issue when you realise how the judges do it.

We also have to think about the other aspects of this matter. One of the difficulties for insurance companies faced with fraudulent claims is that they require the assistance of the person insured to challenge the claim. People do not care to be required to do that, but it is required if you are going to contest the claim. I do not suggest for a minute that that should not continue. There is nothing in the Bill to prevent the insurance company, if it wants to, from contesting the claim altogether. This is only settling the quantum of the claim by a system that is very like the judicial system of doing it. I know of no better way of deciding this sort of pain and suffering claim than to see what has been done in other cases already. Therefore, in my submission to your Lordships, this is a perfectly reasonable way of dealing with a large problem—a very large number of cases at the same time—and I sincerely hope that your Lordships will support the principle of the Bill in the way that it has been set out.

Baroness Berridge (Con): My Lords, I have spoken at every stage of the Bill and I first thank the Minister for his time discussing matters with me.

[Baroness Berridge]

For those who have been in your Lordships' Chamber for the entirety of this debate, it is interesting to note how blame has been passed around like a squash ball. Is the fault that of the Government for not acting quickly enough, the insurance companies, those dastardly claims management companies or the judiciary for not getting a handle on this earlier?

While there is undoubtedly a problem with fraudulent claims, the one group not to blame is those people who are genuinely injured in this manner in an accident. Some of these cases indeed reach court: I have the privilege of representing those people.

Before I proceed, let me also comment on the matter of low-end claims or minor claims. I have met many a claimant for whom the difference in damages now proposed by the introduction of the tariff, taking some damages from four figures—£1,200 or £1,400—down to the likes of £470 is a significant matter for many people's incomes up and down this country. I cannot have it portrayed that this might not make a great deal of difference to many ordinary people in the country.

From my experience in your Lordships' House, we are in an unusual situation. We have so often spoken of the scrutiny of legislation needed here to avoid unintended consequences. But in this Bill, the intended consequence—whether that is the conscious intention of the judge or the virtually certain consequence of the legislation—will be to affect that group of people. Therefore, we are in the unusual situation where an amendment is laid on Report that is like a Second Reading point, because it is a point of principle about the Bill. It is also affects a point of principle that, as a law student, was the DNA of our justice system. It was taught to you from the moment you entered your lecture theatre—where, I have to say, I was taught by some amazing people.

I have thought much since Second Reading about how these genuine claimants might respond—the hundreds of folk who I have had the privilege of sitting with in waiting rooms on the northern circuit when I was a barrister—bearing in mind that they also, of course, care about their premiums and the societal implications of fraud, which is alleged to be so prevalent. It is these people to whom the justice system and the amount of compensation must be explained and make sense.

In my view, a genuine complainant might respond: "Her Majesty's Government say that the insurance companies are to blame as well. Have you made them do everything possible before depriving me of my compensation?". In fact, we know that insurance companies have often made commercial decisions to pay out for possible claims just to get rid of a claim at an earlier stage because it is cheaper—even suggesting to people that they might have been injured although they themselves have not mentioned it. Her Majesty's Government have not asked the insurance companies to stop this behaviour first. The insurance companies have paid out without medical reports, so would it not be fairer to genuine claimants to have a period with the medical reports that the legislation will make mandatory before reaching for such a drastic policy solution?

Secondly, a genuine claimant might respond: "Was this situation so dire for the insurance companies that insuring everybody was really at risk? How are their profits doing?". A report from Direct Line Group, the largest insurance group, shows profits for the financial year 2017 of £610.9 million—a leap of 51.4% on 2016. Dividends were up 40.2%. In its interim report in 2017, one of the reasons it gave was fewer than expected bodily injury claims. It is not the only insurance company to give this reason at the moment. I quote from the *Insurance Times* of 24 May this year:

"Fewer whiplash claims have helped Sabre Insurance Group's gross written premium return to 2017 levels. Sabre said: 'Pricing action was taken in early March to reflect the improving claims trends, specifically lower whiplash claims frequency'".

Could the insurance companies not be asked to use perhaps a fraction of these profits to fight the fraud before genuine claimants have to be affected by such a policy decision? I could not help but notice that genuine claimants might actually see the flaw in the system: if, for example, Harry Kane were to get injured in a road traffic accident and was unable to captain England, that would probably merit more in compensation than my having a whiplash injury.

Genuine claimants might respond to the Government and ask, "With those enormous changes that you made as a result of the Jackson review and LASPO, introduced in April 2013, what happened then to premiums and savings made?" I repeat the figures I outlined in Committee. Insurers have saved £8 billion in claims costs between 2010 and 2016. The figure to date is £11 billion. But premiums have gone up from £385 in the second quarter of 2013 to £493 in the last quarter of last year, according to the ABI's own premium tracker—an increase of 28% since the LASPO changes. Would not a genuine claimant ask, "Can the Government just make sure that the premiums will actually come down so that my compensation that I should have got will in fact be reallocated in lower premiums to everybody else, and not in higher profits for the insurance companies"?

Unfortunately, the legislation at the moment is unable to ensure that. There is nothing wrong with higher profits. Pension funds need them—I recognise that. But this is genuine claimants' compensation that we are asked to redistribute in this way. I agree with the principle mentioned by the noble and learned Lord, Lord Brown of Eaton-under-Heywood, that this is a policy decision. For the reasons I have outlined, I do not think that we have reached the point—although the time is fast approaching—to so affect genuine claimants and their understanding in the waiting rooms of our courts throughout this country of what a justice system should deliver. More can be done, so unfortunately, at this time, I cannot support the Government.

Lord Sharkey (LD): My Lords, I will speak briefly in support of Amendment 18, in the name of the noble and learned Lord, Lord Woolf, and, as a consequence, I will not be speaking to my Amendments 9, 10 and 17.

As this Bill has progressed, I have repeatedly pointed out that the tariff levels proposed by the Government lack any substantive justification. It remains entirely

unclear why these specific amounts have been chosen. What is clear, of course, is that they are very substantially lower than the amounts currently awarded. What is also clear is that they require genuine claimants to suffer a very large reduction in damages in order to try to reduce the incidence of alleged fraud or unmeritorious claims. The incidence of such claims is highly contested and relies, in part, on data that unhelpfully categorises dropped claims as probably fraudulent.

The noble Lord, Lord Faulks, if I heard him correctly, asked if there can be any doubt about the incidence of whiplash claims. The answer is yes; such a doubt exists, for example, in the House of Commons. The House of Commons Justice Select Committee discussed the question in its report of 15 May this year. Paragraph 2 of its conclusions and recommendations states that,

"we are troubled by the absence of … data on fraudulent claims and we find surprising the wide definition of suspected fraud that is used to collate the ABI's statistics. In particular, the failure by the ABI to break down their figures by the nature and type of claim, and to isolate RTA PI claims broken down by type of road user, is a significant and regrettable omission that weakens their evidence base".

The committee went on to recommend that,

"in the interests of accuracy, the Government work with the ABI to develop a more nuanced approach to avoid conflating innocent—if unexpected—consumer behaviour with fraudulent activity".

It seems wrong in principle to look to genuine claimants to pay for what may reasonably be characterised as, at least partially, a failure of the insurance industry's own practices. The long-standing practice of no-med settlements springs to mind here.

The Government's proposals would also create serious anomalies, as mentioned at Second Reading and in Committee, and as the noble and learned Lord, Lord Woolf, has again mentioned today. A whiplash injury of 24 months' duration suffered at work would attract damages of up to £6,500. Under the Government's proposed tariff, that injury would attract £3,725 in a road traffic accident, which is obviously undesirable and unjust. Finally, as far as I can see, the Government's forecast reduction in the cost of fraudulent claims takes no account of dishonest claimants trading up. The Government's proposed tariff may well deter small claims, but it may equally encourage dishonest claimants to attempt to move up the duration ladder to compensate.

I believe that we should remove Clause 2, which would leave the determination of damages where it currently is, with the judiciary. It would give the Government and the insurance industry time to reflect further on how better to assess the level of fraud and time to work out how to reduce it without unreasonably burdening genuine claimants, creating unacceptable and unjust anomalies in awards and creating incentives for larger dishonest whiplash claims.

5.15 pm

Lord Beecham: My Lords, I refer to my interest as an unpaid consultant to my former legal practice. A distinguished former Member of this House in the late 19th century, Lord Bowen, who served as a Lord of Appeal in Ordinary, was a noted wit. He it was who wrote:

"The rain it raineth on the just
And also on the unjust fella;
But chiefly on the just, because
The unjust hath the just's umbrella".

In its enthusiasm to deprive the unjust claimant in whiplash cases of the umbrella of justice, the Government's measures, embodied in Clauses 2 and 3, will effectively remove it from the just claimant—a reversal of Lord Bowen's scenario. As the noble and learned Lord, Lord Woolf, asserted, this is,

"a proposal which involves a genuine victim of whiplash injuries receiving reduced damages in order to deter a dishonest claimant from bringing a claim".

Let me be clear. There can be no one in this House who wishes to facilitate false claims. All of us support the need for any claim to be founded on objective medical evidence, and it is right for this to be a requirement of any out-of-court settlement. However, as the Bar Council points out, the effect of the Bill as originally drafted, and the draft regulations that have been published, would result in reductions of between 22% and 89% in compensation for the victims of whiplash injuries for up to two years, coupled with the costs that they will have to bear no longer being recoverable by the defendants. Thus the compensation under current Judicial College guidelines, set in 2017, for a four to six-month duration of injury, would drop from a range of £2,150 to £2,703 to £470 under the draft regulations, and for a 10 to 12-month duration from £3,257 to £3,810 as a range to £1,250. Of course, the new arbitrary figures for damages would relate only to the time factor and not, for example, to the intensity of any pain suffered.

The amendment proposed by the noble Lord, Lord Sharkey, comes closer to the Judicial College guidelines, but it would be better in my submission simply to delegate the responsibility for certain tariffs to the college rather than to either Ministers or Parliament. That should be a matter for the judiciary.

The Minister's letter of 7 June contains some welcome changes to the Bill as drafted, including a triennial review of Part 1. However, it contains a statement that underlines the problematic nature of the Government's response. The Minister avers:

"The Lord Chancellor should set those tariffs which will act to disincentivise unmeritorious claims to reduce costs for all motorists but which will also continue to provide a proportionate amount of compensation where genuine injury is suffered".

In other words, a genuine claimant is to recover less compensation than he would otherwise receive in order to deter the fraudsters.

But why are the insurers not more rigorous in their assessment of claims, and what happens when the fraudsters cotton on to the implication that they simply need to moderate their claims and the insurers will be content to pay up, effectively on demand, without demanding proper examination of the claim? As the noble and learned Lord, Lord Woolf, averred in a note circulated some time ago, this proposal,

"involves a genuine victim of whiplash injuries receiving reduced damages in order to deter a dishonest claimant from making a claim".

There is of course disagreement about the extent and cost of fraudulent claims, which should certainly be resisted by insurance companies. It has been suggested that they have been too ready to settle dubious claims

[LORD BEECHAM]

rather than risk the costs of defending them. But, importantly, the insurance industry's own estimates show that the amount paid out on whiplash claims declined by 17% between 2007 and 2016, while premiums rose by an average of 71%. Meanwhile, premium tax—imposed, of course, by the Government—doubled to 12% between 2014 and 2017, and the cost of repair bills has risen by 33% since 2013. The noble Baroness, Lady Berridge, gave us further illustrations of where costs are rising. I remind your Lordships at this point that there is not a consensus on the number of fraudulent complaints brought and settled hitherto. Of course fraud must be deterred—but again I say, not at the expense of genuine victims.

Another consequence that is highly likely to flow from the Bill's proposals is on the working of an already overstretched court system, with the increased number of litigants in person already causing delay likely to rise even further. Perhaps the forthcoming courts and tribunals Bill will impact on this, as more people who work in the system will be empowered to offer advice—although not representation, which is no longer available from legal professionals. However, there must be a risk in reducing the level of expertise in this way.

Amendments 6 and 8 in this group would restrict the application of the clause to 12 months rather than two years. Most cases are in that category, and two years of pain and discomfort is surely too long for the lowest level of compensation. Injuries that are serious enough to last over one year and up to two years are not "minor" by any reasonable definition. The effect of the reductions in damages is the removal of the right to claim full compensation. These are arbitrary and disproportionate measures.

Amendment 7 deletes an unnecessary requirement to mitigate the effect of damages which of course is already part of common law. We on these Benches support Amendment 9. On Amendment 10, there has been much pressure, understandably, for the tariff to be in the Bill. However, the problem with that amendment, and generally with Clause 2, is that the figures would be determined by the Lord Chancellor—with all due respect to former Lord Chancellors in your Lordships' House. Our view is that, while any changes would be made by secondary legislation, the setting of the tariff should be determined by the Judicial College—and we concur with the argument of the noble and learned Lord, Lord Woolf, in that respect—in accordance with the practice as exemplified by the 14th edition of the *Guidelines for the Assessment of General Damages in Personal Injury Cases*. It should be for the judiciary, not the Government of the day, to determine this, and we do not favour Amendment 10 on that ground.

Amendment 12 goes some way to meet that requirement, but still leaves it open to the Lord Chancellor of the day—now, of course, no longer necessarily someone well-versed in legal matters, as other noble Lords have pointed out—to take a position contrary to that of the judiciary. This could be a troublesome precedent for other areas of justice at a time when it seems to be increasingly difficult to recruit judges of calibre, let alone with the experience of the noble and learned Lords participating in today's proceedings.

Amendment 29A follows in seeking to leave out Clause 13 and giving the court power where it seems that the tariff is inadequate in respect of damage inflicted. We on these Benches support Amendment 46, which would require regulations for the FCA to report on the effect of insurance practices in relation to premiums and savings.

The noble and learned Lord, Lord Woolf, made a powerful case for removing Clauses 2 and 3 from the Bill. If the real concern is the prevention of fraud, with which we all concur, we should look at other measures. These could include heavier sentences for insurance claims fraud, higher no-claims bonuses and, above all, not punishing a genuine claimant for the misdemeanours of the fraudulent or the laxity of the insurance industry in resisting the fraudster. Of course, the role of claims management companies demands rigorous examination and action.

In the light of our support for the noble and learned Lord's proposal to delete Clause 2, we will not push our amendments to Clause 2 today, as we hope that the clause will disappear. However, should it remain, we will need to bring our amendments back at Third Reading.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): I am obliged to noble Lords for their contributions. I will speak to Amendment 6 and to Amendments 7, 8, 9, 10, 11A, 12, 17, 17A, 17B, 18, 19, 20, 25, 26, 27, 29A, 30, 32, 39 and 46. I hope noble Lords will forgive me if I take a little time over some of the points.

I begin by picking up on some of the observations made by noble Lords but will begin with a generality. I sometimes have the feeling that, were some noble Lords faced with an enormous edifice, their response would be, "You have to explain how every component part is held together before I am prepared to believe that I face an edifice". The reality was outlined by my noble friend Lord Faulks, who pointed out that there has been a 70% rise in whiplash-based claims in the past 10 years, during which time the number of road traffic injuries reported has dropped dramatically and during which time Thatcham Research has identified that the safety of seats and headrests in cars has improved in something like 88% of vehicles on the road, up from 18%.

Seven hundred and eighty thousand personal injury claims arising out of road traffic accidents were reported in 2016-17. That is the totality. Of those, 670,000 were whiplash claims. It is an astonishing statistic, and the edifice, let alone its component parts, is enormous. As some have already observed, there is clearly widespread abuse.

We have heard reference to the need to test the validity of claims. I noted the reference of the noble Lord, Lord Beecham, to the impact on the courts of increased litigation. One has only to stop and imagine the impact of trying to litigate 650,000 claims in the courts in order that liability can be established and the claim can be tested in each case. The cost implications of that go wider than just the impact on the courts.

There was a call from the noble Lord, Lord Marks, to do more to test the validity of claims. Again, one of the difficulties is the sheer magnitude of the problem

that we now face. He also alluded to the need for further measures in relation to aspects such as cold calling, which feed this enormous industry.

To address that point, the GDPR and the Data Protection Act 2018 ensure that, where personal data is obtained through an unlawful cold call, further use of that data will not be allowed, and indeed the ICO can impose very large fines. In addition, the Financial Guidance and Claims Act bans any legal person, not just claims management companies, from making unsolicited calls relating to claims services without having first obtained consent. Crucially, changes made by that Act make it explicit that any organisation in the United Kingdom cannot make unlawful cold calls and, in addition, cannot instigate others to do so on their behalf. Notwithstanding that, there is an enormous unregulated industry out there, much of it based abroad where we cannot touch it, and it continues with these practices. It is a major social problem and requires a policy decision.

Touching on the matter of the damages, the noble and learned Lord, Lord Woolf, referred to a highly complex judicial process, but I take issue with that. As my noble and learned friend Lord Mackay of Clashfern pointed out, the assessment of damages for pain, suffering and loss of amenity is essentially a jury question. Whether you give it to a judge or a jury is neither here nor there; it is essentially a jury question and it always has been.

5.30 pm

As the noble and learned Lord, Lord Brown of Eaton-under-Heywood, pointed out, we are dealing here with a policy that requires deterrents and with a political question. The law is replete with policy reasons for excluding damages for negligence in particular cases, and the noble and learned Lord, Lord Brown of Eaton-under-Heywood, referred to the case of Caparo industries, where the court referred to the test of what is fair, just and reasonable in particular circumstances. So there is nothing exceptional about this.

At one point, the noble Lord, Lord Pannick, intervened on the noble Earl, Lord Kinnoull. He began by asking: is there any other area in which the Executive rather than the judiciary fix damages in a civil claim? Even as he asked the question, it obviously crossed his mind that there might be, and so he added the rider, "I expect they are really rather unusual". The obvious example here is damages for bereavement. It is a very interesting analogy because, again, how do you fix damages for bereavement? It becomes a policy issue, just as when you are dealing with minor physical injuries and minor loss of amenities suffered by reason of a road traffic accident whiplash injury. There may be scope for a policy decision as to what damages should or should not be available. We are not taking damages away from Peter to pay Paul. We are essentially taking a policy decision that there should be a tariff for this form of injury to deal with a very real policy issue.

It is a policy issue which, as the noble Lord, Lord McNally, alluded to, has been under consideration for at least seven years—indeed longer, I believe, because it goes back to before 2010 and to the last Labour Government, who also felt that this matter had to be addressed. I stress, therefore, that we have not rushed at this matter. I notice that my noble friend Lady Berridge would like us to take it a little more slowly and one step at a time. But age is against me, and I feel we may have reached the point at which we have to move with the pace of a snail.

Let me go over the background for a moment. The Access to Justice Act 1998 was extremely well-intentioned but encouraged a proliferation of no-win no-fee conditional fee agreements. That fed large amounts of money into the personal injury claims market, with little or no risk, frankly. To bring back control, the Government, largely by implementing the Jackson reforms in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, introduced a ban on referral fees and rebalanced no-win no-fee deals so that claimants had a financial stake in the costs involved in handling their claim. These reforms had an impact and insurance premiums went down, but an adaptable market found new ways to sustain high levels of claims and premiums rose again. Further reforms in subsequent years improved the independence and quality of medical evidence through the introduction of the MedCo system, which I believe is widely supported. Legislation also banned lawyers from offering gifts and cash to encourage whiplash claims and introduced a power for the court to strike a personal injury claim out in its entirety in cases of fundamental dishonesty. However, the case had to be taken to court, with evidence laid and considerable legal expense engaged in, before you could achieve that result in one case, let alone 600,000.

These measures have helped, but the number of whiplash claims remains too high. That is why the Queen's Speech confirmed legislation to meet our manifesto commitment to reduce the cost of insurance for ordinary motorists by cracking down on exaggerated and fraudulent whiplash claims. It is why this Bill now provides for a tariff of predictable damages for pain, suffering and loss of amenity. In my respectful submission, it is the only reasonable way forward. The tariff applies to all whiplash claims with an injury duration of up to 24 months on an ascending scale. We believe that those levels are fair and proportionate to genuine claimants but should work to disincentivise unmeritorious claims and reduce the cost to the consumer. I emphasise that we are dealing with claims where pain and suffering and loss of amenity has a duration of less than 24 months. We are not dealing with major, catastrophic personal injury.

It is surely right that the levels of compensation should be set by the Lord Chancellor in circumstances where it clearly is a policy decision to deal with a very real problem. Having a tariff in regulations will provide a degree of flexibility to allow them to be reviewed. We have of course indicated that it would be our intention to look at the tariff regularly. The bottom line is this: this Government—and, frankly, previous Governments—have an obligation to ensure that there is real reform in this area. We cannot continue with the present situation. While previous action has attempted to tackle the problem of whiplash claims, the adaptive nature of the personal injury sector has meant that those reforms have not been nearly as effective as one might have hoped. The enduring scale of the problem

[LORD KEEN OF ELIE]

justifies giving the role of setting the tariff to the Lord Chancellor. I suggest that that is a carefully targeted approach to deal with a specific and enduring problem. It is not a widespread challenge to the judicial role under the common law with regard to damages; it is focused.

The current system, which utilises the Judicial College guidelines, has in our view led to compensation levels that are out of step with the level of pain and suffering endured as a result of these injuries. That is why we consider that we should step in with a tariff system. The system is not unique. Variations on a tariff system have been deployed in Spain, France and Italy, with levels set by the Government. I have just mentioned the Judicial College guidelines, which are clearly based on reference to decisions by judges. But the Judicial College itself includes representatives of claimants' lawyers and defendants' lawyers. These are not the only guidelines used by lawyers involved in the settling of claims of this kind; other guidelines are referred to as well.

In addition to fixing the tariff, we have made provision for an uplift in exceptional cases. We consider an uplift of 20% appropriate and a reasonable increase where there are exceptional circumstances. Again, I notice that it is consistent with European jurisdictions such as Italy, where a similar tariff and uplift is in operation.

In referring to the uplift, I should also like to speak briefly to Amendment 25, which is a technical government amendment. It aims to tighten the drafting of the Bill to clarify our intent with regard to the circumstances that might be considered exceptional by the court when it determines whether to apply an uplift. It captures both where the injury itself is exceptionally severe or where the circumstances of the injured party increase the pain, suffering or loss of amenity caused by the injury, and where those circumstances are exceptional to the particular claimant.

Amendment 20 in the names of the noble Lords, Lord Marks and Lord Sharkey, and Amendment 29A, as proposed by the noble Lord, Lord Beecham, would provide the court with complete discretion in increasing the tariff payments in exceptional circumstances. Together with Amendment 10, in the names of the noble Lords, Lord Sharkey and Lord Marks, they aim to place the tariff amounts in the Bill, rather than in regulations. However, as I have indicated, we do not consider that the appropriate way forward. The Government are clear that the tariff must be fair and proportionate. However, we believe that these amendments and an uncapped uplift would only encourage more claimants routinely to request a hearing for an uplift, and would therefore remove the overall objective of this policy.

Noble Lords will be aware that we have tabled an amendment which proposes that a review of the tariff must be undertaken no later than three years after the date that it first comes into force and every three years thereafter. That will ensure that the Lord Chancellor is required to publish a report in respect of each review, which is to be laid before Parliament.

I want to touch on Amendment 12, spoken to by the noble and learned Lord, Lord Judge. We consider this amendment helpful. It seeks to introduce a requirement for the Lord Chancellor to consult the Lord Chief Justice before setting the tariff. Within the framework of the Lord Chancellor setting the tariff through regulations, the Government agree that introducing this requirement would be helpful to ensure that we can reflect the views of the judiciary and we therefore propose to bring forward at Third Reading an amendment to require the Lord Chancellor to consult the Lord Chief Justice before setting or amending the tariff.

Amendments 6, 7 and 8 restrict the scope of the tariff provisions by reducing the injury duration of affected claims from two years to 12 months. We are not in favour of such a reduction. We consider that the tariff should cover claims of up to two years' duration. First, that will ensure that the majority of all whiplash claims are captured by the measures in the Bill. Secondly, if we do not do this, it would have the negative effect of encouraging unfair pressure on medical experts to inflate prognosis periods in claims to move a number of claims out of the tariff and into the more expensive fast-track process. In doing so, it would effectively remove the underlying policy reasons for the entire proposal. In addition, a duration of two years is consistent with the Judicial College guidelines, which indicate that minor orthopaedic neck injuries are those where full recovery is within three months and up to two years on an ascending scale. We consider it appropriate for the period of 24 months to remain.

