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PARLIAMENTARY DEBATES
(HANSARD)

# HOUSE OF LORDS
## OFFICIAL REPORT

*ORDER OF BUSINESS*

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

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

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# House of Lords

*Wednesday 27 June 2018*

*3 pm*

*Prayers—read by the Lord Bishop of Peterborough.*

## Anti-terrorism: Hate Speech

*Question*

*3.06 pm*

*Asked by* ***Lord Pearson of Rannoch***

To ask Her Majesty's Government whether, in pursuit of their anti-terrorism strategy, they will require preaching in mosques and teaching in madrassas in England and Wales to be monitored for hate speech against non-Muslims.

**The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con):** My Lords, it is just a year since the Finsbury Park terror attack on the mosque, and I am reminded how the Muslim community acted then—with dignity, determination and compassion—as no doubt the noble Lord is also so reminded. Our Government are clear on our strong objective to tackle hate crime. Free speech and freedom of belief are fundamental principles of our society. The Government have no plans to require monitoring of preaching in mosques or in any other faith institution.

**Lord Pearson of Rannoch (UKIP):** My Lords, I am grateful to the noble Lord for that reply, but I fear that it underestimates the problem because the Government must know that hatred of us kuffar is central to radical Islam, that it is being taught in our mosques and madrassas, and that their own Behavioural Insights Team has said that their present policies are failing. Should not the Government get real by requiring all such teaching to be in English, as soon as possible, and by insisting on far greater collaboration from our peaceful Muslim friends in the meantime? After all, they know what is going on. And will the Government please stop using the word "Islamophobia", because it is surely reasonable and not at all phobic to fear the world's most violent ideology, from which indeed most hate speech now comes?

**Lord Bourne of Aberystwyth:** My Lords, first, the Government are committed to tackling Islamophobia. Secondly, perhaps I could tell the noble Lord of two recent visits I have made in relation to faith institutions. One was to a mosque in Manchester: an excellent mosque in Gorton, where Jews and Christians were welcomed for a great iftar. It was a true expression of British Muslim activity. Similarly, the previous day I visited the Manchester Islamic High School for Girls, where the opening words from the headmistress were on how proud she was to be British—but she was also proud to be Muslim.

**Baroness Warsi (Con):** My Lords, I do not like to read, but I shall be really careful how I phrase this with reference to the original Question. Could I