Amendment 9, tabled by the noble Lords, Lord Sharkey and Lord Marks, is a simple provision aimed at further explaining the meaning the duration of the whiplash injury in Clause 2(1), but we believe that essentially this is covered already in Clause 2(1)(b).

Without delaying matters for too long, I hope noble Lords will understand the Government's position on these issues. We cannot accept the amendments proposed, particularly those that seek to affect the reasonable and necessary aim of this whole policy. We are concerned that the amendment which would remove Clauses 2 and 3 from the Bill would in effect tear the bottom out of it; it would remove its raison d'être. It would frustrate our manifesto commitment to reduce the cost of insurance for ordinary motorists by cracking down on exaggerated and fraudulent whiplash claims. I hope that in those circumstances, while I intend later to move government Amendments 19 and 25, the noble and learned Lord, Lord Woolf, will withdraw his amendment.

Lord Woolf: My Lords, we have had a good debate and all the points have been explored, so I shall not detain your Lordships for long by seeking to review the evidence which has been given, in excellent speeches, on behalf of both sides of the argument. However, there is a serious point to make. I would suggest that the vital feature at the core of my case for deleting Clause 2 is very clear: it results in injustice and it is known to result in injustice. Indeed, no one can deny that it results in injustice. There has never been a case where legislation deliberately introduces injustice into our law. It may be that it is only in regard to small claims, but surely it is important that we pause before we do that.

5.45 pm

If one is in any doubt about the consequences of the injustice, they were set out in the excellent speech of the noble Baroness, Lady Berridge. She described the people who will be affected by the injustice. The thing about justice is that it depends on the public supporting the courts. If the courts are required to take a course which involves doing the sort of thing that the noble Baroness has identified, we will regret that for a long time. It is fortunate that there is no precedent for deliberately introducing this sort of prejudicial situation to our justice system. For that reason, I will seek the opinion of the House.

As regards the point made about the manifesto, I must confess that I have not studied the document in question, but I feel confident in saying that what it does not set out is that there has to be legislation which does what I am complaining about; that is unique. I do not think that any party would want to put into their manifesto a situation where they would tackle an abuse in the way described, especially if it is a situation where various steps are being taken, as they are being taken in this Bill, which may reduce the dimension of the problem.

I believe that I have to say that I will seek to press Amendment 18 to a vote, but at this point I beg leave to withdraw Amendment 6.

Amendment 6 withdrawn.

Amendments 7 to 10 not moved.

The Deputy Speaker (Baroness Garden of Frognal) (LD): If Amendment 10 had been agreed, I would not have been able to call Amendments 11 or 11A by reason of pre-emption.

Amendment 11

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

11: Clause 2, page 2, line 35, after "injury" insert "or injuries, taken together,"

Amendment 11 agreed.

Amendment 11A not moved.

The Deputy Speaker: If Amendment 11A had been agreed, I would not have been able to call Amendments 12 to 17A by reason of pre-emption.

Amendment 12 not moved.

Amendments 13 to 16

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

13: Clause 2, page 2, line 38, after "injury" insert "or injuries"

14: Clause 2, page 2, line 44, after "injury" insert "or injuries"

15: Clause 2, page 3, line 2, after "injury" insert "or injuries"

16: Clause 2, page 3, line 8, after "injury" insert "or injuries"

Amendments 13 to 16 agreed.

Amendments 17 to 17B not moved.

Amendment 18

Moved by ***Lord Woolf***

18: Clause 2, leave out Clause 2

Lord Woolf: My Lords, I beg to move.

5.47 pm

Division on Amendment 18

Contents 205; Not-Contents 218.

Amendment 18 disagreed.

Division No. 2

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6.01 pm

Amendment 19

Moved by **Lord Keen of Elie**

19: After Clause 2, insert the following new Clause—

"Review of regulations under section 2

(1) The Lord Chancellor must carry out reviews of regulations made under section 2.

(2) The first review must be completed before the end of the period of three years beginning with the day on which the first regulations under section 2 come into force.

(3) Subsequent reviews must be completed before the end of the period of three years beginning with the day on which the previous review was completed.

(4) The Lord Chancellor must prepare and publish a report of each review.

(5) The Lord Chancellor must lay a copy of each report before Parliament."

Amendment 19 agreed.

Clause 3: Uplift in exceptional circumstances

Amendment 20 not moved.

Amendments 21 to 25

Moved by **Lord Keen of Elie**

21: Clause 3, page 3, line 31, leave out "a whiplash injury" and insert "one or more whiplash injuries"

22: Clause 3, page 3, line 32, after "injury" insert "or those injuries"

23: Clause 3, page 3, line 34, leave out "a whiplash injury" and insert "one or more whiplash injuries"

24: Clause 3, page 4, line 2, after "injury" insert "or injuries"

25: Clause 3, page 4, line 3, leave out paragraph (b) and insert—

"(b) it is the case that—

(i) the whiplash injury is, or one or more of the whiplash injuries are, exceptionally severe, or

(ii) where the person's circumstances increase the pain, suffering or loss of amenity caused by the injury or injuries, those circumstances are exceptional."

Amendments 21 to 25 agreed.

Amendments 26 and 27 not moved.

Amendments 28 and 29

Moved by **Lord Keen of Elie**

28: Clause 3, page 4, line 15, leave out "a whiplash injury" and insert "one or more whiplash injuries"

29: Clause 3, page 4, line 17, leave out "a whiplash injury" and insert "one or more whiplash injuries"

Amendments 28 and 29 agreed.

Amendments 29A and 30 not moved.

Amendment 31 had been renumbered as Amendment 29A.

Clause 4: Rules against settlement before medical report

Amendment 32

Moved by **Lord Sharkey**

32: Clause 4, page 4, leave out line 27 and insert—

"(i) of the whiplash injury, and

(ii) that the claim does not arise from cold-calling, and"

Lord Sharkey: My Lords, Amendments 32 and 39 return to the issue of cold calling, the problems of which we have debated on many occasions in this House. Our latest attempts to curb the menace of cold calling became law with the passing of the Financial Guidance and Claims Act, but, despite frequent debates and new laws, there remains significant uncertainty as to whether our current set of regulations is as effective as it should be. In particular, as we said in Committee, we are concerned at the extent to which cold calling will continue to drive fraudulent claims for RTA whiplash injuries. The Commons Justice Committee shares these concerns. Paragraph 133 of its 15 May report says:

"We conclude that the Government's current package of reforms creates a risk of increasing cold calling by, or on behalf of, CMCs; we welcome the restrictions on cold calling in the Financial Guidance and Claims Act, but believe they do not go far enough and that an outright ban should be introduced. In the meantime, we recommend that the Government monitor the effectiveness of the proposed restrictions, particularly on calls from overseas, and that technical remedies are urgently explored to tackle any loopholes that might be exploited by overseas operators to circumvent the restrictions; we ask that the Government report to us on progress with this within a year of the proposed restrictions being implemented".

In Committee we discussed amendments that would require an assessment of the real-world effect of all the current regulations trying to prevent cold calling. We also discussed the possibility of trying to cut off the revenue streams of cold callers by banning the commercial use of data so collected. I think that the Minister understood our concerns: he acknowledged, as he did again this afternoon, what he referred to as, "the problem of regulating the unregulated". He mentioned that the Government were seeking to approach this problem by regulating the use of material gathered by cold calling, and we entirely support this approach. There is a widespread unease that we have not really cracked this problem yet—and I believe that the Minister shares at least some of this unease.

Our Amendments 32 and 39 do two things. First, they give the Minister the opportunity to address the House once again on the issue of whiplash and cold calling. Secondly, they propose yet another method of coming at the problem of cutting off the revenue stream of cold callers. Clause 4 sets out new rules against settlement of whiplash claims before medical report. Amendments 32 and 39 extend these rules to cover whiplash claims arising from cold calling. Amendment 32 does this by making it a breach to settle without seeing appropriate evidence that the claim does not arise from cold calling. Amendment 39 allows the Lord Chancellor to specify the form of any

[LORD SHARKEY]
evidence required to demonstrate that the claim does not in fact arise from cold calling. Both amendments mirror the provisions in the Bill to ban pre-med settlements.

I realise, as I think we all do, that clamping down on cold calling is a difficult and complex business—but it is also vital. I hope that Amendments 32 and 39 will suggest to the Government a way forward in their attempts to cut off revenue streams and I very much look forward to the Minister's reply. I beg to move.

The Deputy Speaker (Lord Faulkner of Worcester) (Lab): I advise the House that if Amendment 32 is agreed I shall not be able to call Amendments 33 and 34 for reasons of pre-emption.

Lord Beecham: My Lords, I shall speak very briefly to the amendments in my name and that of my noble friend Lady Chakrabarti. There is not, I think, a great deal of difference across the House on the need to ensure that there are proper medical reports and that the MedCo website should be used. The amendments would allow the Government to employ others with medical qualifications, in addition to MedCo, if that was thought to be helpful. Our amendments expressly state that there must be appropriate medical evidence of injury. The amendments are fairly straightforward: we do not dissent from those of the noble Lord, Lord Sharkey, and we hope that the Government will look sympathetically on the amendments here.

Lord Marks of Henley-on-Thames: I shall speak very briefly to Amendments 35 and 36, both of which concern medical reports. These and also Amendment 39, to which my noble friend Lord Sharkey spoke, are in my name. The purpose of Amendment 35 is simple. While it is very difficult to prove, there is widespread concern that the quality of medical reports and, sadly, sometimes the quality and genuineness of those who provide them, is low.

Of course, it is notoriously difficult for clinicians to give reliable evidence of whiplash injuries, both because the symptoms are self-reported—and reported differently by different patients depending on their robustness—and because patients' accounts are hard to test objectively. Assessment of the likely duration of whiplash injuries, which becomes increasingly important in view of a cliff edge-type tariff, is also very challenging because the course of recovery is extremely difficult to predict and varies from patient to patient, again often dependent on no more than the robustness of the patient concerned. However, some clinicians develop considerable experience of these injuries, and a sensible system of accreditation, with the assistance of MedCo—which is already involved in assisting with the criteria for qualifications to produce medical reports, and quality assurance—ought to be able to encourage some consistency. That is why we seek the incorporation of a reference to MedCo in the legislation.

Amendment 36 would require the Lord Chancellor,

"by regulations make provision for the cost of obtaining appropriate medical evidence … to be recoverable by a claimant who succeeds … unless the court decides that such recovery would be contrary to the interests of justice".

This is a topic on which I have sought reassurance from the Minister in previous stages, and I have received some. But the current position is that recoverability is a matter of discretion. With the proposed change in the small claims limit and the proposed new portal, we would like to hear a statement that it is intended that in all cases where a claimant, even one below the small claims limit, succeeds in recovering damages for pain, suffering and loss of amenity under the tariff, the cost of obtaining the medical report, which will be compulsory, will go with it, unless doing so,

"would be contrary to the interests of justice".

Baroness Vere of Norbiton: My Lords, the amendments in this group all relate to either the provision of medical reports in relation to the ban on pre-medical offers for whiplash claims or the cold-calling provisions.

I start by reassuring noble Lords that the cost of medical reports is already recoverable in personal injury claims where the defendant insurer has admitted any part of liability. They will continue to be recoverable following these reforms, including in the small claims track following the proposed increase of the limit to £5,000.

The amendments in the names of the noble Lord, Lord Beecham, and the noble Baroness, Lady Chakrabarti, place the requirement for medical reports to be,

"provided by an accredited medical expert selected via the MedCo Portal",

or other experts specified by the Lord Chancellor in regulations. Currently, the Civil Procedure Rules require any initial medical report in support of a whiplash claim to be sought through the MedCo IT portal, which, as noble Lords will be aware, was established to improve the independence and quality of medical reporting. The Civil Procedure Rules also require that all MedCo medical reports must be provided by an accredited medical expert.

These provisions were made through the Civil Procedure Rules for a reason. The Civil Procedure Rules are flexible and their use allows for rapid responses to changed circumstances. MedCo is an industry-owned and operated company, and it would be very unusual to enshrine the purposes of such an organisation in the rigid structure of primary legislation. MedCo was formed to take forward government policy in relation to medical reporting. However, circumstances may change, as could MedCo's role. Alternative accreditation schemes may be added or it may become necessary to appoint another organisation to operate the current process. Were the use of the excellent MedCo process to be put in the Bill, the ability to respond to such changed circumstances would be lost, and genuine claimants could suffer as a result. I therefore urge the noble Lord, Lord Beecham, not to press his amendments.

Amendments 32 and 39, in the names of the noble Lords, Lord Sharkey and Lord Marks, seek to add a requirement relating to claims sourced through cold calling to the Government's prohibition on the making or seeking of settling whiplash claims without medical evidence. While I fully understand the noble Lords' motivations in tabling these amendments, I believe it would not be appropriate to widen the ban on seeking or offering to settle a whiplash claim without the

claimant first seeking medical evidence to also include claims which may have been sourced via a cold call. This could discriminate against genuinely injured claimants.

6.15 pm

Noble Lords will be aware that not all cold calls are illegal. The Financial Guidance and Claims Act 2018 introduced a ban on cold calling made by any person in which the call relates to claims management services, including personal injury, except where the customer has consented to such calls. This will reduce the number of uninvited nuisance calls received by consumers and will be enforced by the Information Commissioner's Office. As well as government action to curb cold calling in relation to claims management services, lawyers are already banned by the Solicitors Regulation Authority's code of conduct from undertaking cold calling.

The Government are of the view that these measures, taken together with the new rules imposed by the general data protection regulation and the Data Protection Act 2018, mean that consumers will receive far fewer unwanted calls from CMCs than they currently do. Although they are well meaning, these amendments could both impact on genuine claimants and place additional requirements and burdens on regulators, which will already be taking firm action to ensure compliance with government policy in this area. The 2018 Act also introduces a tougher regime for claims management companies, by transferring responsibility for their regulation to the FCA. The FCA has a wide range of enforcement powers, and I take this opportunity to point noble Lords towards a detailed consultation published just last week by the FCA, which spells out the rigorous steps it proposes to take in future in relation to regulating CMCs.

The Government agree that social nuisances such as cold calling must be curbed, but replicating actions already enshrined in other legislation is not the way to do it. While I appreciate noble Lords' intent, I respectfully request that they withdraw or not move their amendments.

Lord Sharkey: I thank the Minister for her reply about cold calling. It is a pity because, as I said in moving Amendment 32, there is a widespread feeling that things are not working. I hesitated to say this in the previous debate but I got three calls over the weekend—I thought it might be more appropriate to mention that now rather than earlier. There is a common unease, as my quoting the report from the House of Commons Justice Select Committee shows.

It may get better, and I hope it does, but, as I am sure the Minister knows, I was deeply involved—as was the whole House—in trying to craft regulations in the then Financial Guidance and Claims Bill, which were substantially watered down when they reached the Commons. When they left here, they were much stronger than they turned out to be after the other place had had its way with them. Again, that seems to reinforce the possibility that actually we have not yet got a grip on this. I ask the Government to reflect on whether or not the current package of regulations is going to work and exactly how we will monitor its working. In particular—addressing the point the noble and learned Lord, Lord Keen, made a moment ago—given that these factories in Pakistan can generate a million calls a day, then close down and reopen next door as another, separate legal entity, how are we going to deal with that if not by cutting off the revenue? I would welcome a conversation—perhaps not on the Floor of the House—about what progress we think we have made in the existing regulations in cutting off the flow of the revenue. In the meantime, and pending that kind of conversation, I beg leave to withdraw the amendment.

Amendment 32 withdrawn.

Amendment 33

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

33: Clause 4, page 4, line 27, after "injury" insert "or injuries"

Amendment 33 agreed.

Amendments 34 to 39 not moved.

Amendments 40 to 44

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

40: Clause 4, page 5, line 6, leave out "a whiplash injury" and insert "one or more whiplash injuries"

41: Clause 4, page 5, line 6, after "person" insert "on a particular occasion"

42: Clause 4, page 5, line 8, after "injury" insert "or injuries"

43: Clause 4, page 5, line 8, after "(a)" insert "suffered by a person on a particular occasion"

44: Clause 4, page 5, line 10, after "injury" insert "or injuries"

Amendments 40 to 44 agreed.

Amendment 45 not moved.

Clause 6: Regulation by the Financial Conduct Authority

Amendment 46

Moved by ***Lord Sharkey***

46: Clause 6, page 6, line 2, at end insert—

"(4A) The Treasury must, within one month of the passing of this Act, make further regulations specifying that the Financial Conduct Authority is to require all insurers holding a licence to offer UK motor insurance to publish a report—

(a) on the loss cost savings achieved as a result of the provisions of Part 1 of this Act, and

(b) how, and the extent to which, such savings have been applied to reduce motor insurance premiums.

(4B) The first such report from insurers must cover the period of 12 months beginning with the first day of the month immediately after the commencement of Part 1 of this Act and must be sent to the Financial Conduct Authority by the end of the period of 15 months beginning with the commencement of Part 1 of this Act.

(4C) The regulations must grant the Financial Conduct Authority the power to require further reports on an annual basis.

(4D) The Financial Conduct Authority, within the period of 18 months after the commencement of Part 1 of this Act, must make and publish a reasoned assessment of whether it is satisfied that each such insurer is passing on to customers any cost benefits arising from Part 1 of this Act.

(4E) The regulations under subsection (4A) must make provision for the Treasury to grant powers to the Financial Conduct Authority to enforce a requirement for insurers to pass on loss cost savings, achieved as a result of the provisions of Part 1, from insurers to consumers through a reduction in the cost of premiums if, after the period of 30 months following the commencement of this section, the Financial Conduct Authority advises the Treasury that such powers are necessary."

Lord Sharkey: My Lords, Amendment 46 is in my name and those of my noble friend Lord Marks, the noble Earl, Lord Kinnoull, and the noble Lord, Lord Beecham. I am grateful to them all for their support. The amendment addresses the question of pass-through. How much of the savings generated for insurance companies by whiplash reforms would in fact be passed on to motorists, in the form of reduced premiums?

Most of the insurance companies wrote to the Lord Chancellor in March. The penultimate paragraph of their letter said that,

"the signatories to this letter today publicly commit to passing on to customers cost benefits arising from Government action to tackle the extent of exaggerated low value personal injury claims and reform to the personal injury Discount Rate".

There would obviously need to be clarity about: the definition of a cost benefit; whether all customers would share the promised distribution or just those with motor insurance; and how the savings would be passed on. This might be in lowered premiums or just the promise of lower than expected premiums in the future, for example.

The House of Commons Justice Select Committee again noted the problem in its May 2015 report. Paragraph 3 of its conclusion and recommendations said:

"Potential savings to motor insurance customers are central to the policy justification for these reforms, but we conclude that the Government's estimate of the pass-through rate may be over-optimistic, given the lack of robust evidence and the unenforceable nature of insurers' promises to reduce premiums".

The committee recommended that,

"if the reforms are implemented, the Government work with the ABI and either the Prudential Regulation Authority or the Financial Conduct Authority to monitor the extent to which any premium reductions can be attributed to these measures and report back to us after 12 months".

Our amendment would require the Treasury to make regulations specifying that the FCA would require all motor insurers to publish a report on the savings made as a consequence of the whiplash reforms in the Bill, and how and to what extent these savings have been applied to reduce motor insurance premiums. It specifies the period to be covered by these reports as 12 months after commencement and how long the insurance companies would have to submit reports to the FCA, which would be three months. The FCA would then have a further three months to make and publish a reasoned assessment of whether the insurers have made the promised passed-on savings. The amendment also gives the FCA the power to request further reports from insurers annually as it sees fit. Finally, it would ensure that the FCA has the power to force the insurance companies to pass on savings if they have not done so, or done so sufficiently, within 30 months of commencement.

I think most if not all noble Lords would agree that the insurers should be held to their promise. To do that, we need to monitor and assess whether they have in fact held to their promise and, if they have not, to have the power to force them to do so. To do these things requires a tough and experienced regulator. Only the FCA has the resource, reputation, toughness and experience to be the regulator to do that, which is why this amendment gives it the job.

I know that the Minister feels strongly that insurers must be held to their promise and I realise that achieving this may be a rather complex matter. However, it is critical that we achieve it. It would be absolutely scandalous if savings made by insurers as a consequence of the Bill were retained by insurers. Amendment 46 sets out a method by which we can hold insurers to account for their promises. I beg to move.

Lord Keen of Elie: My Lords, we have on several occasions referred to the savings under these measures, which will be passed on to consumers by motor insurers. I understand that a number of Peers clearly have concerns about ensuring that this actually occurs.

I should say that the Government hold firm that the highly competitive nature of the motor insurance sector will mean that insurers have little or no choice but to pass on savings to consumers or risk being priced out of the market. An in-depth investigation by the Competition and Markets Authority in 2012 found that the motor insurance market is highly price-sensitive, driven by low levels of market concentration and high levels of penetration by price comparison websites. Resulting estimates indicate that 85% of insurance savings from whiplash measures will be passed on to the consumer. Finally, as the noble Lord, Lord Sharkey, observed, motor insurers providing cover to 84% of the UK market have already written to the Lord Chancellor to make the welcome commitment that they will pass on any savings.

That said, the Government are not unsympathetic to the underlying intention of Amendment 46, as tabled by the noble Lord, Lord Sharkey. The point is that having made a firm commitment, insurers should be accountable for meeting it. It is, however, important that any amendment in this regard is drafted with care so that it is effective but does not also impose requirements that push beyond the recognised remit of regulators such as the Financial Conduct Authority. I also observe that we must ensure that any legislative requirement in this area does not infringe on the very important area of competition law.

I therefore confirm that the Government will accept the views of Peers and develop an amendment, to be tabled in the House of Commons, that meets these requirements and provides an effective means for reporting on the public commitment made by the insurance sector, showing that it results in savings being passed on to consumers and thereby holds insurers to account. This is quite a complex and delicate process and it is ongoing at present.

I add only one further matter. Requiring a report to be made within 12 months of commencement is not likely to be the best way forward because claimants have a three-year period in which to make claims. After the Bill receives Royal Assent, there will therefore be an overhang for up to three years of claims that fall outwith the requirements for the tariff to be applied. We will have to look carefully as well at what point it would be appropriate for a report to be made and laid before Parliament. However, that is under active consideration and, in light of that indication, I hope the noble Lord will consider it appropriate to withdraw his amendment.

Lord Sharkey: My Lords, I am very grateful for the Minister's answer and encouraged by it, too. I take the points about being careful on competition law and the period over which we assess the insurance companies' return to the people they insure. I will follow with interest the progress of a government amendment as it goes through the House of Commons. Having said that, I beg leave to withdraw the amendment.

Amendment 46 withdrawn.

Amendment 47

Moved by ***Baroness Hayter of Kentish Town***

47: After Clause 7, insert the following new Clause—

"Restriction on increase in small claims limit for relevant personal injuries

(1) In this section, the "PI small claims limit" refers to the maximum value (currently £1,000) of a claim for damages for personal injuries for which, in accordance with Civil Procedure Rules, the small claims track is the normal track.

(2) Civil Procedure Rules may not increase the PI small claims limit in respect of relevant injury claims to an amount above £1,000 for the first time unless—

(a) the Lord Chancellor is satisfied, and has certified in writing, that on the day the rules are to come into force, the value of £1,000 on 1 April 1999 adjusted for inflation, computed by reference to CPI, would be at least £1,500, and

(b) the rules increase the PI small claims limit to no more than £1,500.

(3) Civil Procedure Rules may not increase the PI small claims limit in respect of relevant injury claims on any subsequent occasion unless—

(a) the Lord Chancellor is satisfied, and has certified in writing, that on the day the rules are to come into force, the value of £1,000 on 1 April 1999 adjusted for inflation, computed by reference to CPI, would be at least £500 greater than on the day on which the rules effecting the previous increase were made, and

(b) the rules increase the PI small claims limit by no more than £500.

(4) In this section—

"CPI" means the all items consumer prices index published by the Statistics Board;

"relevant injury" means an injury which is an injury of soft tissue in the neck, back, or shoulder and which is caused as described in paragraphs (b) and (c) of section 1(3) (negligence while using a motor vehicle on a road, etc.);

"relevant injury claim" means a claim for personal injury that consists only of, or so much of a claim for personal injury as consists of, a claim for damages for pain, suffering and loss of amenity caused by a relevant injury, and which is not a claim for an injury in respect of which a tariff amount is for the time being prescribed under section 2."

Baroness Hayter of Kentish Town (Lab): My Lords, Amendment 47 stands in my name and those of my noble friends Lord Bassam, Lord Beecham and Lord Monks. We need this amendment because, on the back of wanting to take action on what are claimed to be fraudulent whiplash claims, the Government propose to remove legal help from a swathe of people with genuine personal injury claims. This is not simply unnecessary but wrong.

When the Government introduced fees in employment tribunals, the absence of legal advice and representation frightened many away from taking cases to court and we saw a drop-off of some 90%. In family courts, where legal aid was largely withdrawn, we have again seen the difficulties when people are unrepresented. Denying legal advice undermines the commonly held view—I thought it was commonly held—that justice should be open to all and not just to those able to pay.

6.30 pm

The Government are proposing to double the tariff below which legal aid is recoverable, such that only claims officially above £2,000—or £5,000 for road traffic cases, which is a fourfold increase—will be taken under the fast-track procedure and thus be eligible for cost recovery. I say "officially" because the measure of whether a case falls within the small claims track is calculated only on the potential award for general damages or pain, whereas losses and expenses, the so-called special damages, are outwith the calculation. So, for example, if general damages are worth £900, the claim goes into the small claims track at the moment, even if wage losses were, say, £700, bringing the £1,600 total above the small claims limit. In future, any claim for general damages below £2,000, or £5,000 for RTAs, will have to be dealt with by the small claims procedure, even if the total is above that, with legal costs then not being recoverable. Yet for these sorts of amounts, paying privately for advice would never make economic sense. It would take too big a sum from whatever was awarded.

We have to ask why the Government are doing this. The £1,000 limit has been with us since 1999. Since then, using, say, the RPI index, there may be a case for uplifting to, say, £1,500, but no higher. Indeed, Lord Justice Jackson supported a £1,500 limit when inflation justified it. Last month, the Justice Committee concluded that,

"increasing the small claims limit for personal injury (PI) creates significant access to justice concerns",

and "risks falling short of" guaranteeing,

"unimpeded access to the courts".

The Minister might not think that a £500 difference is very great, but it is for a nurse, a bus driver or a care worker and, indeed, it represents 50 hours' work for those on the minimum wage, exactly the sort of people mentioned by the noble Baroness, Lady Berridge, on an earlier group. The Government are proposing that people with claims under £2,000—potentially substantially more with loss of earnings—take on insurers with no paid legal help. It is no good the Minister responding

[BARONESS HAYTER OF KENTISH TOWN]
that they can always swap tracks if the case is perceived to be complex, as he said in Committee, because you only know if a case is perceived to be complex if a lawyer has told you that, and you will not have a lawyer at that point.

These cases are where the consumer—in case the Minister wonders why I am here, it is because I am in my consumer role, rather than my Brexit role; he might have thought there was a European aspect—is always the small guy up against the big one, with disparity of power, according to the Transport Committee, or an asymmetric relationship in Lord Justice Jackson's words. That is why until now the limit has been kept deliberately low.

These changes will affect not simply whiplash claims. The increase in the small claims limit to £2,000 will affect cyclists and pedestrians, and I declare my interest as both, although the idea that I am likely to suffer whiplash is rather absurd. Not only does whiplash not affect such claimants, but there is no suggestion of false claims from such non-whiplash claimants.

Here we have a Bill to deal with whiplash, but the Government are taking action on the limits which flies in the face of advisers and is unrelated to whiplash or fraud, but will affect tens of thousands of people a year. Furthermore, the Government have offered no justification for increasing the small claims limit in all road traffic accidents, not just whiplash, to £5,000, which could capture perhaps nine in 10 of all RTAs, leaving them effectively without legal representation. The changes will also affect employment injury claims. Again, there is no suggestion of fraud or misuse of the courts, and the amounts are significant to low-paid workers, exactly those least able to pursue a claim without legal advice or representation.

Of the cases handled by trade unions—remember that many of the very low-paid are not even in trade unions, but they still need legal advice—of the half that were dealt with by Thompsons, nearly one in five were below £2,000. Some of those who are injured will try to pursue their own claim with no legal assistance, but even on the Government's own figures we know that 133,000 cases will never proceed, just as we saw a 90% drop in ET cases after fees came into being. Yesterday's MoJ figures show that personal injury claims in county courts fell by 7% in the first quarter, which confirms this trend, as does the DWP compensation recovery unit, where cases dropped 13% in 2017-18. These are serious fall-offs of people with genuine claims who are simply unable to pursue them themselves without legal aid.

Amendment 48, which is also in this group, would ensure that claimants can get advice so that they do not undersettle their claim because they have not fully understood the medical evidence or have been overpressured by insurers. As the noble and learned Lord, Lord Mackay, said, claimants who have to contest an offer by themselves find that very hard to do without legal advice. They simply do not know whether the offer is fair.

We should ask who would benefit from removing legal advice from a swathe of injured claimants. It is clearly not the injured themselves, nor the NHS, which will lose some £6 million a year, but it is possibly the insurers. The impact assessment suggests they could get an extra £1.3 billion, and there is no guarantee that it will be passed on to consumers, although in the light of what the Minister said on the previous amendment I feel some reassurance that that may now be looked at more closely. Perhaps we can see, if not at Third Reading certainly in the Commons, whether the undertakings he has just given would ensure that any such savings are passed on. If it is the insurers who win in these proposals, that hardly accords with the Prime Minister's promise in Downing Street in July 2016 that her Government would,

"be driven not by the interests of the privileged few, but by yours ... When we pass new laws, we'll listen not to the mighty, but to you".

Perhaps that is why she is slipping this change through not in the Bill before us but behind the scenes by asking her Lord Chancellor to order the rule committee to make changes which would deny thousands of people legal help with their claims as a result of changes brought in by statutory instrument.

The Government's proposed changes are not in consumers' interests. They will deprive people of legal representation to obtain their rights, which is hardly what Lord Reed wants as he said people should have "unimpeded access" to courts as without that,

"laws are liable to become a dead letter".

It is right that people who are injured get compensation, but they need to be able to do that with proper advice. We do not accept that reducing access to our courts should be done in this underhand way by this change in limits. This amendment will bring the issue into primary legislation, where it belongs. I beg to move.

Lord Bassam of Brighton (Lab): My Lords, I rise to support my noble friend Lady Hayter and specifically to speak to Amendments 47 and 48. It is worth saying that we are trying to bring forward and implement part of the Jackson recommendations.

My noble friend Lady Hayter has covered most of the ground better than I could ever dream of doing in making her powerful and persuasive case from the Front Bench. If we could, we would have brought forward a different amendment and found a simpler way of inserting into the Bill a restriction to the Government's ability to raise the small claims limit for personal injury to £1,500. This amendment, imperfect though it is, goes some way towards tackling that problem. It is our contention that, by raising the limit in the way they have, the Government intend to seriously disadvantage those with an entirely legitimate personal injury small claim and prevent them gaining access to justice and legal advice.

I have no doubt that most of us privileged enough to sit in this House, or in the other place, have little fear of taking on those in authority and power—some of us rather enjoy it. That is not the case if you are a nurse or a teacher, a farm or shop worker, or you work in a factory and have limited spare time, financial resources and ability to tackle issues of personal injury. This amendment seeks to protect those people. As has been said on numerous occasions, the Government are proposing to make changes to the small claims limit, not on the face of the Bill but by other, back-door means. This will impact on hundreds of thousands of

people injured through no fault of their own. It will pitch the nurse, the teacher, the shop worker, the factory worker and the land worker against the insurer, on their own and in their own time. The insurers will be able to afford lawyers and wily negotiators, but the injured will be expected to take on these forces with no help whatever.

The Minister, who I am sure is a fair man, may say that the system that deals with this is simple, but it is not designed by those who have to confront it. We all know that there are many who cannot use portals and online means of tackling these issues because they do not have the training or expertise and feel uncomfortable in the online world. The Minister may say that insurers will not fight a case which they know they are going to lose but that does not stop them playing hardball because they choose to. Why would they not, faced with a claimant on their own? Insurers also have a duty to their clients. I trust that the Minister will not say—as he did before the Justice Committee—that claimants can get help from the CAB, because anyone who knows anything about the diminished state of free legal advice services in this country would be only too happy to take him to see how they are struggling and the queues, delays and frustration that are routine.

From this perch, I could recite case after case where insurers have fought injury claims to the bitter end for reasons that frankly perplex lawyers for the claimants. However, we have limited time so I will briefly quote just two of many cases provided to me by Thompsons. One claim involved a care assistant in her early 40s who injured her right elbow and upper arm when lifting a patient. She was using the correct technique but did not have the equipment required to complete the task properly. The employer denied liability throughout and fought the case for more than a year before it was eventually settled for a sum that would have fallen within the new proposed small claims limits. The other case, which would also fall within the new limits, involved a senior staff nurse who tripped over wires that had not been properly protected and covered. Her employers fought the claim right up to the point when the trial was due to begin. Our amendments seek to ensure that those who do not have a corporate lawyer behind them do not fall prey to another racket—the routine denial of claims by insurers, just because they can.

The amendment seeks to ensure that claimants always have advice on the value of their claim so that they do not undersettle. It also provides that, where insurers deny liability, the claimant has someone by their side to advise them and, if necessary, represent them in relation to the issue of liability. It does not propose that the costs recoverable by the lawyer for the claimant are open ended; they will be the same fixed costs that would be recoverable if this case were in the fast track.

As my noble friend Lady Hayter has outlined, the second amendment in this group is specifically aimed at ensuring that those injured can have access to medical advice in their case and recover the cost of medical reports that might be necessary. That is essential and will be a contribution towards ensuring that there is no significant undersettling, which is a major issue in these cases. These amendments are about fairness and equity in the legal process. They may not seem to the Minister to be vast in their extent, but they are numerous. Although they do not always involve large sums of money—which noble Lords may feel uncomfortable talking about—this House has a duty to try to ensure fairness and balance in the legal system. Even at this late stage, the Minister could make a commitment to retaining the limit in accordance with Lord Jackson's recommendation.

6.45 pm

Lord Monks (Lab): My Lords, I will add briefly to the points that have been made by my noble friends on Amendment 47. I declare an interest: I am associated with Thompsons Solicitors, one of the largest trade union solicitors in the country. In its current form, the Bill will deter claims for personal injury for many vulnerable, low-paid people. The inequality of arms which exists when someone tries to bring a case will be overwhelming for many people. I note from UNISON's brief—which most noble Lords got—that it did a survey of people it had helped to get compensation. This found that 63% would not have taken the case if they had not had a guarantee of legal support and an opportunity to recover costs. There is an absence of good information about the effects of these changes, so that is probably as good as any. There will be a deterrent effect on this sector of personal injury.

When speaking to an earlier amendment, the noble Lord, Lord Hunt, was rather dismissive of the access to justice argument, which a number of lobbyists have drawn to the attention of those who follow this subject. The information supplied by UNISON and others shows that there will be a lot of people who will not take cases who otherwise would have done under the present limit. On this side of the House, we are looking to temper that kind of approach by the Government. The noble Lord, Lord Hunt, will know from his experience with the Transport and General Workers' Union—to which he referred—that for low-paid and vulnerable people a period off work for an injury or illness is a big deal. It is not to be assumed that employers will automatically cover the cost. These people experience the cost of illness more than those of us in comfortable jobs.

Amendment 47 seeks to tie the Government to the recommendations made by Lord Jackson in his review of civil litigation costs. These said, in effect, that there should be an increase in the small claims limit only when inflation justifies it. The Justice Committee in the other place very much agreed with that in its recent report. That is what leads to the figure of £1,500, an increase based on changes in the CPI, rather than the £2,000 which the Government are pressing for. I note that the Justice Committee was deeply unimpressed by the inability of the Ministry of Justice to quantify the impact of raising the small claims limit for employer liability and public liability claims to £2,000. That is the crux of the issue addressed by the amendment. I hope that in light of these points, and those made so ably by my colleagues, the Minister will soften a little bit and look at the plight of the people at the bottom, the most vulnerable, those who are struggling, those who lose money when they are ill and off work, and

[LORD MONKS]
so on. Without labouring it too much, I hope that the Government can see our point rather more clearly than they have done so far.

Lord Judge (CB): My Lords, as it has not emerged that the amendment is the property of the Opposition, perhaps I may add a few words in support of Amendment 47.

Lord Justice Jackson's report was a remarkable document. It exhaustively analysed the entire structure of our civil justice system. It would not have supported the present Government's position. I would love to read out the Justice Committee's report—but, if I did, we would be here awfully late and no one would want to hear it. However, can we briefly recognise that the Justice Committee report is not adverse to the Government's proposal but deals a series of hammer blows, each one individually worth noting?

"We recommend the Government should not increase the small claims limit to … £5,000".

Bang.

"There is no policy justification for including vulnerable road users within the reforms proposed".

Bang.

"We recommend that they be excluded from any higher small claims limit that is imposed on other RTA PI claims".

Bang.

"We are deeply unimpressed by the inability of the Ministry of Justice to quantify".

Bang.

And so it goes on. This is not one of those reports with recommendations that obscure their meaning, and perhaps the Minister will consider that as an important feature of this debate.

Lord Keen of Elie: My Lords, I will not begin with a bang but I will address the points that have been raised.

I begin by pointing out, with great respect, that the noble Baroness, Lady Hayter, may not be entirely correct in some of the propositions she advanced. She said that the £1,000 limit had been with us since 1999. It has been with us since 1991. The small claims limit in respect of claims other than personal injury and housing claims is now £10,000 and operates effectively and efficiently at that level. That has to be borne in mind as well.

The noble Baroness spoke with her consumer hat on and referred to the small guy. Reference was made to the worker with limited ability to deal with his claim. The noble Lord, Lord Bassam, referred to workers being pitched out on their own with no help and alluded to a number of examples given by Thompsons solicitors—I shall come back to that in a moment—of where they were perplexed by the way in which claims were dealt with by insurers. The noble Lord, Lord Monks, said rather modestly that Thompsons solicitors were one of the largest firms of trade union solicitors in the country. They must be the largest by quite a long way. They are well established and have been for many years. Why do we refer to them as trade union solicitors in this context? It is because one of the great benefits of union membership for workers is the availability to them of legal advice and assistance when they require it in respect of a claim, particularly one arising in the course of their employment—which is why legal aid is not available in those circumstances. So, far from the little guy, the worker, being pitched out on their own without any help, they almost invariably have the assistance of probably the largest and most established firm of trade union and personal injury solicitors in the country.

I do not decry that—it is an immediate and obvious benefit—but the disbenefit of increasing the small claims limit is that the extent to which the union will recover its legal costs will be more limited, and that will have an impact on trade unions. I understand that and one has to take it into account in the overall scheme of these provisions.

Lord Bassam of Brighton: The noble and learned Lord will probably accept that somewhere in the region of 6 million people are members of trade unions. That leaves a rather larger workforce who are not represented by trade unions. Those employees are in a more vulnerable position than that faced by those who are represented by a union. My guess is—perhaps the noble and learned Lord can help me here—that the majority of people will not be able to access the support they would get if they were a trade union member. So most people who come up against this limit will be affected by that.

Lord Keen of Elie: I note what the noble Lord says about national trade union membership, and no doubt the unions will try harder to recruit more widely. One of the obvious benefits they can hold out is the provision of legal advice and assistance for those who become members. I accept that there is a balance to be struck.

Amendments 47 and 48 seek to restrict the increase in the small claims track limit for whiplash injury claims to a maximum of £1,500, as opposed to the proposal that there should be an increase to £5,000. They also seek to restrict the ability of the Civil Procedure Rule Committee to make further amendments to the upper limit. As we have indicated before, motor insurance premium costs are increasing as insurers pass on the cost of dealing with the continuing high number and cost of whiplash claims. I referred earlier to the 2017 election manifesto provision that the Government were committed to cracking down on these claims and ensuring that the money saved was returned to consumers through lower premiums. These amendments would maintain the burden on ordinary motorists by restricting the flexibility of the Government to reduce the costs of civil litigation through changes to the Civil Procedure Rules.

Whiplash claims are generally straightforward and do not routinely require legal advice. The small claims track is suitable for such claims. It is designed to be accessible to litigants in person, and the Government are working closely with stakeholders to develop a comprehensive package of guidance and support for users.

The Government have chosen to increase the small claims limit for road traffic accident personal injury claims to £5,000 for good reason. This limit, as I said, has been set at £1,000 since 1991 and, as compensation levels have risen, the small claims track no longer covers the same breadth of claims as it once did. Following consultation, the Government believe that

increasing the limit for RTA personal injury claims to £5,000 is a careful and proportionate increase, particularly having regard to the fact that the limit for other claims, with the exceptions I mentioned earlier, is now £10,000. A level of £5,000 will facilitate early and expedited settlement under the proposed tariff structure and will encourage insurers to challenge unmeritorious claims, many of which are not now challenged because of the potential legal costs.

A decision to tie such limits—currently, for good reasons, enshrined in secondary legislation—to a restrictive primary legislative process would be inflexible. The Civil Procedure Rule Committee, under the leadership of the Master of the Rolls, sets out the rules of procedure to ensure that the civil justice system is fair, open and effective. It is the body that sets the financial upper limits for the current three tracks of the civil justice system following consultation. That system has operated effectively for some time. It is flexible and it is appropriate that procedural changes should be made in this way to the civil justice system.

However, we listened to points made earlier about the position of those who are considered to be vulnerable road users. Noble Lords will be aware that they are already excluded from the provisions of Clause 1, and it is proposed that they may be exempted also from the £5,000 limit on the small claims track. We are giving further consideration to that at the present time.

Amendment 48 seeks assurances as to the recoverability of the cost of a medical report in respect of whiplash injury claims, notwithstanding the increase in the small claims track limit. That has been addressed already. The amendment also seeks to change the nature of the small claims track itself by permitting a claimant to recover their legal expenses. We consider that, given the nature of the small claims track for personal injury claims, it would be wholly inappropriate to introduce the recovery of legal expenses. The small claims track was designed to be a low-cost process accessible to litigants in person. The rules have been purposefully and carefully drafted to ensure that both parties share the financial burden of litigation and pay their own legal costs—or, in the case of a union member, have them met by the union. That is a key advantage of the process.

A number of noble Lords have questioned why insurers do not do more to challenge potentially inflated or fraudulent claims, particularly whiplash claims. Part of that answer lies in the cost of defending a claim in the fast track. Increasing the small claims limit so that more of these straightforward whiplash claims—where the insurance industry tells us that liability is admitted in around 90% of cases—are heard in a small claims court will encourage insurers to challenge unmeritorious claims. By contrast, challenging a claim in the fast track is an expensive process that insurers not unnaturally seek to avoid. So there are very clear cost advantages overall in increasing the limits for the small claims track. Where a case is considered to be of a degree of complexity such that it would not lend itself to the small claims track, clearly the court can direct that it should go on to the fast track.

Therefore, in respect of Amendment 48 in particular, the idea of having different cost rules in the small claims court based on the type of claim would create confusion, would undermine the whole purpose of the small claims track and would potentially be unfair to all users of the court system. In these circumstances I invite the noble Baroness, Lady Hayter, and the noble Lord, Lord Bassam, not to press their amendments.

Baroness Hayter of Kentish Town: I thank not the Minister but the noble and learned Lord, Lord Judge—I will get him to move things in future. He is so much more effective than I am.

I was very disappointed by the tone of the response. I stand here as the shadow Consumer Minister, talking about consumers, and we get a sort of suggestion that this is all about keeping trade unions happy. As my noble friend Lord Bassam said, sadly there are only 6 million people in trade unions—I wish it was more. It is exactly the low paid and the people who are most vulnerable to this who are not represented by trade unions—but, even if they were, I do not accept that that makes putting up the limit somehow acceptable.

I will not take up time. I acknowledge a movement on vulnerable passengers—for which, as a cyclist and a pedestrian, I am grateful—but I am afraid that the Government's own figures show that, by their changes, one in four of the people compensated today would no longer be compensated. If on that basis the Minister thinks that we will save costs—in other words, it is injured people who will pay—I do not think that that is good enough. It should be done not behind the scenes but in the Bill. I beg leave to test the opinion of the House.

7.02 pm

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7.14 pm

Amendment 48 not moved.

Clause 8: Assumed rate of return on investment of damages

Amendment 49

Moved by ***Lord Hodgson of Astley Abbotts***

49: Clause 8, page 7, line 31, at end insert—

"( ) Rules of court under subsection (1) must draw attention to those aspects of orders for periodical payments which may make them more suitable in cases where individuals receive large sums of damages, have long-term injuries or are risk-averse."

Lord Hodgson of Astley Abbotts (Con): My Lords, we come to a matter that we discussed at some length in Committee, so I will cut to the chase. An award of damages that will be paid out over a long period—for example, to provide care to someone previously injured in their 20s—is based on two very important assumptions: how long the person will live and what rate of return can be expected from the sum awarded. If the damages are awarded in the form of a lump sum, these two factors assume a particular and increased importance. The first of these factors, the length of time that a person is expected to live, is inevitably based on averages, so if the injured person lives beyond the expected average then there is a risk that the individual will spend the last few years of their life in financially straitened circumstances. As regards the second factor, if the investment performance falls below that which is anticipated then a similar outcome will result.

As we have already discussed, there is a way for the individual to avoid both the longevity risk and the investment risk. He or she can do so by taking the award in the form not of a lump sum but of a periodical payment order, a PPO. Under a PPO, part or all of the award can be paid weekly, monthly, quarterly or whatever to suit the injured party, and paid normally on an inflation-proof basis for the rest of a person's life. Sadly, though, we have discovered that PPOs appear to be the poor relation as regards the methods of awarding damages. We discussed in Committee the various structural reasons why this was so—the preference of insurance companies for a swift solution and the capital required to back a PPO, the potentially seductive nature of a very large lump sum compared with the more modest amount of a periodic payment and so on.

My amendment is designed to tip the balance more in favour of PPOs, so that in cases where lump-sum damages exceed, say, £1 million and/or the award will be paid out over more than 10 years and/or the individual is of a risk-averse nature, the court should press for the award to be made in the form of a PPO. To be clear, the court should not compel; that would be completely inappropriate. If a person is determined to have a lump sum, a lump sum they must have. However, the court should certainly encourage PPOs. None of this appears to run counter to the wishes of the House of Commons as expressed by the Justice Committee in its report on the discount rate, nor indeed the thinking of the Government as expressed in their response to that report.

So how to achieve this desired result? Giving the Minister the power to make regulations in this area might interfere with judicial independence, so it appears that the only avenue remaining is the use of the Civil Procedure Rules of court, and that may perhaps be a clumsy way to proceed. If my noble friend cannot accept my amendment, and I fear he may be unwilling to do so, I hope he will be able to make a clear and unequivocal statement that the Government favour the increased use of PPOs in the sorts of cases that I have described so that, with the views expressed in your Lordships' House today and previously in Committee and, no doubt, in due course in the other place, courts can be in no doubt about the will of Parliament in this important matter.

It may be worth while undertaking a review at some future date of whether the use of PPOs is increasing. That might be along the lines of Amendment 89 in the name of the noble Lord, Lord Beecham, to which I have no doubt he will speak fruitfully in a minute or two. In the meantime, though, I beg to move.

Lord Hope of Craighead (CB): My Lords, I should like to say a word in support of Amendment 50, which is in my name and builds on an amendment tabled in Committee by the noble Lord, Lord Faulks, to which I put my name but to which I was unable to speak because at the very moment he rose to speak I was taken out of the Chamber for a business meeting, so I never got to say what I should like to say now.

I have proposed for the noble and learned Lord's consideration an expanded version of his amendment, and I should like to explain the background to it a little more so that the point is firmly before the House. On page 7, line 32, subsection (2) of proposed new Section A1 provides that proposed new subsection (1), which talks about the duty of the court to take into account the rate of return prescribed by order by the Lord Chancellor,

"does not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question".

At first sight, that is quite a reasonable provision which the courts might feel able to use from time to time, but, as case law has developed, the door has effectively been shut on any use of the provision in these terms in cases where it is most likely to be wanted, which is those of injury of maximum severity.

In Warriner v Warriner 2002, the Court of Appeal, drawing on points made in Wells v Wells, stressed that on policy grounds there was a need for negotiations to be conducted with reasonable certainty as to the result and to eliminate unnecessary costs and the leading of extensive evidence. Building on the principle stated in Wells, which I of course support, it refused to interfere with the rate of return prescribed. That point was repeated in subsequent cases and more recently in the Court of Session in Edinburgh, where the same principles apply. The Lord President, Lord Carloway, made it clear in the case of Tortolano v Ogilvie Construction Ltd in 2013—*Court of Session Inner House Cases*,

[Lord Hope of Craighead]
page 10—that there must be something special or exceptional about the case and that the fact that the injuries were catastrophic, which puts the level very high indeed, was not a special or exceptional case factor that would justify departing from the specified rate.

My point is that the Bill repeats almost exactly the wording of the Damages Act 1996, on which the case law has been built. There is one tiny difference. The formula in the 1996 Act was "does not, however, prevent". In the Bill, we find the slightly different words "shall not, however, prevent". But the crucial wording, in particular the word "appropriate", is still there. If the wording of the Bill remains as it is, my concern is that it is effectively a dead letter because the courts, following established case law in the Courts of Appeal both north and south of the border, will feel that there is no case for interfering at all, even in the most extreme cases, where, as I have suggested, the need for even more precision and care in the rate of return is most compelling.

There is reason to be a little more generous at this stage. As the noble and learned Lord is well aware, the basis on which the rate of return is to be struck is to be taken at a slightly different level from that on which Wells v Wells was based. In Wells, the House of Lords used a rate of return that was inflation-proof—adopting a relevant government bond which had that rate of return—to avoid any risk of losing touch with inflation. Now, instead of a very, very low level of risk, there is to be an assumption that more risk will be acceptable than a very low level of risk, although it is less risk than would ordinarily be accepted by a prudent and properly advised individual investor. So there is a change towards a slightly greater element of risk, although not that high. The point is that any change in the level of risk being contemplated raises the possibility that in these extreme cases, the level may fail to achieve what is needed to provide the injured party with what is necessary to compensate them fully for the loss and injury sustained.

Simply to repeat the same formula is unsatisfactory. I was grateful to the noble and learned Lord for agreeing to a meeting the other day at which I was able to explain the point. I think the meeting was left on the basis that an attempt would be made to find a form of words that would not undermine what the Government seek to do but would, at the same time, allow the courts to look afresh at the idea of departing from the rate—although one would of course not want them to do so as a matter of course or have any unnecessary delay or expense in going through these complicated cases just to achieve a different rate. It would have to be a case that really justified such attention.

Some points can be drawn from Wells that may be relevant to my point. First, I was looking at the award in the form of a capital sum—we are talking about that rather than what the noble Lord, Lord Hodgson, was talking about a moment ago—in which the income will not be reinvested. The ordinary investor would reinvest the income to keep the capital sum as inflation-proof as possible, but in our case the income would be used to meet the needs of the injured party. At the same time, the injured party would be drawing on the capital sum, because it is a diminishing fund, the idea being that at the end of the claimant's lifetime, or when the injuries have finally resolved themselves, there will be nothing left. So we have the extraordinary situation of a sum of money where the income cannot be used to protect against inflation and, at the same time, the sum is reducing. As Lord Lloyd of Berwick pointed out in Wells, if you are having to draw on the capital to meet these costs because the income is not good enough, in a diminishing market, that runs the real risk that the market may not recover sufficiently to bring the award up to the level needed to sustain the injured party for the rest of the period during which that party needs to be sustained. There is a difficult area here: in some cases, particularly if you alter the level of risk, you run into the possibility of the injured party not being fully compensated.

I seek by the amendment to suggest for the noble and learned Lord's consideration a slightly different formula of words in that critical proposed new subsection that would enable the court to escape from the straitjacket of existing case law in cases that justify a fresh approach. On that basis, I have expanded a little on the formula of the noble Lord, Lord Faulks, to draw attention to the need for this sum to be sufficiently large to meet the needs of the claimant for the rest of the period. It is in that context that I ask the noble and learned Lord to consider my amendment in deciding what best to do to avoid simply repeating a dead letter.

Baroness Bowles of Berkhamsted (LD): My Lords, I shall speak to my Amendment 73. It is an attempt not to change anything in the Bill, just to avoid some very unfortunate, superfluous wording. At the foot of page 9, it would delete the words,

"who has different financial aims".

The effect of that deletion is to leave intact the wording cited just now—without what I would say are the offending last words—by the noble and learned Lord, Lord Hope. It leaves intact the reference to an,

"assumption that relevant damages are invested using an approach that involves … less risk than would ordinarily be accepted by a prudent and properly advised individual investor".

At that point I would put the full stop, as it is clear and sufficient to achieve the intended purpose. Adding on that this prudent and properly advised individual investor "has different financial aims" at best adds nothing, and at worst contradicts the earlier provisions about the basis for the rate of return, which appear in new paragraph 3(2).

7.30 pm

There is a whole universe of investors with different financial aims. Which ones are relevant? The Bill gives no indication. Does this mean an override of the basis laid out in new paragraph 3(2)(c) for example, especially that the damages are to be,

"exhausted at the end of the period for which they are awarded"?

Is it saying that the different aim could be capital preservation? It does not exclude that and it does not say that it cannot be, even though the Lord Chancellor may start out with the basis following the wording in new paragraph 3(2). The later wording may imply that it can be tweaked, changed and that it is not fixed.

We probably all understand that the intention is to say, broadly, that more prudence than the norm is necessary because of the vulnerability of recipients, but it is still odd to try and define that with reference to what it is not, and with the only qualification being that it is not this thing that is different. Furthermore, there are among the universe of non-recipients of damages other vulnerable people. Does that mean the assumption has to be that the investment is more prudent than would be accepted by a properly advised and really quite vulnerable person, because that would make a difference to the rate of return that would be decided?

I suppose we can try to hang something on the fact that the provision says "ordinarily" and that this individual investor may therefore be ordinary rather than vulnerable, although that is not what the Bill says. However, it still does not say anything about what their "different financial aims" might be, or are allowed to be, and it still sets up the possibility that the aims encompass difference from those specified in the earlier paragraph.

I will not elaborate any more possible confusions, but these are words that add nothing but uncertainty and are best left out. The rest of the sentence makes the only point needed:

"less risk than would ordinarily be accepted".

I appreciate that the letter from the Minister after Committee cleared up which was the intended interpretation as between the Bill and the language in the Explanatory Notes. The letter says that it is the Bill's wording that is intended. That is a regrettable clarification because I thought the wording of the Explanatory Notes, with the extra comma in it—which seems to be what caused the changed interpretation—was actually better.

I can barely suggest that leaving out these words would be a concession because I am not trying to change the outcome, but I hope that at the very least a statement could be made in the Chamber that these words do not provide an override of the conditions laid down in the earlier new paragraph 3(2), to which I made reference. I am sorry to be pedantic but 30 years as a patent attorney teaches me that, if in doubt, leave it out.

Lord Faulks: My Lords, I could not hope to better that very compelling speech and I will not try to add any confusion to the analysis. I agree with what my noble friend Lord Hodgson said about the desirability of periodical payments, but all is not gloomy on that front. I regularly act for the NHS in settlements involving periodical payments even now, when it is probably less attractive for periodical payments than it has ever been, having regard to the change in discount rate. Nevertheless, the desirability for periodical payments is a point that the House is generally agreed upon and I entirely accept what my noble friend has said.

However, it has to be said—my noble and learned friend the Minister will confirm it—that the courts have power to order periodical payments by virtue of Section 100 of the Courts Act 2003, which built on the original Act—the Damages Act 1996. The fact that they do not is usually because both sides are advised at a reasonably high level, having regard to the size of the claim and the complexity of injuries, so on the whole the courts will stand back and not seek to impose on or insist against somebody's periodical payments. None the less, it is something that all advisers will be very much bearing in mind, and I do not disagree with the suggestion that the rules of the court may well be useful to ensure that as far as possible these are considered by the courts, the parties' advisers and the parties themselves.

I turn to the amendment tabled by the noble and learned Lord, Lord Hope, which, as he kindly said, built on something that I put down in Committee. He puts it much better in his amendment than I did. Of course, the variation in rate is something that was explored, as I said in Committee, by Jonathan Sumption QC, as he then was, in a case in Guernsey, when he decided that it would be appropriate in certain cases to have a different discount rate. As the noble and learned Lord, Lord Hope, said, the amendment makes the scope of the power clearer. There is much in what he says.

I look forward to what will apparently be a fruitful analysis by the noble Lord, Lord Beecham, when he comes to address his amendments. The review that he suggests in Clause 89 troubles me a little because, although all noble Lords are concerned to encourage periodical payments, I am not quite sure how that will work. There are all sorts of reasons why people may or may not have periodical payments. Certainly by changing the discount rate in an upward direction from, say, 0.75% to 1% or 2%, it is much more likely that they would go for periodical payments. However, there are a plethora of reasons why they will or will not seek periodical payments. It is quite a difficult thing for that review to provide the sort of clarity that I am sure the amendment is seeking to achieve. I look forward with interest to the explanation behind it.

Lord Beecham: My Lords, I shall attempt to provide some sort of explanation. The amendment seeks a review of what is actually happening in the light of the changing circumstances; it does not prescribe a particular solution. It offers precisely the opportunity for the professions to contribute to ensuring that the arrangements for periodical payments suit the client, particularly those who have suffered significant injuries and may be looking for lifetime support. It is very much an open request, and the expertise of the noble Lord—and others, of course—is very welcome in dealing with it.

Amendment 73A in my name also seeks a different review on the assumptions on which the discount rate itself is based and how investors have dealt with that over time. As will be seen, the review should, I hope, indicate whether the assumptions on which the discount rate is based need to be changed, and set out any recommendations.

This is entering new territory, and it is reasonable to have a report within a reasonable time—three years is probably long enough—to allow a proper examination of the impact of the new arrangements. For that matter, there is a question of course about how often there should be such a review. It would be difficult to prescribe, because interest rates and returns on investments change. We have been living in a fairly good period in terms of returns, but that may not last. So periodic reviews should be very much part of the agenda.

[LORD BEECHAM]

On the amendment proposed by the noble Lord, Lord Hodgson, I strongly support the position that he takes and hope that the Minister will feel sympathetic to it and to the other amendments in this group.

Lord Keen of Elie: I am obliged to noble Lords. In speaking to Amendment 49, I shall also address Amendments 50, 73, 73A and 89. Clearly, we welcome the support on all sides of the House for the appropriate use of periodical payment orders as a means of ensuring that the anticipated future needs of an injured person are met. Of course, periodical payment orders avoid many of the uncertainties inherent in taking damages for future loss as a lump sum.

My noble friend's Amendment 49 would require new rules of court to be made to highlight features of PPOs that may make them more appropriate than a lump-sum payment for a person with a long-term injury who is risk-averse, who would otherwise receive a large award for damages for future pecuniary loss. In responding to the very similar amendment tabled by my noble friend in Committee, the Government underlined their support for the use of PPOs. However, they also recognised that claimants and defendants must be able to make choices, and that the best choice for any individual is dependent on the circumstances of their particular case. My noble friend Lord Faulks pointed out that under Section 100 of the 2003 Act it is open to the court to insist on a PPO being utilised. As far as I am aware, the court has never actually exercised that power, but it does exist in statutory form.

It is vital that claimants who have suffered long-term serious injuries are well informed as to the implications of their choice between a lump-sum payment and a PPO, irrespective of whether their particular case reaches such a stage that the court has to consider whether to order a PPO. The Government remain fully committed to ensuring that appropriate advice is available to claimants in all cases. We are working to encourage the use and understanding of PPOs. In particular, we will over the coming months provide, or at least endorse, guidance that ensures claimants fully understand the choice between a lump sum and a PPO, and investigate whether current advice received by claimants on the respective benefits of lump sums and PPOs is effective.

Over and above that, we have listened carefully to the points raised in Committee and in further engagement with noble Lords. I am obliged to many of them for their engagement in the period running up to this stage of the Bill. The Lord Chancellor has now written to the Master of the Rolls on this matter, and I am pleased to say that he has recently agreed in principle to the Civil Justice Council, with its specialist expertise, exploring the issue with a view to suggesting the most practical, beneficial steps to increase the use of PPOs within the current system. The Government are grateful to the Master of the Rolls for this.

Taken together, we believe that these steps will ensure that focused and practical action will be taken to identify effective reforms that will encourage the use of PPOs whenever they are suitable. These measures can be tailored to address specific identified problems. Rules of court may be part of the solution, but they will relate to the practice and procedure of the courts. That is the appropriate function of rules of court and their related practice directions, not providing guidance as to when one form of taking an award of damages might be better than another, which might be better in guidance itself. In light of that explanation, I hope that my noble friend would consider it appropriate to withdraw his amendment.

I turn now to Amendment 50 in the name of the noble and learned Lord, Lord Hope, which, as he says, would require the court to consider certain factors in deciding in an individual case whether it would be appropriate to take into account a different discount rate to that prescribed by the Lord Chancellor. As he pointed out, the wording in the present Bill reflects almost exactly the wording that appeared in the original provisions in the Damages Act 1996. The application of those earlier provisions is, of course, coloured by the decision of the Court of Appeal in Warriner, and the more recent decision in the Inner House in Tortolano. In light of that, I wish to give further consideration to the matter that the noble and learned Lord has raised to come to a view as to whether something might be done to tailor the wording to address the almost complete guillotine that is, in effect, in place in the two Appeal Court decisions.

7.45 pm

Ultimately, the prescribed discount rate is an instrument that simplifies proceedings, adds certainty and exists for the overall benefit of all affected litigants—so we have to proceed with some care to ensure that, in so far as we meet concerns or seek to meet concerns raised by Warriner and Tortolano, we do not arrive at a place where parties will almost inevitably engage in litigation simply to see whether they can get a different discount rate. So there is a balancing act to be achieved—and I shall look at that.

Amendment 73 in the name of the noble Baroness, Lady Bowles, also addresses the question of risk, but in the context of the setting of the assumptions to be used in the setting of the rate. The amendment would change one of the assumptions that the Lord Chancellor is required to make in setting the rate about the assumed approach to risk of the hypothetical claimant. Paragraph 3(3) of the new Schedule A1 provides a range of approaches to risk, from which the Lord Chancellor may make a choice as to the appropriate level. The range is relatively broad, I accept. The lower end of the range is more risk than a very low level of risk; that is broadly the familiar level used under the present law. The upper limit is less risk than would ordinarily be accepted by a prudent and properly advised individual investor with different financial aims from those specified in paragraph 3(2). This amendment would remove the assumption that a prudent and properly advised individual investor has different financial aims than the assumed recipient of relevant damages. The effect of the amendment would therefore be to alter the current ceiling as to the approach to risk.

The Government consider that claimants are not ordinary investors. They are assumed in the Bill to be more cautious, and the Bill therefore provides for them to be assumed to take less risk than an ordinary

prudent investor with different financial aims. Quite how much less risk will be a matter to be determined by the Lord Chancellor in his deliberations, assisted by the advice of the expert panel, based on the evidence that it gathers. I accept that an ordinary prudent investor could, in principle, have the same aims of a more cautious investor, albeit achieved by different approaches to risk. But it will be for the Lord Chancellor in setting the rate within the legal framework to weigh the evidence of investments and their returns and assess the expected consequences of choosing particular rates within the range against the legal framework. From those judgments, the Lord Chancellor will decide on the appropriate rate. We consider that we have taken the appropriate approach. We do not consider that these words are redundant, and I invite the noble Baroness to consider withdrawing her amendment.

Finally, I address Amendments 73A and 89 in the name of the noble Lord, Lord Beecham. Both look to the future and provide for reviews of how different aspects of the changes to the law relating to compensation for future loss in personal injury cases have worked in practice. As I understand it, Amendment 73A would require the Lord Chancellor to commission the expert panel to review the statutory assumptions on which the personal injury discount rate is to be based, and to review how investors of relevant damages are in fact investing such damages. The review would be commissioned within three years of Clause 8 coming into force and the panel would be required to make recommendations on whether the assumptions should be changed. Amendment 89, which is similar to Amendment 92B, tabled by the noble Lord and the noble Lord, Lord McKenzie, in Committee, would require a review of the impact of the reforms in Part 2 on the making of PPOs. Both amendments clearly have much in common, but I will deal with each in turn.

The Government's aim is that the application of the assumptions in light of the evidence that has to be considered should produce a fair and evidence-based discount rate. However, we doubt whether the expert panel would be the best body to carry out a review of the appropriateness of the legal assumptions on which the rate is based. We also question whether a three-year deadline allows sufficient time for the effects of the new system to manifest themselves.

On the review of PPOs proposed by Amendment 89, of course we support the use—and the increased use—of PPOs, as I have set out. However, the CJC exists to provide advice to the Lord Chancellor, the judiciary and the Civil Procedure Rule Committee on the effectiveness of aspects of the civil justice system, and to make recommendations to test, review or conduct research into specific areas. It may well be an appropriate body to carry out an intended PPO review, if it is willing and able to do so. Another possibility might be the Law Commission. I also mention that the timing of the proposed review of PPOs—within 18 months of Royal Assent and a report made to Parliament within two years—may again be too soon to identify the real effect of the changes in the legislation, so there is a concern there.

However, I accept that these are matters of detail, and I do not wish to detract from the important concern underlying the amendments, which is that the result of the legislation should be assessed. I make the point that there is already a system for the reviewing of the working of legislation, which involves the gathering of evidence of its effect. The well-established procedure of post-legislative scrutiny will, in our opinion, provide a suitable and effective way to assess the outcome of legislation and to decide whether any further changes are necessary.

This scrutiny is normally carried out three to five years after the legislation in question comes into force. These reviews are carried out by government, which, in the case of legislation affecting general personal injury law, would prepare a report for the Justice Select Committee. Such a review of Part 2 would consider the effect of the legislation in the round rather than just in relation to the assumptions for the setting of the rate or the making of PPOs. The noble Lord will be aware, for example, that a post-legislative review of Part 2 of LASPO is going on. We therefore anticipate that form of review being carried out, but in the timeframe of three to five years, which we consider would be more effective in determining what the impact of these changes has been.

In light of these observations, I invite the noble Lord to consider withdrawing his amendment at this stage.

Lord Hodgson of Astley Abbotts: My Lords, I said that my amendment was designed to tilt the balance in favour of PPOs, and I am grateful to the Minister for his comments. It is good to know that guidance will be rewritten to draw attention to the PPO advantages, and to hear the news that the Lord Chancellor has written to the Master of the Rolls on using the Civil Justice Council to make improvements in that regard. Before I withdraw my amendment, can my noble and learned friend say how long he thinks it will be before the Civil Justice Council produces some results from that discussion and consultation?

Lord Keen of Elie: I cannot at this stage answer that question. However, I will consider the point and write to my noble friend, and place a copy of the letter in the Library.

Lord Hodgson of Astley Abbotts: I am grateful to my noble and learned friend and, on that note, I beg leave to withdraw the amendment.

Amendment 49 withdrawn.

Amendment 50 not moved.

7.53 pm

Consideration on Report adjourned until not before 8.53 pm.

Immigration and Nationality (Fees) Regulations 2018

Motion to Regret

7.53 pm

Moved by ***Baroness Lister of Burtersett***

That this House regrets that the Immigration and Nationality (Fees) Regulations 2018 include a £39 increase in the fee for registering children entitled to British citizenship, given that only £372 of the

[Baroness Lister of Burtersett]

proposed £1,012 fee is attributable to administrative costs; and calls on Her Majesty's Government to withdraw the fee increase until they have (1) published a children's best interests impact assessment of the fee level, and (2) established an independent review of fees for registering children as British citizens, in the light of the report of the Select Committee on Citizenship and Civic Engagement (HL Paper 118) (SI 2018/330).

Baroness Lister of Burtersett (Lab): My Lords, this is the first time I have moved a regret Motion, and I do so because of my concern for an estimated 120,000 highly vulnerable children. These are children who are not automatically British because of their parents' status, despite being born in the UK or having lived here most of their lives, but who nevertheless have rights to register, or in some cases to apply to register, as British citizens, subject only to a good character test from the age of 10. However, because of the exorbitant registration fee levied, many of them do not do so and can then find themselves effectively treated as immigrants, at risk of removal, even when born in this country.

The Motion itself is very modest. Having pointed out that only £372—less than two-fifths—of the new fee is attributable to administrative costs, it calls for two things. First, it calls for a children's best interests impact assessment of the fee level. A freedom of information request has elicited that such an assessment has never been carried out, even though, since 2009, Section 55 of the Borders, Citizenship and Immigration Act requires the Home Office to ensure that children's best interests are given primary consideration in all decisions that affect them. Secondly, it calls for an independent review of fees for registering children as British citizens. This should cover not just the level but the recommendations of the Select Committee on Citizenship and Civic Engagement, of which I was a member. These concern situations where the fee might be waived—or, better still, I suggest, no fee should be charged at all: I should emphasise that so far the Home Secretary has not introduced any waivers or exemptions for these cases—and the appropriate age from which to apply for the good character test.

I readily acknowledge that the power to levy a fee above the administrative cost was introduced by Labour, but for some years the problems it was creating went unnoticed, rather in the way that the mounting problems faced by the Windrush generation went largely unnoticed. However, the fee is much higher now and has increased by 51% just since 2014. Thanks to the work of Solange Valdez-Symonds, who established the Project for the Registration of Children as British Citizens—the Project, for short—supported by a small, dedicated group of volunteer lawyers and later joined by Amnesty, there is now no excuse for ignoring the injustice being caused. I pay tribute to their commitment and tenacity and thank them, as well as Coram and Let Us Learn, for their help with this Motion.

The Project and Amnesty first drew my attention to the issue during the passage of the Immigration Act 2016. I and the noble Lord, Lord Alton of Liverpool, raised it in the middle of the night with, I think, only the Minister there to hear us. The response from the noble Lord, Lord Bates, was unusually hard-line for him, and no one took much notice. But in the past year, the issue has begun to surface. Last July, Synod passed a unanimous motion on the level of citizenship fees, and in December there was a demonstration of children, supported by Citizens UK, protesting against the fee level and pointing out that it is considerably higher than the equivalent in other EU countries. The Mayor of London raised concerns in his strategy for social integration and has more recently spoken out on the issue, and our Select Committee could,

"see no ground for the Home Office charging more than the costs they incur",

and questioned the application of the fee to children in care or who have spent their entire life in the UK.

An Early Day Motion, tabled last month, calls for the fee to be reduced to no more than the cost of processing, and for various exemptions and waivers. Its co-sponsors include a Conservative and a DUP MP, and, at his first appearance before the Home Affairs Committee, the new Home Secretary was questioned closely more than once on the issue. I am pleased to see that the shadow Home Secretary has now committed my party to reducing the fee. It has now been taken up by the media, which, quite rightly, are making the link to the Windrush scandal. Although this is a different group, there is a remarkably clear parallel, because, like the Windrush generation, these children face a possible denial of social and economic rights, and even removal, because they lack necessary documentation. Yet—this cannot be repeated too frequently—those born here are children with a clear legal right to be registered as citizens.

When I last raised this issue in your Lordships' House, the Government's response revolved around two main arguments. First, they argued that the level of the fee was and continues to be justified on the grounds of the Home Office's commitment to a self-funded border, immigration and citizenship system, so as to minimise the burden on the taxpayer, who, it was argued, should not have to pay for the benefit falling to those who make the application. That might be fair enough when we are talking about adult immigrants applying for what amounts to the benefits accruing from naturalisation, which is not a clear right. However, in the case of children born here, some of whom are stateless, this is about registration of a pre-existing statutory entitlement. In what way does that constitute a benefit? Do we think of our citizenship as a benefit? As it is, children entitled to register as citizens are in effect being asked to subsidise the immigration system. How can that be fair? When I tell people what the fee is—over £1,000—and that nearly three-fifths of it is in effect profit to be recycled in the immigration system, they are shocked.

8 pm

The other main argument is that citizenship is not really that important—that it is not necessary in order for a person to exercise his or her rights in the UK—yet the guidance on the form on which children register as British states:

"Becoming a British citizen is a significant life event".

Apart from allowing a child to apply for a British passport, British citizenship gives them the opportunity to participate more fully in the life of their local community as they grow up. Let Us Learn, a youth-led campaign group, writes:

"Our hopes for the future lie here"—

yet it cannot afford to ensure that those hopes are securely realised.

It is not just the positives that registration of citizens can bring; there are also the serious negatives that it prevents. In particular, without proof of citizenship young people can find it impossible to enter higher education because they are treated as overseas students, with higher fees, and they are unable to access student financial support. They could even end up being denied access to healthcare, housing or a job as, undocumented, they become victims of a hostile/ compliant environment policy. Most seriously, they risk removal, particularly once they are over 18. According to the Project and Amnesty, the Home Office not only can but does exercise its powers to remove from the UK children not registered as British. It has exercised this power in cases where it is fully aware of a child's entitlement to British citizenship and the fact that the child is unable to register because of the fee. This is truly shocking.

The Project does what it can to help children register, often with the help of charitable support. One example it gave me was of Nathan, who was born in the UK. He was 10 years old with a statutory right to British citizenship when he was referred to the Project by the No Recourse to Public Funds team at the local authority. He was facing removal from the UK with his family, who could not afford the fee. Because of the concern that he would be removed, his local church community and a generous member of the public together paid it. If they had not, he would have been removed from the UK—the country in which he had spent all his life and where he was entitled to citizenship—to a place he neither knew nor had ever been to. It cannot be right that a child must rely on charity and good will to exercise a basic right to citizenship.

Underlying much of what Ministers say is a fundamental failure or refusal to understand that registration is not about immigration control but about the citizenship of children, many of whom are fully entitled to be so registered. However, where they are unable to exercise the right to apply for registration because of the fee or, in some cases, a lack of knowledge, they face the prospect of being drawn into the immigration control system. They then face the same kind of hostile or compliant environment difficulties that faced the undocumented Windrush generation. Indeed, Coram has described them as the "future Windrush kids". As Sonia Sodha argued in the *Guardian* recently, this,

"should be as big a scandal as the treatment of the Windrush generation".

Even as they promise to right these terrible wrongs—much too slowly, I fear, according to Saturday's *Guardian*—the Government are knowingly and consciously creating the next generation of Windrushers, and they do not care. I am giving the Government an opportunity to show this evening that they do care. I was encouraged that, when pressed by the Home Affairs Committee, the Home Secretary conceded that the Home Office needs to get the "right balance" between funding its work and what he described as,

"a huge amount of money to ask children to pay for citizenship".

I repeat: a huge amount of money. He accepted that it is right at some point to take a fresh look at fees and said that,

"it is something that I will get around to".

That is the first sign of movement on the part of the Home Office and, as such, it is welcome—but to "get around" to something suggests a distinct lack of urgency. I understand the pressures that the Home Office is under at present, but this issue has been festering for some time now, and the longer the delay, the greater the likelihood of some children losing their rights or even being wrongly removed.

My Motion calls for an independent review. This should not be a major piece of work requiring much time. In his recent statement on the SI enacting the Windrush scheme, the Home Secretary underlined that it is also fundamentally important that the lessons from that episode are learned for the future so that it never happens again. As I have argued, it already is happening again. Acceptance of the spirit of this Motion through a clear and firm commitment to act swiftly would send out an important message that the Government are learning and are willing to act on lessons learned before any more children are turned into Windrush kids. I beg to move.

Lord Alton of Liverpool (CB): My Lords, with her usual combination of conviction and eloquence, the noble Baroness, Lady Lister, has rightly returned to a policy which, as she said, we both contested in 2016 at the Committee stage of the Immigration Bill and again on Report. She has done so with her customary forensic skills and I am in agreement with the arguments that she has put forward. She was also right to pay tribute to Let Us Learn and Coram. I was struck by one of the cases that they drew to my attention—that of Regina, a 22 year-old woman who has lived in the United Kingdom all her life. They say:

"She was taken into the care of the local authority as a child. Despite repeatedly asking the local authority for her documents, and several commitments from them that they would assist her in applying for her British nationality, she left care with no citizenship, or any form of immigration status. She is now homeless, and unable to find the fee to secure her rights. The only fee waiver available is for an application for time-limited leave to remain and without any proof of her status, Regina cannot work, or rent a property. She is pregnant, and desperately needs documentary proof to prevent her being charged for health-care. Without further action, her child will also be born without citizenship, or a right to stay in the UK".

That is why this regret Motion is so important. It is about this generation but, as the noble Baroness said, it is about future generations as well.

Two years ago, on 21 March at the Report stage of the Immigration Bill, I mentioned that the then Minister, the noble Lord, Lord Bates, and I had been in correspondence about the fees required for a child to be registered as a British citizen. Along with the noble Baroness, I argued that Amendment 145A, which bears the attention and interest of noble Lords who might like to know the background to this evening's debate, would have prevented the Secretary of State using the money of these child applicants

[LORD ALTON OF LIVERPOOL]
for profit. The only matter to which he could have had regard would have been the cost of processing the application.

The amendment also provided that fee regulations—the matter before your Lordships' House tonight—would have required fees to be waived where a child was in care or otherwise assisted by a local authority, and it provided for discretion to waive the fees in other cases on the grounds of the means of the child, his or her parents or his or her carers. The amendment, of course, was not accepted by the Government, although some of the arguments clearly struck a chord.

In our correspondence and in debate, the noble Lord, Lord Bates, referred to the importance of children in the care of local authorities having their status regularised and registered. This was no doubt because of the importance that the Home Office—and, I dare say, all of us—attached to drawing a clear line between those who are here legally and those who are not. But this was also bound up with the so-called hostile environment, referred to by the noble Baroness, a doctrine promulgated by Amber Rudd and others.

As the noble Baroness and I argued two years ago, the then fee of £936, as of 18 March 2016, was the reason why undesirable non-registration had occurred. As I said then, in many cases, the reason why no registration had taken place was precisely because of the size of the fee. Where the child and/or the parents cannot afford to pay, or the local authority will not pay, this money is simply beyond their means. I pointed out that the cost of registration in 2016 was calculated by the Home Office at £272, having risen from £223 in 2015—that is £272, compared with a charge of £936, which is an indefensible discrepancy. There is an old adage that it is the profit that makes things so expensive. Profit may not, in many circumstances, be a dirty word, but profiteering by government on the backs of vulnerable children is a stain that brings no credit on any of us.

That was 2016: let us fast-forward to 2018. We now have a new Home Secretary, Sajid Javid. On 15 May, he said that the fee—now up from £936 to £1,012—is a "huge amount of money" to ask children to pay for citizenship. He is right. Let us look once again at the discrepancy between the now £372 attributable to administrative costs and the £1,012 taken by the Home Office. Yes, it is a "huge amount". As for Amber Rudd's "hostile environment" policy, Mr Javid says he will review it in the wake of the Windrush scandal, to which the noble Baroness referred in her remarks. He says he regards the phrase as,

"a negative term, a non-British term",

and that there were lessons to be learned from the controversy. He has said that he wants to replace the term "hostile environment" with the term "compliant environment", which distinguishes between illegal and legal immigrants. Speaking to the BBC, he said:

> "I am going to look at how it's being implemented. I want to review aspects of the policy. I've already made some changes".

The noble Baroness's Motion, which calls—modestly, as she said—for the fee increase to be withdrawn until the Government have published an impact statement and established an independent review, gives Mr Javid the opportunity to make another change and to do so right away. Failure to do so, letting things stand, means that many children with a statutory entitlement to British citizenship will continue to be excluded because of what Mr Javid says is a "huge amount of money " to ask children to pay. Incidentally, some of these children have no memory of any country other than this. Like yesterday's Windrush children, they simply assume that they are as British as their school friends. What a cruelty it is when they discover they are not and that they do not have the resources to do anything about it.

In 1981, I was a Member of the House of Commons and I participated in proceedings on the British Nationality Act. It was always Parliament's intention, and that of the Government of the day, to entrench the concept and reality of citizenship. It was never the intention that the Home Office should impede or prevent full integration of children by levying prohibitive fees. That Act recognised that some children would be born here and grow up here without parents who were themselves British. The law categorically states that they,

"shall be entitled to be registered as a British citizen".

In other circumstances, the Act also retained the discretion from the British Nationality Act 1948 enabling the Home Secretary to register a child as British where, for instance, parents have become estranged or deceased and status is problematic.

The 1983 fee for registration was £35. Today, as I have said, it is £1,012. That is inflation on quite some scale. As the noble Baroness said, the opportunity to make a profit was taken in 2007 and the fees have risen inexorably since then. This statutory right was never supposed to have been about income generation or supporting Home Office officials. We are talking here about British citizenship, not the National Lottery or a nice little earner on the side. The argument put forward by the Home Office, that a child can apply for leave to remain instead of citizenship, is flaccid and insulting. That is not what Parliament intended and it is not a tenable substitute.

In 2016, the Minister said that the money needed to go into the general pot to,

"achieve a self-funded border, immigration and citizenship system by 2019-20".

He asked why resident taxpayers should,

"be the ones who have to pay".

He went on to say:

> "Citizenship can never be an absolute right, nor is it necessary in order for a person to reside in the UK and access our public services".—[*Official Report*, 21/3/16; cols. 2217-18.]

But this is like Don Quixote inviting us to tilt at imaginary windmills. These children should not be categorised in the first place as migrants: children born here are not migrants. For them to be used to subsidise the UK immigration system is an affront and an injustice.

8.15 pm

The opportunistic conflation of adult naturalisation and children's registration is not what the law intended. Worse, it makes us derelict in our duties under the 1989 United Nations Convention on the Rights of the Child and our duty to protect children's best interests.

Some would argue that we are technically in breach of the letter of the convention; it is certainly true that we are in breach of its spirit. Mr Javid should ask his officials to provide him with a copy of the convention and a copy of Section 55 of the Borders, Citizenship and Immigration Act 2009. He should ask why his officials have failed to undertake a children's best interest assessment—as advocated by the noble Baroness tonight—before hiking up these fees yet again. Officials should be asked how they justify the conflation of vulnerable British children with adults from overseas seeking citizenship and how they square this with the charter obligations that this Government have affirmed.

The noble Baroness is right to have tabled this Motion tonight, and I hope that Mr Javid's promise of change will lead to a rapid change in this policy.

Lord Kirkhope of Harrogate (Con): My Lords, I was not originally going to take part in this debate, but as a former Immigration Minister it seemed to me that it was worth looking carefully at the regret Motion. Indeed, having listened to the introduction of the noble Baroness, there are one or two things that ought to be put on the record with regard to the history of this.

I know that these matters, particularly those that deal with children, produce a lot of emotion and concern, as they rightly should. But of course we have to go back. I think that the noble Lord, Lord Alton, just mentioned the British Nationality Act 1981 and other legislation which has been passed from, in fact, 1948 onwards. That reflects on the fact that, as the noble Baroness said, the benefits of British citizenship should not be overstated—or at least she said something similar to that. The fact of the matter is that none of us who are British citizens really prizes our citizenship as much as we ought.

That does not mean that it has to be used as an excuse to look at the value of citizenship against the fees that are charged, but I would point out that when I was the Minister, the Treasury was always on my back, wanting me to produce value for money in anything that my department did. Of course, this was confirmed, as the noble Baroness has admitted, by the Labour Government in 2004, which introduced the term "over-cost", as it was called, and applied it from 2007 onwards. This related to fees in a vast number of areas across a vast number of departments. Because of pressure from the Treasury and indeed from outside of government, the idea was to try to make sure that the costs of departments that were involved in matters such as immigration were, as far as possible, covered to minimise the amount of extra moneys that would be required from the public. That is perhaps rather more surprising under a Labour Government than it might be under the normal Conservative prospectus, but there it was and there it has been ever since. The fees have been rising commensurately ever since in a great many areas.

I am not here to defend those facts except to say to noble Lords that I am delighted to know that the Government are at least now looking at the issues of complexity, which is the other point I wish to make. When I was doing things on immigration, we had a simple situation. There were few areas and qualifications with which one could remain in this country. Similarly, the application processes and the way we looked at these matters was simple as compared with the situation we now have, with different categories of rights to remain, which have been referred to, such as indefinite rights to remain and temporary rights to remain; they now exist and they are applied. In my opinion, we are much more generous, and rightly so, towards many more applicants than we used to be. In those days, we were much tougher: either you were able to remain here or you were not. However, the complexity has got out of hand. We have so many different headings and categories that, inevitably, there are going to be those, including children and perhaps some others, who will fall foul, as it were, of the regulations whatever they happen to be.

I therefore welcome the Government's approach, which is to look at the complexity and try to simplify these matters. Bearing in mind what may well be happening after next year, it will be necessary for us to have a new approach to how we deal with citizens who are closer to this place than normal—Europe. All of this gives us an excellent opportunity to try to simplify the system. However, I fear that while the regret Motion has been put before us today, we are in a situation where the fee structures in this department and in others is to some extent controlled. Moreover, as has rightly been said, the discretions of Ministers in being able to help are somewhat limited, although they do exist in certain cases. I would certainly urge that, in those cases of particular suffering or particular poverty or particular circumstances, Ministers should exercise what powers they have in favour of child applicants.

Baroness Sheehan (LD): My Lords, I rise to support the noble Baroness, Lady Lister, and thank her for bringing this regret Motion to your Lordships' House. She has drawn our attention to the iniquity of the Government's position, which would add insult to injury by seeking to increase the fee for registering children entitled to British citizenship and thus increase the Government's profit.

As we have heard, the figure of more than £1,000 per child that is being demanded is, according to the Government's own figures, comprised of £372 in administration fees with the remaining £640 being pure profit: profit, including even on the backs of children in care. According to the current Home Secretary, it is a "huge amount of money" to ask children to pay for citizenship, a comment he made just a few weeks ago. I agree with him, and he has the power to do something about it. The noble Lord, Lord Kirkhope, pointed out that he does have vestiges of power that remain.

The Home Secretary has come close to recognising that the imposition of the fee is part and parcel of the wish of the previous Home Secretary but one—perhaps Amber Rudd also, but certainly Theresa May—to create a "hostile environment" in this country for—but this is where I come unstuck. Who precisely is the hostile environment aimed at? We are told that it is to deter illegal immigrants, but the events of the last few weeks have shown us that innocent people, those who have every right to be here and who believe themselves to be utterly British, are finding that they are ensnared

[BARONESS SHEEHAN]
in these pernicious rules. Without British citizenship, these children face the same issues as the Windrush generation, which have been exposed recently: being refused access to healthcare, employment, education, social assistance and housing; being held in detention centres; and potentially being removed and excluded from the country altogether.

The briefings that we have received from the Coram Children's Legal Centre and Amnesty International tell us the human stories of the economic hardship and psychological trauma of being unable to surmount the barriers to gaining citizenship. We have heard a couple of the stories this evening; they are heartbreaking. These children have statutory rights—that cannot be stressed enough—to be registered as British citizens, conferred on them by the British Nationality Act 1981. No child should be denied their British citizenship rights by a fee. I add my support to that of others in asking for the removal of any element of the registration fee over and above the actual cost of administration, the removal of the entire fee in the case of children in local authority care and the introduction of a waiver of the fee in the case of any child who is unable to afford the administrative cost of registration.

Of course, I also support the call in the regret Motion of the noble Baroness, Lady Lister, asking the Government to withdraw the fee increase until they have published a children's best interests impact assessment and established an independent review of fees for registering children as British citizens, as recommended by the report of the Select Committee on Citizenship and Civic Engagement.

The Lord Bishop of Derby: My Lords, I support the Motion of the noble Baroness, Lady Lister, and associate myself with the remarks of the noble Lord, Lord Alton. I will not go into the mathematics—which are very simple, in a way—but I invite the Minister to help us understand the Government's role in dealing with citizenship. This is about citizenship, not immigration, although sometimes they are linked.

All of us were probably born into citizenship—that is, children become citizens in our country. Obviously, there has to be a system looking at qualification if people come here by other routes. Citizenship is the privilege that glues a country together and enables a Government to have a culture of law and order that people respect and work in and where they support each other. In a market-driven economy, the role of citizenship is even more important because the market will cover some things, but you need a lot of energy and commitment underneath to look after people, look out for them and go the extra mile. There is enormous evidence of social breakdown, including the breakdown of families and communities, isolation and alienation, one of the causes of which seems to be what I call a "citizenship deficit"—that is, many people are not public-spirited, wanting to be citizens with others and live in a joined-up way for a common good.

Noble Lords will know that church people in particular give millions of hours every month to voluntary activity to improve the life of the community. That is what citizenship is: going the extra mile. Many others do this, not just church people. People engaged in such work could give lots of examples of how the civic energy that we need to offer welfare, support, friendship and kindness to make human life more bearable is under stress more and more. We need more recruits. The challenge facing the Government is to create a culture where citizenship is good, creative and worth while.

This issue points to the giving of signals that increase the citizenship deficit. I want to tell two stories from my diocese. I could take you to a parish where an Australian family with three children who were all born here, who have lived over half their lives in this country, claim citizenship. They could afford to pay, so there was not that kind of struggle, but from knowing the family I know that they feel insulted and undervalued. They are citizens living among citizens and making contributions, but suddenly they have to find quite a lot of money to register that.

More poignantly, there is an enormously poor Nigerian family in the parish. They struggle tremendously. Their children are entitled to become citizens, but the fees are way above their possibility. Local church people work hard to try to raise the money, but it is a double whammy: the people becoming citizens feel that the state does not want people to be part of it—it has no commitment to them, so why should they commit to the state?—and all the people of good will who raised the money think, "Golly, what is happening to citizenship in our country, when it is not a right that can benefit society, but some kind of financial transaction that people struggle to meet?".

If we are not careful, we give out a message that society is just a heap of things that have to raise money to pay the costs of things. A rich society is one in which we give ourselves to each other, generously, graciously and compassionately—that is what citizenship is about. If we cannot induct children into that culture, but give the contrary message that it is a very expensive privilege, and then you just live for yourself, or that very poor people cannot afford to be citizens despite their legal rights and their participation in communities, then I think we are contributing through this scheme to the citizenship deficit and the continuing disintegration of our society.

8.30 pm

This is a key signal to give to people that citizenship is precious, that it counts, that it is worth while and should be welcomed. We need Governments to be generous in that direction and certainly not to make a profit by enabling people to participate in that privilege.

Lord Judd (Lab): My Lords, in welcoming strongly what the right reverend Prelate said, does he not agree that, in the breakdown of society, what is repeatedly demonstrated is that children need to belong? There has to be a culture, an overwhelming culture, of being wanted and belonging, and if that is not there, disintegration increases. Does he not also agree that, in the kind of society he is talking about, phrases such as "hostile environment" have absolutely no place, because they generate the wrong kind of context?

The Lord Bishop of Derby: I would be very happy to say that belonging is what it is about—that is what a citizen is. It is about belonging, not just to your close

family but to your community, your society and your state. We want people to feel proud of that, to feel welcome and fully participative.

Lord Haskel (Lab): My Lords, I congratulate my noble friend on bringing this regret Motion. I sit on the Secondary Legislation Scrutiny Committee and, yes, this regulation did cause us concern: that is why we reported it to the House. For the Minister's convenience, that was regulation 330. Last week, regulation 680 came before the committee with an almost identical title, dealing with fees for children and immigrants, and this one caused us even more concern: this one dealt with the waiving of fees for the Windrush generation. As my noble friend said, they came here as children. Here again, the Home Office's uncompromising attitude towards immigrants caused a lot of disruption and difficulty for a lot of people—people legally entitled to be here but whose family settled in the UK prior to 1 January 1973, when the Immigration Act 1971 commenced.

People were not informed and only recently has Parliament become aware of these problems, and the difficulties and expense to which people have been put. The Government quickly introduced the Windrush scheme to put it right and this enabled the Home Office to waive fees for those eligible for the scheme. Yes, in this case the Home Office has apologised and rushed to put things right. Indeed, it has rushed so much that regulation 618 came into force without the normal period for people to pray against it. Indeed, the Immigration Minister wrote to your Lordships' committee explaining the need to bring these regulations in immediately instead of waiting the usual 21 days. Your Lordships' committee asked the Home Office how many people it anticipated would use the scheme, the cost and the end date. The answer was that it did not know.

This later regulation 618 proves that my noble friend is absolutely right to raise this question, because there was more trouble in the pipeline; trouble which, at least on this occasion, the Government have apologised for and tried to put right. The effect of having a hostile environment in the Home Office towards immigrants—presumably to get numbers down to the tens of thousands—and the damage done to innocent people will not be put right by an apology.

This policy has done the NHS an enormous amount of harm, as today's first Oral Question illustrated perfectly, with concern expressed on all sides of the House. Only a change in policy will put it right, so I hope the Minister will carry my noble friend's message to the Home Secretary and the Prime Minister and that they will accept my noble friend's proposal.

Lord Russell of Liverpool (CB): My Lords, I support the Motion of the noble Baroness, Lady Lister. I declare my interest as a trustee of Coram, which includes the Coram Children's Legal Centre and the Migrant Children's Project. I will give a cross-party flavour. The noble Earl, Lord Dundee, would have spoken in support from the Government Benches but he is unavoidably detained, organising the wedding of his last remaining unmarried daughter. Understandably, that takes priority.

One almost feels a degree of sympathy for the Home Office at the moment. It is under enormous pressure. The Windrush scandal has been mentioned, as has the cap on skilled workers, particularly the effect on doctors. One wonders who will be next in the firing line. Some of us in this Chamber have a horrible sinking feeling that it will be children.

As has been mentioned by other noble Lords, the new Home Secretary—brave man that he is—went in front of the Home Affairs Committee on 15 May. He went so far as to agree to a memo giving a rundown on costs and how they were justified, without giving any timeframe for when that would happen. He mentioned that he found the £1,012 fee to be rather a lot and said, "I understand the issue". Let us hope that he is beginning to understand the full complexity and awfulness of it.

As has been said, we have a fee where there is a £640 surplus over the cost of processing a child's application. We are completely out of line with other countries. Our fee is nearly six times what it costs in Ireland, 20 times the amount it costs for a child to be registered as a citizen in Germany, and 21 times what it costs in France—not an entirely comfortable place to be.

As the noble Baroness, Lady Lister, said, we think there are about 120,000 children in this country with neither citizenship nor immigration leave to enter or remain, and for many of them these fees are a huge and significant impediment. I think we all agree that that is completely unfair.

The noble Lord, Lord Alton, gave the example of Regina. I will quickly talk about another lady, Amelia. She is 24 years old. She is a single mother. She has been living in this country since she was 12. She has one dependent child: a son aged two. She will have to pay a series of four payments—£3,066 every two and a half years—in order for her to reach settlement in the UK. She will need in due course to pay a total of £7,144 for her son to become a citizen, and a total of £9,851 for herself. She is unlikely to be able to afford legal advice, if indeed she could find it, so she may be unaware that her son is in fact entitled to British nationality under Section 1(4) of the British Nationality Act 1981. At the moment there is no legal aid available for her or her child at any stage. That is simply unacceptable and untenable.

I would like to put on the record my own deep embarrassment and shame at what has been going on recently with the Windrush scandal. I suspect I speak for many of your Lordships when I say that. That is combined with a degree of anger over what I have read about the ill treatment and lamentable maladministration that appears to have gone on. How on earth the Home Office could even imagine not grasping this slightly uncomfortable and complex nettle of how to deal with children, I cannot really understand—not least in the interests of its own self-preservation and to spare it further embarrassment, anger and shame. There is almost a sense of institutional depression, which occasionally seems to be the culture there.

I strongly support the regret Motion in the name of the noble Baroness, Lady Lister, which has been carefully crafted to give the Home Office a "get out of further embarrassment" card. I urge the Home Office to seize the moment or regret it later.

Baroness Massey of Darwen (Lab): My Lords, I congratulate my noble friend Lady Lister on her important regret Motion. I shall be very brief, as noble Lords have spoken eloquently and poignantly about children being sometimes cheated out of their livelihood. I want to do one thing, which is to appeal to this House's sense of fairness and responsibility towards children. We have always had that responsibility and we have had many Bills over the last few years—longer, indeed—on issues relating to child welfare, child protection, social mobility, poverty measures, child refugees, integration into British society and so on. We have consistently been concerned for vulnerable children and vulnerable families. We have a strong record of supporting and protecting children. Can we really forget all that?

I regard this profiteering by the Home Office on all children who make nationality and immigration applications as quite extraordinary and unacceptable. We all know that young people need an affordable way of gaining permanent status and stability. They also deserve legal advice, along with legal aid for separated children and young people. As we have stated over and again, young people in our society deserve help to succeed and lead useful lives. How can a young person faced with this extraordinary situation pay this kind of money, as my noble friend and others have said, for their own security as citizens in this country, something to which they are entitled? What price the Government's policies on social mobility and child protection? Surely this needs urgent attention.

Lord Scriven (LD): My Lords, I will be brief and, like other noble Lords, I thank the noble Baroness, Lady Lister, for instigating this debate. I want to tackle head-on something that no one else has: the facts and figures of the Home Office's budget and the reason why it says it has to do this. When she responds, I think the Minister needs to reply to this.

The cost impact assessment says that this provision will close a £60 million gap in the Home Office's budget. If we read the financial impact assessment, that is the primary reason why this is being done. The amount that will be raised by the issue in the Motion tabled by the noble Baroness, Lady Lister, is just over £1 million of that £60 million. That comes within a total Home Office budget of £13 billion. If we take a look at the accounts for last year, we see that the Home Office underspent by £60 million. The accounts clearly show that, at the stroke of a pen today, the Home Office could write this measly figure off. It is a litmus test for this Home Office and the words that have been spoken. Is this really a new system with a humane approach or is it the system in which the Windrush generation was caught up? I say advisedly to the Minister that there is no financial reason whatever to deny these children their citizenship. There is no financial reason to increase this fee and I ask the Minister to explain financially why, at the stroke of a pen, this cannot be written off and the fee put to bed.

8.45 pm

The Earl of Listowel (CB): My Lords, I thank the noble Baroness, Lady Lister, for moving this very important Motion. I am grateful to the noble Lord, Lord Kirkhope, for highlighting that there may be complexities to this and limits to what the Minister and the Secretary of State can do. I must confess that when thinking about this I feel furious. How can we as a country do this to our vulnerable children—children who have a right to be here? Why would we so foolishly make them feel unwelcome? It is absolutely shameful. There may be constraints on what the Minister can do. This morning I spoke about child health at the Royal Society of Medicine with young GPs and young paediatricians who are enthusiastic to help children in their community. They are working in Hackney and other deprived neighbourhoods. I am proud to be British, to have a health system that is free at the point of delivery and helps vulnerable families and families of all kinds, and an education system available to all. Many countries do not have such services. I am proud of that. I am deeply ashamed of this. What is the underlying message here? We do not want you here. You have a right to be here. We will begrudgingly let you be here. We are going to make as much money out of you as we can because we can get away with it—until the noble Baroness, Lady Lister, highlighted it to us.

The right reverend Prelate the Bishop of Derby talked about belonging and helping people to be proud to be British, to be proud of this country and to want to be a part of it and contribute to it. I spent this afternoon with foster carers. Church groups around this country have recognised the need of the children of this country for foster carers and adoptive parents and work with their congregations to recruit more vital placements for those young people. These congregations are reaching out to the vulnerable, mostly from impoverished backgrounds, to take them into their homes.

We talked yesterday about the *Serious Violence Strategy* and young people feeling that they do not belong. When they do not belong, they find places where they are welcomed—gangs where they feel they have a family. Noble Lords will have followed stories of young people from this country choosing to go to Syria to fight for ISIS because they felt that was the place they belonged. Will the Minister say how this policy fits with the Government's strategy to prevent the alienation of young people so that they may wish to be drawn towards organisations such as ISIS? It is surely in our own best interests not to be so penny-pinching and, where these children have a right, to make it as easy as possible for them to become British citizens and fully integrated members of our society. I am sure there are limitations on what the Minister can say tonight, but I hope she can assure us that every effort is being made to address this problem as speedily as possible.

Baroness Hamwee (LD): My Lords, I, too, congratulate the noble Baroness. I will add persistence to the attributes that have already been listed. As noble Lords have said, this was raised not only in the Select Committee on Citizenship and Civic Engagement but at a recent Home Affairs Select Committee taking evidence from the Home Secretary. In response to one member, the Home Secretary said that the Home Office had to get the right balance between the funding

of the Home Office and the fees charged. Like other noble Lords, I question whether this is a matter of balance.

As the noble Lord, Lord Russell, mentioned, a memo giving a rundown of the cost of these fees and how they were justified was requested. The Home Secretary responded to the comment that, on the face of it, the fees go way beyond normal cost recovery by saying that it would be a "good exercise for me" as well.

We hear many complaints and expressions of astonishment about the level of Home Office fees generally. I take the point made by the noble Lord, Lord Kirkhope, that the complexity of the system is at the root of this. When the Home Office introduced its premium service some years ago, my first reaction was that, given what all applicants have to pay, they should all get a reasonably quick and reliable service. I do not think I need to expand on that. The briefings have reminded me that I have often read about a whole family being subject to fees, particularly those payable periodically over a long period. That is similar to the position of Amelia, which has been mentioned. If it is not essential to pursue the matter, for instance with naturalisation, and it is too much for the family, some members are omitted. It may be children but often it is women. I can imagine the potential problems down the line in the cases we have heard about, quite apart from the issue of these children being unable to exercise their rights.

What is at issue is not entitlement but the registration of that entitlement. The child has a statutory right to citizenship and everything that goes with it. As noble Lords have said, this is not about immigration control. On Thursday, we will be debating the difficulties that some people face when they try to pursue activities in everyday life. However, these children are not migrants and, as the noble Lord, Lord Alton, mentioned, the leave to remain is not a substitute for citizenship, as is sometimes suggested by the Home Office. I understand that it is not necessarily available, but it is not for the Home Office to dismiss rights in this way.

In his strategy for social integration, the Mayor of London put it very bluntly, saying that,

> "if a young person has the right to be a British citizen, then government should remove obstacles to them becoming one".

He commented on the profit element, which is,

> "at least ten times higher than in many other European countries",

and is,

> "preventing too many young Londoners from accessing the rights they are fully entitled to by law".

The Project, to which the noble Baroness referred, is very telling and powerful and I will quote one short paragraph from it:

> "High-cost fees are completely contrary to the promotion and process of integration. Fees act to divide, distorting the vibrant futures of us—and other young people—caught in the complex net of immigration and nationality entitlements. Fees prevent young people from working, paying tax and contributing economically to society".

I think that meets the right reverend Prelate's definition of citizenship. Picking up the noble Earl's point about young people finding other families, I recently heard that one should not use the term "gang" when working with young people in gangs, because they regard the gang as their family. That needs to be recognised.

The Joint Committee on Human Rights, of which I am a member, recently reported on a remedial order following declarations of incompatibility with regard to the British Nationality Act. In that case, it was about requirements of good character. We raised potentially discriminatory provisions in British nationality law with the then Home Secretary, concluding:

> "We would be grateful for an assessment and an explanation from the Home Office as to whether any such discrimination does in fact persist",

and were pleased that the Immigration Minister responded that she would ask her officials to look at this. I cannot help thinking that charging fees in the way that we have been discussing is a form of discrimination.

I have read the Library briefing for Thursday's debate. It refers to the work by Coram and the Children's Society, which have reported that there are 144,000 undocumented migrant children in the UK. I do not know how many are in the categories we have been discussing but that is an astonishing and worrying figure. To summarise what other noble Lords have said, I end by saying, "and dot, dot, dot".

Lord Kennedy of Southwark (Lab Co-op): My Lords, my noble friend Lady Lister of |Burtersett has highlighted an important issue in her regret Motion and I agree with almost everything that every noble Lord has said in the debate so far.

First, my noble friend has highlighted the increase in the fees that have to be paid and that just over one-third of the fee payable is attributed to the costs involved. The Government generally have a confusing attitude to fees and charges, and consistency is at no point evident in the actions they take in this regard. Generally, I am in favour of cost recovery on fees and have been calling for this to be implemented in the planning system. That call has fallen on deaf ears—even my suggestion that the idea should be trialled in one local authority has not been taken up—so council tax payers are left subsidising applicants for planning permission. Despite the Local Government Association calling for this to be brought in, the Government will not engage with it. The overcosts referred to by the noble Lord, Lord Kirkhope of Harrogate, have now reached local government planning, because the fee is a local one and not a national fee set by the Government. In that respect the Treasury is not a direct beneficiary—which might explain its attitude.

Here we have the opposite. We go way beyond recovering the costs of the application and are charging a large amount of money and, in effect, making a large profit from the process of becoming a citizen. My noble friend asks the Government to withdraw the increase until they have done two things: first, published a children's best interests impact assessment and, secondly, established an independent review of fees for registering children as British citizens in the light of the report of the Select Committee on Citizenship and Civic Engagement.

Dealing with each point in turn, an impact assessment has been produced in respect of the regulations which is fairly detailed in comparison with some other impact

[LORD KENNEDY OF SOUTHWARK]
assessments I have read on other statutory instruments. However, my noble friend's regret Motion to Regret is specific: it does not refer to the whole of the fees set out in the regulations but specifically to the increase that affects children. In that respect the impact assessment is fairly light.

As the noble Lord, Lord Russell of Liverpool, said, the new Home Secretary, the right honourable Sajid Javid, has accepted that the fee is a very large amount of money. He said on 15 May:

"It is a huge amount of money to ask children to pay for citizenship".

So my noble friend's request for a specific impact assessment to be produced focusing on children impacted by this fee increase is reasonable, and I hope the Government will agree to it willingly.

The children impacted include those born in the UK; those who came to the UK at a young age, who have grown up in this country and often have no idea that they are not British; stateless children; and children growing up in local authority care. As we have heard, the British Nationality Act 1981 brought to an end being born in the UK on its own as a sufficient reason to acquire British citizenship—unless you were born to British parents. However, the Act recognised that there would be other children who also had a very strong claim, and if the level of fees being charged is becoming a barrier to that, it is a matter of much regret.

The second part of my noble friend's Motion draws the attention of the House to the report of the Select Committee on Citizenship and Civic Engagement. This has a section on the naturalisation process, and two of its recommendations are particularly pertinent to today's debate. On page 120, at paragraph 485, the Select Committee says that the fees charged for naturalisation should be much more in line with the actual costs and that the Government should not seek to make excessive profits out of the process. On page 122, at paragraph 492, it asks the Government to consider whether the fees should be waived for children in care and children who have spent their entire life in the UK. My noble friend is asking for an independent review to be established in the light of this report—and, again, she makes a very strong case.

I was struck by the figures that the noble Lord, Lord Scriven, brought to the debate. I will bring one final point to noble Lords' attention. The fee in 1983 was £35. If that fee had increased only by taking into account inflation, it would today be £114.71—£897.29 less than the proposed fee of £1,012 in the regulations. As I said at the start of my remarks, I am in favour of cost recovery, so it should be set at least at that £372 mark—but those figures are stark and highlight why my noble friend is right. The Government should act quickly on this and the House should support my noble friend in the Division Lobby.

9 pm

Baroness Manzoor (Con): My Lords, I congratulate the noble Baroness, Lady Lister, on securing this important debate and on the way she advanced her arguments. No one can be in any doubt about the strength of her feeling or her concern for the well-being of children, and I pay tribute to the tenacity she shows in furthering this area of work. It is laudable. I am also very grateful to all other noble Lords who have contributed to what has been a thoughtful and compassionate debate. My thanks also go to my noble friend Lord Kirkhope, who of course was, as he said, a Minister for the Home Office, so has great experience and expertise in this area.

I must declare an interest: I came to the United Kingdom as a child and had my first encounter with the immigration system here as a four year-old. So how the immigration system treats children is a subject close to my heart.

I will deal with the specific issues raised by the noble Baroness in her Motion in a moment. Before I do, I will say a few things about the issue at the heart of this debate—the welfare of children. The noble Baroness, Lady Massey of Darwen, raised this in her contribution. There is no greater test for any society than how it looks after its most vulnerable members.

I remind the House that our immigration, asylum and nationality functions are already delivered with a requirement to take account of the need to safeguard and promote the welfare of children. Indeed, Parliament has explicitly to give statutory effect to that requirement through Section 55 of the Borders, Citizenship and Immigration Act 2009. As the noble Baroness, Lady Massey, said, words in statute are not enough: it is actions that matter.

The Government fully accept the need to be concerned about the plight of migrant children. We understand that children are often caught up in situations and circumstances not of their own making. That is why it is important that I put on record that we have acted and granted asylum or another form of leave to 51,000 children since 2010, and we have committed to resettling 3,000 children and their families fleeing the Syrian conflict under the vulnerable children's resettlement scheme by 2020. This is in addition to the 20,000 individuals, who will include children, under the wider Vulnerable Persons Resettlement Scheme. Since 2010, more than 180,000 children have been granted settlement, giving them the right to remain in the UK permanently, through our routes for children and families. These are not insubstantial numbers.

I also reassure the House that the Home Office has regular meetings with a range of children's charities and advocacy groups in order to understand children's needs and ensure that there are ways of meeting them—the Children's Society in particular but also Barnardo's, Save the Children and other smaller groups that are in contact with these young people.

I turn to the issue of the fees that the immigration system charges for those who want to come to the UK, whether as visitors or as workers, and for those seeking to make their stay in the UK permanent. The noble Lord, Lord Russell, and other noble Lords raised these important issues. Again, I want to make some general observations. It is essential that we have a sustainable and well-resourced border, immigration and citizenship system that is fair to all who use it and who are affected by it—both issues that my noble friend Lord Kirkhope raised in his contribution.

Income from fees charged for visas and for immigration and nationality applications plays a vital role in such a system and in minimising any additional burden on the taxpayer. It is for that reason that the fees for any individual application are likely to be in excess of the cost of processing an individual application. To put it simply, the fee for an individual application not only pays for the cost of that application but also makes a contribution to the wider cost of operating the border and citizenship system—for example, the Border Force officers who staff the desks at ports and airports. The noble Lord, Lord Kennedy, said he understood the case for charging.

Lord Harris of Haringey (Lab): Would the Minister explain why it is relevant to the cost of these children getting citizenship, when they have lived their entire lives in this country, to pay for the borders when they have probably never crossed them?

Baroness Manzoor: I will come to that point in a moment. The noble Lord makes a very relevant point.

As I said, the noble Lord, Lord Kennedy, said he understood the case for charging. It is only right that immigration fees should contribute to funding an effective and secure immigration system to support the prosperity and security of the UK. This approach, which has been in place since 2004, as the noble Baroness, Lady Lister, herself acknowledged, was endorsed by Parliament through the enactment of the Immigration Act 2014 and in previous primary legislation, which the 2014 Act replaced.

I shall put this into context. To reset fees for child registration so that they cover just the costs associated with processing an individual application—a point raised by the noble Lord, Lord Scriven—would reduce fees to below the level that they were in 2007 and reduce the amount of funding that the Home Office has available to fund the immigration system by about £25 million to £30 million per annum. However, I take fully on board the other points that the noble Lord, Lord Scriven, made in relation to this.

I turn to the issue of child registration fees. Let me be clear at the outset that, far from wanting children and young people who regard this country as their home to leave, the Government strongly encourage them to make appropriate applications to make their stay here lawful. The most compelling reason for this is that these children are at risk—at risk of being exploited by adults and of being led into unofficial work that is neither safe nor properly rewarded, and without proper status they could easily be led to look to the wrong social groups for support. The noble Baroness, Lady Hamwee, alluded to this.

Baroness Hamwee: My Lords, can the noble Baroness explain how this might apply to children who are here lawfully, who are entitled to be here? It is their entitlement to citizenship that we have been discussing, not the concerns that she is raising, which I see would apply to other cohorts of children, but not, I think, these.

Baroness Manzoor: I am getting to that point, but I thought it was important to give the scenario. All children are important, but I want to talk about children who have not been registered in any way. As I said, the most compelling reason for this is that those children are at risk, and we want them to make appropriate and lawful applications.

I accept that the immigration system is complex—several noble Lords raised this issue, including the noble Lord, Lord Kirkhope, the noble Baroness, Lady Hamwee, and others. I accept that we need to address that and that the system needs to be simplified. But there is no reason why a child who has been in the UK since birth should be afraid of contacting the Home Office or asking a charity to do so on their behalf. I think that that was the point that the noble Baroness was raising.

The Home Office may grant leave to remain to a child who has lived in the UK continuously for seven years or to a young person who is over 18 but under 25 who has lived continuously in the UK for half of their life. Such leave gives the person concerned the right to live, study and work in the UK and the right, in appropriate circumstances, to receive benefits from public funds.

The noble Lord, Lord Alton, is right that immigration applications require a fee. Even so, an application can be made to the Home Office for the fee to be waived when it involves certain human rights-based claims for leave to remain and there are reasons why the applicant cannot meet the payment required. These human rights-based claims include those that are relevant to a child who has been in the UK continuously for seven years.

In addition, there is no fee where a child is being looked after by a local authority at the time that an application for leave to remain or indefinite leave to remain is made to the Home Office. This will, of course, cover some of the most vulnerable applicants and children in our society.

Of course, some migrants, like my parents, may wish to become citizens, reflecting that they have spent most of their lives here and are committed to this country—I agree with the right reverend Prelate the Bishop of Derby that citizenship is important as a part of civil society. That is something that we should welcome. I speak as someone who was born abroad but is now very proud to call myself British.

However, a child will normally acquire citizenship at birth derived from his or her parents. Since 1983, it has not been automatic that a child born in the UK is British. This does not mean that we do not cater for children and their well-being. We care. Children born in the UK are indeed catered for in our immigration and nationality provisions, which are designed to take account of the fact that a child's strongest entitlement is to preserve links with his or her parents and, where they exist, with his or her country of origin.

If I may respond to the right reverend Prelate, one reason that the Government require formal applications to be made in a designated way is so that all the factors relevant to a child's life and future can be taken into account in an appropriate and considered way. We do not provide fee waivers for citizenship, which reflects the fact that, while citizenship provides extra benefits such as the right to vote in elections and the ability to receive consular assistance while abroad, becoming a citizen is not necessary to enable individuals to live, study and work in the UK, and to be eligible for

[BARONESS MANZOOR]
benefit of services appropriate to being a child or a young adult. The decision to become a citizen is a personal choice, and it is right that those who make that decision should pay a fee.

9.15 pm

Baroness Smith of Newnham (LD): My Lords, the noble Baroness suggested that the Government wanted people to take citizenship. We are talking about children. In what way does the increase in fee, which the noble Baroness, Lady Lister, has raised in her Motion to Regret, help any of the things that the noble Baroness says the Government aspire to?

Baroness Manzoor: My Lords, I have answered in my earlier comments exactly and precisely the question raised by the noble Baroness. I am conscious of pressing time and I want to deal with some specific points that have also been raised.

As I said, the decision to become a citizen is a personal choice, and it is right that those who make that decision should pay a fee. However, the legislation does allow for local authorities which are looking after children to pay a child citizenship fee if they believe it is in the child's interests.

I shall respond to a few questions. The noble Baroness, Lady Lister, said that the Home Office needs to move much more quickly, and I can tell your Lordships that only last week the Immigration Minister met Solange Valdez-Symonds to whom she referred, to discuss this issue, which I think is an indication of the seriousness with which we treat this matter. I can say to the noble Baroness that caring and compassion about the welfare of children, as we have seen this evening, rests across the House, including on these Benches.

The noble Baronesses, Lady Lister and Lady Sheehan, the noble Lords, Lord Alton and Lord Russell, and other noble Lords, made some comparisons with Windrush. Just to be clear, Commonwealth citizens who arrived in the UK before 1973 had a legal right to be here then, and to stay here. There is not a comparison between the children we are talking about today and the Windrush generation.

I turn to a question raised by the noble Baroness, Lady Sheehan and the noble Lord, Lord Alton, that the Government are making a profit from children in care. I cannot agree with that, and I totally refute the allegation that has been made. Those in care can qualify, as I said, to receive indefinite leave to remain, and are exempted from paying the fee. Local authorities may also pay their citizenship fee, where appropriate, as I have said. Those who are not in care and who meet the destitution criteria receive limited leave to remain free of charge. The normal period of leave to remain for those applications is 30 months, but there is discretion to grant a longer period of leave and to grant indefinite leave to remain immediately, where appropriate and where it is clearly sought.

We have in place legislative safeguards to ensure that children have access to education and health services, and that they are supported with access to accommodation and living needs if these cannot be provided by their parents. These safeguards apply to all children, irrespective of their immigration status. Limited leave to remain, based on a child's private life or other human rights grounds, confers legal resident status and allows access to higher and further education, training and employment opportunities.

Time is moving on, and I hope that that has captured some of the issues that were raised. In conclusion, as I said at the start of my remarks, this has been an excellent debate, with informed contributions from all sides. I repeat my thanks to the noble Baroness, Lady Lister, for having given your Lordships the opportunity to discuss this important topic. As I sought to demonstrate, the Government are deeply committed to the welfare of children who come into contact with the immigration system, and the numbers that I cited earlier provide strong evidence of that. We set fees at a level designed to minimise the burden on the taxpayer. As I have said, there is the capacity to waive fees for those who most need it. The Government will continue to honour their international obligations in respect of children and ensure that those children who are here are treated fairly and humanely.

Like the Home Secretary, I understand the issue and care about it passionately. I have heard very clearly the strength of feeling on this matter expressed by your Lordships this evening about children. Of course, I will ensure that the message is transmitted to the Immigration Minister and the Home Secretary.

Baroness Lister of Burtersett: My Lords, I am very grateful to everybody who has spoken and to noble Lords who have listened as well. I shall not try to sum up everything that has been said, but many noble Lords spoke with great passion and drew attention to how we compare with other European countries in how the fee has increased. The noble Lord, Lord Kirkhope of Harrogate, said that I had argued that the benefits of British citizenship should not be overstated. It was not me who argued that; just for the record, I was stating that that is what the Government argue. Noble Lords such as the right reverend Prelate and the noble Lord, Lord Alton, emphasised the importance to children of citizenship and belonging.

I am grateful to the Minister. I feel that she has drawn the short straw; she has been asked to justify the unjustifiable, and there were moments when I got the sense that she was finding it quite difficult to do so. That is not a criticism, actually—it is a compliment.

I was looking around the House and there was a look of bewilderment on everyone's faces. I lost count of the number of times that the noble Baroness talked about immigration. A number of noble Lords made it clear from the outset that this is not about immigration; it is about children who are either born here or have lived most of their lives here and know no other country. That is what we are talking about. We are not talking about the number of asylum-seeking children who have been let in—not nearly enough, as I am sure my noble friend Lord Dubs would agree. We are talking about children who belong here, who have discovered that they are not British although they thought they had British citizenship—but they have that entitlement to it. I am afraid I do not see it as context; I see it as rather irrelevant and a bit of a red herring.

The Minister talked about visas, immigration and so forth, and the Border Force. As my noble friend Lord Harris said, these are children who have never crossed a border, so what is the relevance? Why should they be paying for the Border Force? She said that the Government strongly encourage children to apply to make their stay lawful, but they are here lawfully—that is not what they are applying for. She said that the fee could be waived for leave to remain, or indefinite leave to remain. The noble Lord, Lord Alton—I think I have his words correct—said that this is "a flaccid and insulting argument". I know that the Minister would not want to be insulting, but we are not talking about leave to remain but about the need for citizenship, and it matters. We have been given examples of children who would otherwise have been removed from the country if it had not been for charitable support and the work of the Project supporting them. So it does make a difference, and I am afraid it is not enough to talk about leave to remain.

The Minister then said that it was not right to make the comparison with the Windrush generation because they have the legal right to be here. We are talking about children who have a legal right to be here, which is why a number of us have made the comparison with the Windrush generation, and fear that we are creating a new Windrush generation if we are not making it possible for these children to take up their right to citizenship because of what the Home Secretary himself called a huge cost. "Huge" is not a word government Ministers use lightly, but it is on the record that the Home Secretary thinks that this fee is huge. He said that, yes, perhaps we need to look again at whether we have the balance right. We clearly do not have the balance right. How can we have the balance right when, in effect, there is a surcharge of £640 per each child applying for their right to citizenship?

I am desperately disappointed. When the Home Secretary told the Home Affairs Committee that,

"we have to get the right balance",

talked about the "huge amount of money", said that,

"it is right at some point to take a fresh look … and it is something that I will get around to"—

which, as I said, did not exactly give a sense of urgency—and said, "I understand the issue", I thought it suggested that the Home Office was finally accepting that it had to do something about this and that there were signs of movement here. It appears that those signs were an illusion. They were fine words, perhaps simply given to placate the Home Affairs Committee.

It is not enough just to say that the Immigration Minister met with Solange Valdez-Symonds from the Project last week. I know that, but a meeting is not enough. I hoped for an acceptance that the Home Office must take some action now, swiftly, and make a clear and firm commitment. In the end, I was asking only for a clear and firm commitment that the Home Office will look at this issue now before further injustice is done. That is not what we have heard tonight. I know that it is late, that many noble Lords will have gone home, and that noble Lords want to get on with the next business, but I am sorry—this is so important. The passion with which so many noble Lords have spoken suggests that we should test the opinion of the House, and I would like to do so.

9.27 pm

Division on Baroness Lister of Burtersett's Motion

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Division No. 4

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Civil Liability Bill [HL]

Report (Continued)

9.38 pm

Amendment 51

Moved by ***Lord Sharkey***

51: Clause 8, page 8, line 12, leave out "90" and insert "25"

Lord Sharkey (LD): My Lords, all the amendments in this group are aimed at significantly bringing forward the date of the first review of the discount rate. They are all in my name and those of my noble friend Lord Marks and the noble Earl, Lord Kinnoull, and I am very grateful for their support. I am also extremely grateful to the noble and learned Lord, Lord Keen of Elie, and to his officials for the considerable time they gave to the discussion of this matter between Committee and Report, and for their help in suggesting drafting for some of the amendments in this group.

As the Bill stands, the timetable for the first review would be as follows. The Lord Chancellor can decide when the provisions in Part 2 commence and there is no minimum or maximum period laid down. At his sole discretion, he can take as long as he likes to commence the provisions that enable a review of the discount rate. Once he has decided to commence the provisions, he then has up to 90 days to trigger the start of the first review. The review must conclude within 180 days, during which the expert panel has up to 90 days to respond to the Lord Chancellor.

All this means that the entire process will take up to 270 days plus the time elapsed before the Lord Chancellor commences the provisions in the Bill itself. As the noble and learned Lord, Lord Keen, said in his letter of 30 April, assuming the Bill receives Royal Assent this year and that the provisions are brought into force within two months, the statutory timetable means that the first review would be completed before the end of 2019. This will take far too long, as I think all those who contributed to the debate in Committee recognised.

The amendments in this group replace the existing process for conducting rate reviews with a separate and much faster process for conducting the first review. They leave untouched the process for subsequent reviews. Amendments 51, 55, 58 and 59 shorten the length of time after commencement that the Lord Chancellor has to trigger the first review from 90 days to 25 days. Since other amendments in this group will later remove the expert panel from the first review, there is clearly no need for the three-month maximum delay.

Amendments 64 to 66, 72, 74, 78 and 87 set up the new process for the first review. The essence of this new process is contained in Amendment 65. The other amendments are enabling or consequential, with the exception of Amendment 90, tabled by the noble Earl, Lord Kinnoull, to which I have added my name and which I will discuss later. Amendment 65 requires that the review is held and the rate determined within 140 days from the Lord Chancellor's triggering of the first review. It also requires that the Lord Chancellor must, within 20 days of the start of the 140-day period, consult the Government Actuary and the Treasury. The requirement to consult an expert panel is removed entirely from the first review. The only consultees are the Government Actuary and the Treasury. The amendment specifies that the Government Actuary must respond to the consultation within 80 days of the Lord Chancellor requesting the consultation, while Amendment 65 sets out that:

> "The exercise of the power … to determine … the rate … is subject to paragraph 3",

exactly as at present and exactly as for subsequent determinations.

In summary, the changes brought about by the amendments to the process of the first review are as follows. They will reduce the time between commencement and triggering from 90 days to 25 days; they make it

plain that the Lord Chancellor must request consultation no later than 20 days after triggering a review, a period unspecified in the Bill as it stands; they will remove the expert panel from the first review and the only consultees will be the Government Actuary and HMT; they will require the Government Actuary to respond to a request for consultation within 80 days after the request has been made; and the entire review must be concluded within 140 days of the Lord Chancellor's triggering the review.

In all, these measures will reduce the time to arrive at the first determination from commencement by 105 days. This will represent a very significant saving, especially to the NHS, where it may be as much as £300 million a month. Amendment 65 and the other amendments in my name do not address the absolute discretion the Bill gives the Lord Chancellor to decide when the provisions governing rate reviews should commence, but this is addressed in Amendment 90 in the name of the noble Earl, Lord Kinnoull. There is no good reason to allow the Lord Chancellor unfettered discretion and I support Amendment 90, which removes it.

In my view, the time between Royal Assent and commencement should be either zero or some small number. When we discussed these matters in Committee, the Minister opened his response to our proposals to bring forward the first review by saying:

> "I believe we are as one in our desire to see the provisions brought into force as rapidly and sensibly as possible".—[*Official Report*, 15/5/18; col. 633.]

He went on to commit to reflect further on the matter. It is quite clear that he and his officials have done exactly that. Many of the amendments in this group, particularly Amendment 65, are largely the fruit of that reflection and of our discussions. I am grateful for that and I commend these amendments to the House. I beg to move.

9.45 pm

The Earl of Kinnoull (CB): My Lords, it is very hard to follow such a clear speech and say anything. I congratulate the noble Lord, Lord Sharkey, on such a clear presentation. I will only observe mathematically that the latest NHS Resolution annual report states very clearly that the change from 2.5% to minus 0.75% would cost the NHS an additional £1.2 billion per year. Making the change from minus 0.75% to 1%, which appears to be what the industry in general expects, works back mathematically to suggest that speed is worth around £2 million per day to the NHS. So the amendments have great merit in that they would have a direct positive effect on the front-line availability of NHS funds. Accordingly, I commend them.

Lord Hunt of Wirral (Con): My Lords, I declare my interests as set out in the register and congratulate the noble Lord, Lord Sharkey, and the noble Earl, Lord Kinnoull, on Amendment 65, in particular, and the consequential amendments. More than anything else, the simplification of the process for the first review of the discount rate will allow the Lord Chancellor to proceed with the speed that everyone in this House has urged. I very much hope that my noble friend the Minister will confirm that the Government are prepared to accept Amendment 65 and the consequential amendments. I look forward to her acceptance.

Baroness Vere of Norbiton (Con): My Lords, the amendments relate to the speed with which the first review of the rate can be conducted. Initially, I will focus on Amendment 65 and the related consequential Amendments 64, 66, 72, 74, 78 and 87.

The amendments would accelerate the conclusion of the first review in four ways: first, by replacing the need for the Lord Chancellor to consult the expert panel with a requirement to consult the Government Actuary, thereby simplifying the preparation for the first review. Secondly, by reducing the maximum period within which a review must be completed from 180 days to 140 days. Thirdly, by requiring the Lord Chancellor to consult the Government Actuary within the first 20 days of the review starting. Fourthly, by reducing the time for the Government Actuary to carry out his or her review following the Lord Chancellor's request, from the 90 days currently afforded to the expert panel in the Bill to 80 days. The remaining changes made by the amendments, including the obligation on the Lord Chancellor to publish information about the Government Actuary's advice, are consequential to these four changes.

The Government have made clear on several occasions that they are committed to starting and completing the first review as quickly as practical after Royal Assent. The amendments will assist the achievement of that objective because they will remove much of the uncertainty that would exist as to the readiness and availability of the as-yet-unknown members of the panel to commence the review promptly. This means that the open-ended period for the request to the panel can be confined to a specified period.

In addition, the carrying out of a review by the Government Actuary rather than a panel is administratively and substantively a simpler proposition. The overall period for the review and the period for the Government Actuary's response can therefore both be shortened. The proposal that the Lord Chancellor will make the determination on the rate within 140 days of the start of the review, and that the Government Actuary will respond within 80 days of the Lord Chancellor's request, recognises these changes in the proposals. The amendments do not affect the timing of the commencement of the review.

However, the removal of the panel from the first review reverses a policy decision that the Government took when replying to the Justice Select Committee's recommendation to involve the panel in the first review. The reversal of this decision is not something that the Government would do lightly—but, having listened to strong arguments from noble Lords across the House that the first review needs to be completed more quickly than would be possible if the panel had to be constituted, the Government accept that the proposed approach is a sensible and pragmatic step. We have spoken with the noble Lord, Lord Sharkey, and are grateful to him for agreeing some changes from the terms of his initial proposal in Committee. On this basis, the Government are content to accept Amendment 65 and the related consequential amendments.

[Baroness Vere of Norbiton]

Turning to the other amendments in this group, the effect of Amendment 51 and the related Amendments 52, 55, 58 and 59 would be to require the first review to be started within 25 days of commencement, rather than the maximum 90 days as provided for in the Bill at present. Amendment 90 would be even more restrictive on the time allowed, as it would require the timetable for the first review to begin on the date of Royal Assent. As I have explained, we share noble Lords' desire to ensure that a review is carried out as quickly as is reasonably practical. However, reducing the period within which the Lord Chancellor must begin the first review—which is a maximum period that may well be bettered in practice—runs the risk of creating unnecessary problems around compliance with time limits for those involved in translating this legislation into action. This is particularly the case given the Government's acceptance of the reduced time limits in Amendment 65.

Even though the review will no longer involve the expert panel, there is still a need for extensive pre-review research and analysis to be completed to enable the Government Actuary to provide input to the review on a fully informed basis. This will include developing the data requirements to inform a call for evidence on investment advice and behaviour, funds available to investors and their risk characteristics, and allowances for tax and investment management costs; preparing and publishing the relevant call for evidence documents; and collating and analysing the responses. While we will ensure that the gathering of evidence proceeds as quickly as possible, that work will require time and it is important that it is done properly. At present we estimate that it will be completed around the end of November, but there is a possibility that the Bill may achieve Royal Assent earlier than expected.

The Government are, however, sympathetic to exploring ways to reduce the 90-day period within which the first review must begin, without making the period so short as to cause problems for the rest of the timetable. In light of this we would be happy to discuss the detail of these amendments further with noble Lords before Third Reading if they would be willing to do so. I hope that this commitment will reassure noble Lords that the Government are prepared to examine how the 90-day period following commencement might be reduced and, on that basis, I urge them not to press their amendments.

Lord Sharkey: I am very grateful to the Minister for her response, particularly to Amendment 65 and the consequential and preparatory amendments. I am also grateful for her comments about Amendment 51 and the allied amendments. I think it is generally agreed, as she said, that 90 days is too long. Perhaps 25 days is not quite right; perhaps we need a Goldilocks solution. I would be very happy, as I am sure others would, to join in a conversation between now and Third Reading to discuss exactly what size of bowl Goldilocks would like.

I notice, though, that the Minister did not address Amendment 90. I acknowledge the comment that it would be difficult to reduce it to zero, but I heard nothing else. I did not hear a suggestion that it could be some number that is not zero but is still quite small—and certainly less than the number that is currently in place. Would the Minister be happy to discuss that number as well between now and Third Reading?

Baroness Vere of Norbiton: Yes, I reassure the noble Lord that we would be very happy to do that.

Lord Sharkey: I thank the Minister very much. That is very helpful—and having said that, I beg leave to withdraw the amendment.

Amendment 51 withdrawn.

Amendment 52 not moved.

Amendment 53

Moved by ***Lord Hodgson of Astley Abbotts***

53: Clause 8, page 8, line 14, leave out "within the 3 year period following the last review" and insert "if the procedure set out in sub-paragraph (3A) applies.

(3A) The expert panel under paragraph 5 must advise the Lord Chancellor to undertake a review of the rate of return when it considers that the nature of return on investment has changed sufficiently significantly to justify such a review."

Lord Hodgson of Astley Abbotts (Con): My Lords, with this group of amendments we come to the procedure for timing the future reviews of the rate. They are in large measure parallel to some amendments I tabled in Committee but during that debate a number of important points were made by noble Lords, which I have reflected in changes in the drafting.

Our policy objective should be to establish a system that has three guiding principles. First, there should be a change in the rate only when the underlying investment climate—that is, the generally prevailing rate of return—has changed sufficiently significantly. We do not want frequent jerks on the tiller. Secondly, the timing of the change should be as unpredictable and quick as possible to minimise the chance of any people gaming the system. Thirdly and finally, we need to avoid the consequences of political inertia. The decisions to change the rate will always be controversial. As we heard from the noble Earl, Lord Kinnoull, the costs of these changes, one way or the other, can be very great indeed. Therefore, there will always be pressure on the Lord Chancellor to postpone any changes until the very end of any fixed-term period.

The way the Bill is currently drafted in large measure fails this test. First, having time-based reviews—for the reasons I have just explained, these are essentially time-based—fails to link to the fundamental reason for undertaking such a review; that is, the changing of the underlying rate of return on investments. Secondly, a system that requires the establishment of a new expert panel on each occasion—a decision that will undoubtedly leak—inevitably increases the chances of the system being gamed. Thirdly and finally, a system which places on the MoJ and the Lord Chancellor the whole responsibility of deciding both whether a review should take place and then whether the result of any review should be implemented is likely to lead to a preponderance of reviews taking place at the end of any fixed-term period.

The amendments I have tabled are designed to address the system and remedy these weaknesses. First, the decision on whether or not to implement a change remains with the Lord Chancellor because, as noble Lords have pointed out, this is at root a political decision. Secondly, the Lord Chancellor is relieved of the duty of monitoring changes in the available rates of return. This is undertaken by the expert panel, which will now become a permanent body. The expert panel, the proceedings of which will be confidential, will decide when to recommend to the Lord Chancellor that the rate should be changed and, if so, by how much. In this connection, to avoid frequent small changes, I have inserted "significantly" after "sufficiently" in the penultimate line of Amendment 53. All the above can be undertaken confidentially, away from the public glare, inevitably leading to a reduction in the amount of gaming. Indeed, if the Lord Chancellor chose not to accept the expert panel's advice—which he or she would be perfectly entitled to do—no one need ever know it had taken place.

Finally, the other change from my Committee amendment is to remove the expert panel's requirement to report to the Lord Chancellor at the end of every 12 months in which a review has not taken place, explaining why no review has taken place. My original intention was to improve transparency and clarity but it is clear from the remarks of noble Lords in Committee that it was a procedure that confused rather than enlightened and therefore I have struck it out. In the meantime, I beg to move.

The Deputy Speaker (Viscount Ullswater) (Con): I must advise your Lordships that if this amendment is agreed to, I cannot call Amendment 54 because of pre-emption.

Lord Marks of Henley-on-Thames (LD): My Lords, we support the thrust of the amendments tabled by the noble Lord, Lord Hodgson, and his introduction of Amendment 53. My noble friend Lord Sharkey and I, together with the noble Earl, Lord Kinnoull, and the noble Lord, Lord Faulks, have tabled a number of amendments to the proposals for later reviews of the discount rate; that is, all reviews after the first, which we discussed in the previous group. These amendments on the later reviews are considered in this and the following group—the last group—and I shall speak to both groups of amendments now.

Broadly, we support the following propositions. First, we do not regard it as sensible to have a fixed three-year period, or even a fixed five-year period, between reviews of the discount rate. Interest rates and rates of return change unpredictably and at very different speeds over time. Years may go by, as they have recently, with very little change then a period of rapid change may follow. Fixed periods between reviews do not respond to that pattern of change and slavish adherence to fixed periods would lead both to reviews required by statute taking place unnecessarily during periods of stability and, more seriously, to there being periods—possibly long periods—following rapid changes in rates when the discount rate failed to represent an accurate assessment of predicted long-term returns.

10 pm

As a response to this difficulty, while I can see the argument for a five-year longstop provision whereby, at the end of five years following the previous review, there should be provision for a fresh review by the Lord Chancellor, in years one to four of the cycle that review should be available if necessary. However, it should be for the expert panel to decide on the need for a review at these interim stages, on the basis of its expertise and financial experience. So I argue that the panel should be able, indeed bound, to advise the Lord Chancellor on whether such a fresh review was yet necessary during every interim year. Amendment 57 and other amendments substituting five years for three are intended to achieve that end.

That leads to our second proposition: that the expert panel should be an established panel, as the noble Lord, Lord Hodgson, proposes, not a fresh panel established on an ad hoc basis, review by review, which would cease to exist after every review. This is not only for the reason that the noble Lord gave, which was that the formation of an expert panel would be a giveaway, but because it would be better for the expert panel to be always available to give advice on whether a fresh review was necessary. This is one of the purposes of our amendments between Amendment 75 and Amendment 86.

On the Government's proposals, there would be no panel between one review and the next and no formal mechanism for involving the expert panel in deciding when a review should take place at any stage before the end of the proposed three-year maximum interval. That decision would, on their proposals, be for the Lord Chancellor alone with no expert assistance. In deciding on the advice to be given on any review, it would also be better, I suggest from the point of view of consistency of approach, for the expert panel to build up a body of experience over successive reviews.

Thirdly, I suggest that in proposing that the Lord Chancellor should do no more than consult the expert panel, the Bill as it stands has failed to achieve an appropriate balance between that panel, with the considerable experience it will have of investment matters, and the Lord Chancellor, whose experience is now generally political rather than expert or even legal. While I accept that political input and accountability are required, I see no reason why the Lord Chancellor should not be bound to have regard to the advice of the expert panel rather than merely consulting it. That should apply equally to decisions on when to have a review as to decisions made on whether to change the rate on such a review and, if it is to be changed, what the new rate should be. Amendment 63 and proposed new sub-paragraph (8) of the substitute arrangements for later reviews in Amendment 67 are designed to achieve this.

Fourthly, it should be specifically provided that confidence in the ability and independence of appointed members to adopt a balanced approach should be a criterion for their selection. While we agree with the Government that the proposed composition of the expert panel is sensible—although, as we proposed in Committee, we would have preferred to see a medically qualified member of the panel—we nevertheless suggest

[LORD MARKS OF HENLEY-ON-THAMES]
that a commitment to fairness to the interests of both claimants and defendants, as set out in Amendment 80, would be desirable.

So in substance we support the recruitment of an expert panel to assist the Lord Chancellor in ensuring an appropriate discount rate, a process for which, without such assistance, the Lord Chancellor will generally be uniquely unqualified, but the Bill as it stands fails to accord to the panel either the importance or even the role that its expertise and position under the legislation would logically demand for it. While we do not intend to press these amendments to a vote, I would hope that the Minister and his department might consider what is said on the subject of these reviews and, indeed, the consensus that has built up among Members of the House interested in these amendments during discussions on these topics hosted by the noble and learned Lord and the noble Baroness, for which we are very grateful, and then come back with some government amendments at Third Reading that reflect the concerns and the consensus that have been expressed.

Lord Judge (CB): My Lords, I have tabled Amendment 69 relating to the conduct of the review that we have been discussing, in particular in relation to Schedule A1. I wish to add one definite article and three words to this part of the Bill. That definite article and those three words are already part of the Bill in two places, and this afternoon the Minister indicated that there would be a third occasion when the words "the Lord Chief Justice" would appear.

This is a very dry debate, and therefore I remind the House that we are dealing with catastrophic cases, with injuries that are life-changing not only for the unfortunate man, woman or child who has suffered them but—let us not overlook it—his or her family: the wife, husband, parents or child. We are reflecting on family disaster.

Judges have to observe, day by day, year by year, the practical realities of the impact of the discount rate on claimants, defendants and, in particular, settlement proposals. I remind your Lordships that, in the case of children and those who need a guardian for the purposes of the conduct of litigation, a settlement can be acceptable only if it is presented to a judge, usually a High Court judge, to see whether he or she approves it and its satisfied by its reasonableness. In other words, there is a fund of experience constantly being refreshed by the litigation process. If the practical impact, the glitches and the nuances are not fully appreciated, the Lord Chancellor will be deprived of information that is vital to any decision relating to the review. The only way to make it fair and balanced is for there to be judicial input to it as a consultee, and therefore I invite the Minister to agree, as he did this morning in relation to Amendment 12, that the Lord Chief Justice should be made a consultee to this part of the Bill.

Lord Hope of Craighead (CB): My Lords, I added my name to Amendment 69 and I support everything that my noble and learned friend has said. There is just one point that I would like to add. I draw attention to subsection (4) of the new Section A1, which is printed at page 7, lines 37 to the foot of the page. It refers to the content of the original order that the Lord Chancellor will have made, which is the background to the review process. The order not only talks about the rate but has to contemplate the possibility of descriptions of pecuniary loss, the length of the period during which pecuniary loss is expected to occur and the time when the pecuniary loss is expected to occur.

So one is not simply talking about the calculation of a rate of return in the abstract. It would be open to the reviewer to examine whether there should be some fresh approach to the matters that are contemplated in that subsection. It underlines the important point that my noble and learned friend has been making about the need for judicial input against the background of experience which everybody in the courts has drawn out of cases involving these very serious injuries. I support the amendment for that reason.

Lord Faulks (Con): With some hesitation, I offer some slight doubt about the two contributions from the noble and learned Lords relating to the role of the Lord Chief Justice. I entirely accept the significance and appropriateness of the role of the Lord Chief Justice in the first part of the Bill, as the Minister accepted. I am more troubled about the suggestion in relation to the role which the Lord Chief Justice might play in the rate of return on investment. In essence, this is a quasi-mathematical function. The noble and learned Lord, Lord Judge, is quite right that judges regularly see and approve complex cases, and will be aware of the adequacy or otherwise of damages. However, with great respect, that is not quite the issue that the panel will be deciding.

I see a further problem and would be grateful for the Minister's comments on it. The Lord Chancellor makes the rate determination—it has been accepted that this is essentially a political determination—must,

"give reasons for the rate determination",

and,

"publish such information about the response of the expert panel established for the review as the Lord Chancellor thinks appropriate".

If he or she has to give reasons in response to a judicial review—the Minister has said that the decision must be amenable to such review—presumably those reasons might include the advice that he or she has been given by the Lord Chief Justice. I am a little concerned that this puts the judiciary in an unfortunately political position, when it has been agreed that the role of the Lord Chancellor is pre-eminently a political one, albeit advised by the panel. So although I entirely accept the experience and wisdom of the judiciary, I wonder whether this is entirely the right role in this context.

Lord Hope of Craighead: Does the noble Lord agree that subsection (4), towards the foot of page 7, is not dealing with matters of mathematics? The matter of description of categories and so on is involved. It goes a little further than the noble Lord was contemplating in his brief remarks.

Lord Faulks: I entirely accept that it does, but ultimately the question of what the rate is is determined by experts, taking into account the factors which are, I

agree, set out in the Bill. I shall listen with interest to what the Minister says, but it still seems to me that that is perhaps dangerously close to the judges getting involved in an area which might render them subject to criticism.

The Earl of Kinnoull: I will speak extremely briefly in support of the noble Lord, Lord Hodgson of Astley Abbotts. It seems to me that the Lord Chancellor would, very properly, have two questions in life that he would want to ask of an expert. The first is: "Do we need a review?" The second is: "Please will you conduct the review?" However, unless there is a standing panel, who on earth can he ask the first question of? I assume that he will not have anyone within the Ministry of Justice to whom he can turn and say: "Are we in circumstances where we need a review?" That is, in itself, a powerful argument for having a standing function that would allow him some access to expertise in this difficult and esoteric area. So, if the Minister is not minded to be amenable to the amendments proposed by the noble Lord, Lord Hodgson, how will that question be answered?

Lord Beecham (Lab): My Lords, at this late hour I propose only to express agreement with much of what has been said from all round the Chamber in these debates. I am not as concerned as the noble Lord is about the role of the Lord Chief Justice. It does not seem at all inappropriate for the Lord Chief Justice to be consulted, which is all that the amendment suggests, in the course of making these very difficult decisions. The noble Lord need not worry very much about the consequences of that.

I am happy to support all the amendments that have been discussed and I congratulate noble and learned Lords on the progress that has been made. I assume that the Minister will be inclined to accept, and I certainly hope that that will be the case.

10.15 pm

Lord Keen of Elie: I am obliged to noble Lords for their contributions. In speaking to Amendment 53, in the name of my noble friend Lord Hodgson, I shall speak also to Amendments 56, 60, 63, 69, 75 to 77, 79 to 86 and 88. I shall not, however, be speaking to the amendments in the next group, although I appreciate that the noble Lord, Lord Marks, referred to them. On that point and the submissions made by him, the period for review is not fixed either at three years or five years. It is not the case that review would not be available in years one to four if it was five years. The Bill is clear that the three-year period following the last review is the outlier—it is the maximum period—and it is there to ensure that we do not face the situation that we have had in the past where, for one reason or another, no review takes place over many years whether or not a panel or anyone else believes that such a review should have taken place. I wish to make that clear.

The reason we have grouped the amendments in the way we have is because they are generally concerned with the creation of a standing panel or make provision for the panel rather than the Lord Chancellor to determine when the rate should be reviewed and how it should be set. Amendment 53 would replace the system proposed in the Bill for reviewing the discount rate with one without time limits under which the need for the rate to be reviewed would be determined by the expert panel; and it provides that the panel will make its decision by reference to whether the nature of returns on investment has sufficiently changed for a review to be needed. I recognise that Amendments 56 and 60 are consequential drafting amendments on Amendment 53 to remove references to the three-year maximum period that we find in the Bill.

Amendment 77, again in the name of my noble friend Lord Hodgson, would make the obligation on the Lord Chancellor to establish the panel a one-off obligation rather than an obligation on the occasion of each review. Again, that is clearly consequential—as is Amendment 81—because if there is a standing panel there would be no need to deal with the simultaneous review as the panel would not cease to exist at any point.

Amendment 63, in the names of the noble Lords, Lord Marks and Lord Sharkey, would require the Lord Chancellor to have regard to the views of the panel in deciding when to commence any subsequent review of the rate. The expectation underlying the proposal is that the panel will be established again on a permanent basis. I will come back to the observations of the noble Earl, Lord Kinnoull, about that in a moment.

Amendments 75 and 82 would require the panel to be responsible for advising the Lord Chancellor, broadly on an annual basis, whether the rate should be reviewed and also for advising him or her in respect of the second and subsequent reviews of the rate. Again, Amendments 76, 79 and 83 through to 86 are consequential on these changes.

On the point made by the noble Earl, Lord Kinnoull, about who the Lord Chancellor would consult in deciding whether or not there should be a review if there was no standing panel, the answer is that he may consult who he wishes in that context—for example, it is open to him to consult with the Government Actuary and Her Majesty's Treasury as to whether or not economic conditions are such as to prompt him to consider a review. There is no limit as regards the inquiries he may make in order to inform his decision—I emphasise his decision—as to whether or not a review will be required.

The panel's expertise will be in technical matters and its introduction will inject expertise and help to ensure that the rate is reviewed properly with full expert consideration of the issues. However, deciding whether the current rate is no longer appropriate engages issues of judgment as to the level at which the rate should be set and we do not consider that the panel would be well placed to make that decision. It is a question not only of monitoring investment returns, but of making a broader judgment as to the social impacts of, for example, a change in the rate.

The Government therefore consider, as did the Justice Select Committee, that the Lord Chancellor should be responsible for this decision. To ask the panel to make, in effect, a substitute judgment as to what the rate should be would be contrary to its nature as an expert

[LORD KEEN OF ELIE]
panel in providing merely technical advice. Again, we do not consider that the panel should be in that decision-making position. The Lord Chancellor, of course, has to make a properly informed decision in reaching a conclusion on the outcome of a review.

We have listened to concerns expressed by noble Lords and others in Committee that a long-stop fixed review period might result in all parties to litigation somehow engaging in what is termed gaming the system in expectation of a change to the rate. Obviously, we share a desire to ensure that as far as possible that sort of conduct does not take place. On one view, a standing panel might mitigate some of the potential gaming at the end of a fixed period, but we fear it would increase the frequency of gaming around the intervals at which the panel would meet. Claimants and defendants can also watch changes in rates of return, and it will not take long for them to anticipate when there might be a degree of change in investment returns that might trigger the panel's interest in a review. We consider that whichever route we take there is always the risk of gaming. It is something we want to minimise, but we are not persuaded that a standing panel would be the means by which to minimise the gaming of the system, as it has been termed.

Delivering regular and broadly predictable timings for reviews was the principal concern of those we consulted when they replied to the consultation in March 2017. We know from responses to the consultation and pre-legislative scrutiny that the majority of claimants and defendants want and benefit from certainty and predictability. We consider that the approach proposed in these amendments would make the system less certain and perhaps less predictable. We consider that the present approach will deliver a process that will see the rate reviewed at least every three years following the first review. As the noble Lord, Lord Marks, conceded, it is not a fixed term. This will ensure that there is not the possibility that the rate will again be left without formal review for a period of about 16 years, but, of course, the Lord Chancellor will be able to review the rate at any time in the period if he or she consider that the rate is no longer set at the right level.

The reality is that there will always be litigants anticipating what may happen because of changes in the market and seeking to take advantage of them, but we must seek to mitigate and minimise that risk. I emphasise again that the fixed period within which a review must be begun is a maximum period.

I accept that in theory it would be possible to combine a standing panel with the Lord Chancellor deciding when the rate is to be reviewed, but such a panel would probably be inactive for considerable periods and it would increase the level of cost and bureaucracy required. That is something that we do not consider desirable. While the precise estimate for these will depend on how often the panel would consider whether there should be a review, a permanent appointment would require some form of continuous funding and administration.

Amendment 88, which is also in the name of my noble friend Lord Hodgson, would remove the provisions in paragraph 8 of the new Schedule A1 that cover the possibility of the Lord Chancellor deciding on the occasion of the review to set no rate or no rate for a particular class of case. They make clear, for example, that a reference to a review of the rate includes reference to a review of a situation where no rate has been prescribed. Even if the Lord Chancellor decided not to set a rate, paragraph 8 ensures that the review mechanisms in the Bill will still apply and that "no rate" will be reviewed at the next appropriate juncture in the same way as if it had been a rate. The provisions of paragraph 8 do not, contrary to some of the fears expressed in Committee, provide a means for the Lord Chancellor simply to dismantle the machinery for the required reviews of the discount rate.

It may be helpful in understanding paragraph 8 to consider the present law. The new section A1(1) reproduces provisions in the Damages Act 1996 that indicate that the court must take into account such rate of return, if any, as may from time to time be prescribed by an order made by the Lord Chancellor. The wording implies that the Lord Chancellor might decide to set no rate under the present law, and the provisions in paragraphs 8(2) to (4) are intended to clarify how this power would operate.

I concede that the possibility of no rate being set for some or all classes of case may well seem an unlikely eventuality. However, just as is envisaged in the present law, circumstances might arise in which a category of rather unusual cases occur that call out for individual assessment of an appropriate discount rate. Preserving a "no rate" provision would enable the parties in the cases affected to plan their litigation with the certainty that the discount rate would have to be settled as part of the case. That would be a potential benefit for claimants and defendants in unusual cases. Removing these provisions would be unhelpful to future users of the Bill.

Amendment 80 in the names of the noble Lords, Lord Marks and Lord Sharkey, aims to indicate that the four appointed panel members are expected to approach the work of the panel as experts with the objective of advising the Lord Chancellor in a way that is fair to the interests of both claimants and defendants. This is the spirit in which the appointed panel members are intended to approach their work. That is one of the reasons why they are required to take account of the duties imposed on the Lord Chancellor in determining the rate. The amendment is expressed in terms that appear to be aspirational in nature rather than obligatory, leaving us a little uncertain as to what the effect is intended to be.

The Government have already made clear in the response to the Justice Committee our intention to recruit panel members who will act as independent experts and that appointed panel members will be required to disclose potential conflicts of interest. The provisions in the Bill and the assurances already given will lead to advice from the panel that will be fair to the interests of claimants and defendants. We do not consider that any further express provisions are needed in order to ensure that result.

Amendment 69 in the name of the noble and learned Lord, Lord Judge, raises the question of the Lord Chancellor being expressly required to consult the Lord Chief Justice during the review process. I note the point made by my noble friend Lord Faulks

with regard to the potential implications for the Lord Chief Justice. There are some grounds for that because under other legislation—such as, for example, the 2007 Act with respect to the regulation of the legal profession—there is a provision where a party applies for regulatory status, but the Lord Chancellor will consult with the Lord Chief Justice on such an application. Indeed, that occurred recently; the Lord Chief Justice gave his opinion and that is now subject to scrutiny in the context of an ongoing application for judicial review. It is a rather unfortunate situation that the views of the Lord Chief Justice, which he is obliged under the statute to express, come under the scrutiny of his own Administrative Court. So there are potential difficulties here.

Nevertheless, I recognise the force of the point that is made under reference to Amendment 69. On the one hand, I can say that the Lord Chancellor is of course free to take evidence on the question of how he is going to fix the rate, and that could include evidence from the Lord Chief Justice, but that is hardly a complete answer to the suggestion that he ought to be consulted. In light of what has been said on this matter, having regard to the difficulty that was identified by my noble friend Lord Faulks, I would like to take that proposal away and consider it further in anticipation of Third Reading. I will give it further thought and will be happy to speak to noble Lords on that point in due course. In the meantime, I invite my noble friend at this stage to withdraw the amendment.

10.30 pm

Lord Hodgson of Astley Abbotts: My Lords, I am very grateful to my noble and learned friend for his very full response. I am sure he will not be surprised when I say I am slightly disappointed at the way in which he has rejected quite a lot of the arguments that have been put forward from all quarters of the House. He rightly points out that the three-year period is a maximum, but I will have a sporting wager with him that when we come back here 20 years from now the reviews will be bunched around the end of the fixed period, whenever it is, because that is the way the political process will work.

As the noble Lord, Lord Marks, pointed out, the idea of the expert panel is that you build a body of knowledge and institutional memory about how these things will work more effectively, which will get lost if you have to constitute a panel every time.

As for advice, as the noble Earl said, Her Majesty's Treasury has an interest in this case, as when you say, "We are going to change the discount rate", it has to go back and redo its sums. This will be an interesting question that it has to face on each occasion. There remains confusion in the Government's mind between instituting a review and instituting a change, and the two tend to get conflated.

There was a slightly strange suggestion that somehow there will be gaming around the meetings of the panel. That seems to me unlikely. I could not conceive why the panel would be announcing its meeting or why that would cause gaming in any way. No system is free of gaming, but this seems unlikely to lead to a greater degree of playing the system.

My noble and learned friend used a final rather strange phrase. He said that there was a social impact to the decision. I was not clear what social impact meant. This seems to me a clinical decision about the rates of return, which the Lord Chancellor must make. The social impact does not seem to me part of this discussion. Perhaps I have misunderstood what he said, so I will read *Hansard* carefully. In the meantime, I beg leave to withdraw my amendment.

Amendment 53 withdrawn.

Amendment 54

Moved by ***Lord Faulks***

54: Clause 8, page 8, line 15, leave out "3" and insert "5"

Lord Faulks: My Lords, this amendment is in identical terms to that which I advanced in Committee. This time I have the support of the noble Earl, Lord Kinnoull. In view of the fact that there are no changes in the nature of the amendment, I think I can be brief in outlining its purpose.

The purpose is to ensure that the reviews are regular—indeed, that is the purpose of the Bill—which is particularly important in the light of the fact that Lord Chancellors so rarely exercised the power in the previous 20 years or so. The question is: how regular? I respectfully submit that the three-year period is too short, and a five-year period would be much better.

I say this based not least on personal experience at the moment and having had conversations with people on, as it were, both sides of the fence. When you are expecting a change one way or another, as is the position now—because the market suggests, as the noble Earl pointed out, that there probably will be a change, let us say from minus 0.7% to plus 1%—one side or another will see it to their advantage either to bring forward a claim or delay it to take advantage of the putative date of the decision.

This process is perfectly legitimate and part of the hurly-burly of litigation—there are lots of uncertainties in litigation—but this one is of particular significance where large sums of money are concerned. I am not disparaging anyone involved in the litigation process. But if the change happens every five years, there will be less of this gaming than if it happens every three years, just as everyone says about the last year of a four-year term of a President—nothing much happens. A lot of positioning will be taking place before the change.

This is a view expressed widely in the profession. I therefore ask my noble and learned friend carefully to consider accepting the amendment, or at least coming back at Third Reading with something that reflects those considerations. I beg to move.

The Earl of Kinnoull: My Lords, I support the noble Lord, Lord Faulks, in his amendments. I should explain why I did not support them in Committee. In Committee, I listened to two eloquent speeches—one from the noble Lord and one from the Minister. They went carefully through the arguments about gaming and not gaming. I thought it was very interesting. I have a lot of knowledge in this area, but I did not

[THE EARL OF KINNOULL]
actually know. I then spoke to a large number of practitioners on the insurance side to try to form my own view on whether three or five years was right for gaming. I am afraid I strongly formed the view that five years was right and therefore strongly believe that the noble Lord, Lord Faulks, is on to something that would greatly benefit all concerned. That is why I support the amendment.

More importantly, I have tabled Amendments 68, 70 and 71, which are to do with the timing of the second review. Broadly, they try to bring the timing in from what I thought was 180 days to what I thought was120 days. Those thoughts were prior to the arrival from the Minister's office of the draft terms of reference of the expert panel, which I have in my hand. It is very interesting because the expert panel is established at the very moment that the review trigger is pulled—or, I suppose, immediately after. In fact, in a section entitled "Preparation", before the review is triggered there is a call for evidence, which asks for all sorts of evidence all round.

That raises two issues for me. The first is that it extends the period of uncertainty. There is a 180-day review period and the call for evidence period, which I assume is at least 60 days—probably 90 days—to increase the level of uncertainty. During this uncertain period, the people who suffer are not the banks of lawyers on either side of the argument; the fee clock is still running. The people who suffer are the individuals who have the catastrophic injuries. So I worry about that.

The second thing I worry about is that if I were an expert, I would not want someone else to draft my call for evidence. I probably do not need the call for evidence because I am an expert. The idea that the poor old Ministry of Justice will be able to ask for all this expert evidence is wrong. The Ministry of Justice is not full of this sort of specialist in the esoteric areas around the setting of a discount rate. I do not believe that is a wise thing to do, so will the Minister look again at the draft terms of reference? Maybe, when we have our coffee to discuss timings, we could have a short session on the terms of reference so that we can try to align this. The basic point behind Amendments 68, 70 and 71 is a desire to allow enough time for a panel of experts very well versed in discount rates to arrive at the correct answer, without extending that time unreasonably. The uncertainty is bad for the victims of the catastrophic injuries.

Lord Beecham: My Lords, I am inclined to agree with the noble Earl about Amendments 68 and 71, but I am afraid I remain unconvinced about the five-year period as opposed to the three-year period, and find myself in the rather strange position of agreeing with the Minister. It is not as though all claimants will be five years off a review. Some will be and others will not necessarily be. There will be different timescales for individual claims, and I do not think five years is necessary to protect the integrity of the system. Some people will try to game, whatever the period. Five years is not necessarily more likely to protect against that than otherwise. Rather unusually—I am sure the noble and learned Lord will stick to the three-year period in the Bill—I will have to agree with him.

I should like to say at the end of this very long day that the House has done its usual very good job of scrutinising difficult legislation. It is a little late to try to recall everything that we have discussed and agreed, but a good job has been done today and I hope the Bill will be improved. The Minister has offered to consider a number of matters before Third Reading—and, in any case, the Bill will go somewhere else in another week's time and come back to us eventually for further consideration. There may be changes that we have to consider at that stage.

On behalf of these Benches—or what is left of us—I thank the Minister for his running of the Bill. He has been more than willing to talk to colleagues, even when some of them, like me, are rather slow on the uptake in this rather technical area. It is not one where, in practice, I had very much to do with cases at this level, as a personal injury lawyer—thank heavens. Around the House, we have heard some very important contributions from Members from all sides, and there is every prospect of further changes being made at Third Reading or in another place on the basis of the level of debate, discussion and argument that we have had. That is a signal tribute to the work of the House.

Lord Keen of Elie: I am obliged to noble Lords for their contributions, not only to this grouping but to the debate as a whole that has taken place this afternoon and evening. In speaking to Amendment 54, I shall speak also to Amendments 57, 61, 62, 67, 68, 70 and 71. I do so because, although they were not formally moved in this grouping, the noble Lord, Lord Marks, made it clear that he was addressing the amendments in this group when he spoke earlier. I appreciate his determination not to repeat himself.

As I explained in Committee, the choice between three and five years is not one of principle. The three-year period adopted in the Bill represents a compromise approach based on the responses received to the March 2017 consultation, which included a wide range of views, ranging from automatic reviews at short intervals up to a 10-year fixed maximum. We have listened carefully to the arguments this evening and in Committee from noble Lords about the potential for the gaming of the system, depending on whether there is a three-year or five-year maximum between periods.

I note the observations of the noble Lord, Lord Beecham, who brought himself to agree with the Government on this matter. Tempted as I am to move away from the Government's position in light of that, I maintain that, overall, it would be appropriate for us to look to three years. But there is no clear-cut case, and I am perfectly content to speak again to noble Lords before Third Reading if they wish to make further representations to the Government with regard to the period. So I do not close the door on that, but our position is that three years would be appropriate, and we would have to be persuaded by something that might be termed "new evidence" before we would consider moving away from that position. However, as I say, the door is open.

Amendment 67 largely replicates the provisions already in the Bill for the conduct of a review, but applies them only to the second and subsequent reviews,

in light of Amendments 65 and 66. But Amendment 67 in isolation makes a relatively small number of changes to the procedure for the conduct of the second and subsequent reviews. First, it adopts the language of advice rather than response to describe the panel's reply to the Lord Chancellor. Secondly, it makes clear that it is not just the question of whether the rate is to be changed but what the new rate is to be that is subject to the provisions for determining the review in paragraph 3 of the new Schedule A1—and that, in reaching these decisions, the Lord Chancellor should have regard to the advice from the panel. Finally, that amendment would introduce a requirement that the Lord Chancellor will consult the panel within 10 days of the start of the 180-day period for the completion of the review. This is new, but noble Lords' proposals for the first review contain a similar provision, albeit with a 25-day period, and we are conscious of that.

10.45 pm

I think that everyone appreciates the desire to ensure that reviews are conducted promptly, and the Lord Chancellor would have every interest in starting the work of the panel as soon as is practicable, as delay would only reduce the time available for the Lord Chancellor to consider the panel's advice when it comes and to decide the outcome of the review. If there is a reason for a delay, it is likely to be a good one, and imposing a short time deadline is likely to be unhelpful to the overall good conduct of the review: that is our concern. I agree, of course, that the Lord Chancellor must have regard to the advice of the panel and that the Lord Chancellor's decision on what the rate should be is subject to the provisions in paragraph 3. These are clearly the intention of the legislation, and we do not consider that further clarification is needed. These time periods are maxima, and nobody is suggesting, I hope, that the Lord Chancellor will hold out to the end of each of these periods. I hope that, in the light of that, noble Lords will not press their amendments.

Amendments 68 and 71 from the noble Earl, Lord Kinnoull, repeat amendments tabled by the noble Earl that were considered in Committee. In effect, they would reduce the maximum time period for the completion of a review of the rate initiated by the Lord Chancellor from 180 days to 120 days. Amendment 70 repeats an amendment discussed in Committee which would reduce the maximum time available to the expert panel to deliver its response to the Lord Chancellor's consultation from 90 days to 75 days. That would apply to all reviews. Again, I believe that we are all agreed that reviews of the rate must be carried out properly, with due consideration to the relevant factors and without avoidable delay. The question is how long we should allow the people involved in the review to carry out their statutory responsibilities, whatever the circumstances at the time of the particular review. We, who do not have to fulfil these obligations in person, should take some care as to the additional burdens that we impose on those who do.

The 180-day period was proposed in light of experience under the present law. Setting the discount rate is not an easy task and will probably be even less so under the evidence-based approach now proposed than under the current approach, which is based largely on the yields of index-linked gilts. We therefore consider that those time periods have to be approached with care. The Government's intention is that there should be a review of the rate that should be completed in a reasonable time. We consider that the proposed periods are maximum periods, which set a longstop. It would be reasonable and sensible to err, if at all, on the side of caution. Therefore, while I share the noble Earl's determination that the reviews should be completed as quickly as is reasonably practicable, I hope that, in light of these reasons, he will consider not pressing his amendments.

I add that I am open to further discussion on the question of time limits; I have already engaged in some discussion on this with some of your Lordships and would be prepared to do so again before Third Reading if there is an element of fine-tuning to be carried out. However, I simply emphasise that these are maxima—which, clearly, should be borne in mind when we approach this matter. In light of that, I invite my noble friend to withdraw his amendment.

Lord Faulks: My Lords, I am grateful to the Minister for his response to my amendment, to the other amendments in this group and to all noble Lords who have spoken on this group.

I am sorry that I have not been able to persuade the noble Lord, Lord Beecham, of the wisdom of this amendment—nor, it appears, the Minister, or his predecessor who answered this in Committee. I echo what the noble Lord, Lord Beecham, said about the quality of the scrutiny that the Bill has received around the House. However, I am a little disappointed at the level of the response to this amendment. I have not yet heard any reasons why it should be three years rather than five years; I have heard that it is preferred, but not why. The submission that I have made consistently in debates on the Bill is that gaming is going on—I do not think that anybody doubts that at the moment. I accept the point made by the Minister that five years is the outer limit and that it can come earlier than that. The fact is that when, quite rightly, a "must" obligation is inserted in the Bill and there must be a review every three years, it means that in the year leading up to the review people will inevitably be guessing and manoeuvring to do that. That will happen less often if the period is five years. It is a simple but powerful point and, since we are on the whole determined to try to encourage the settlement of cases and as much certainty as possible, this seems to be desirable.

My noble and learned friend has very helpfully said that his door is open, as indeed it has been throughout the passage of the Bill, and I pay tribute to him for his engagement generally. I suggested in Committee that I would try to bring forward some evidence to convince the Government, but I am not sure what more evidence I can give. Inevitably it is hearsay evidence, although we now also have the evidence of the noble Earl, Lord Kinnoull, but I will not give up. Given that my noble and learned friend has left that door open, I will continue to try to assemble better arguments or more evidence to support this amendment. In the meantime, I beg leave to withdraw.

Amendment 54 withdrawn.

Amendments 55 to 63 not moved.

Amendments 64 to 66

Moved by ***Lord Sharkey***

64: Clause 8, page 8, line 31, leave out “2” and insert “1A or 2 (as the case may be)”

65: Clause 8, page 8, line 31, at end insert—

“Conducting the first review

1A_(1) This paragraph applies when the Lord Chancellor is required by paragraph 1(2) to conduct a review of the rate of return.

(2) The Lord Chancellor must review the rate of return and determine whether it should be—

(a) changed to a different rate, or

(b) kept unchanged.

(3) The Lord Chancellor must conduct that review and make that determination within the 140 day review period.

(4) In conducting the review, the Lord Chancellor must consult—

(a) the Government Actuary, and

(b) the Treasury.

(5) The consultation of the Government Actuary must start within the period of 20 days beginning with the day on which the 140 day review period starts.

(6) The Government Actuary must respond to the consultation within the period of 80 days beginning with the day on which the Government Actuary’s response to the consultation is requested.

(7) The exercise of the power of the Lord Chancellor under this paragraph to determine whether the rate of return should be changed or kept unchanged is subject to paragraph 3.

(8) When deciding what response to give to the Lord Chancellor under this paragraph, the Government Actuary and the Treasury must take into account the duties imposed on the Lord Chancellor by paragraph 3.

(9) During any period when the office of Government Actuary is vacant, a reference in this paragraph to the Government Actuary is to be read as a reference to the Deputy Government Actuary.

(10) In this paragraph “140 day review period” means the period of 140 days beginning with the day which the Lord Chancellor decides (under paragraph 1) should be the day on which the review is to start.”

66: Clause 8, page 8, line 32, leave out from beginning to “to” in line 34 and insert—

“Conducting later reviews

2 (1) This paragraph applies whenever the Lord Chancellor is required by paragraph 1(3)”

Amendments 64 to 66 agreed.

Amendments 67 to 71 not moved.

Amendment 72

Moved by ***Lord Sharkey***

72: Clause 8, page 9, line 18, after “paragraph” insert “1A or”

Amendment 72 agreed.

Amendments 73 and 73A not moved.

Amendment 74

Moved by ***Lord Sharkey***

74: Clause 8, page 10, line 20, leave out from “information” to end of line 22 and insert “as the Lord Chancellor thinks appropriate about—

(i) the response of the expert panel established for the review, or

(ii) in the case of a review required by paragraph 1(2), the response of the Government Actuary or the Deputy Government Actuary (as the case may be).”

Amendment 74 agreed.

Amendments 75 to 77 not moved.

Amendment 78

Moved by ***Lord Sharkey***

78: Clause 8, page 10, line 24, after “return” insert “required by paragraph 1(3)”

Amendment 78 agreed.

Amendments 79 to 86 not moved.

Amendment 87

Moved by ***Lord Sharkey***

87: Clause 8, page 12, line 6, after “paragraph” insert “1A or”

Amendment 87 agreed.

Amendments 88 and 89 not moved.

Clause 11: Commencement

Amendment 90 not moved.

House adjourned at 10.55 pm.

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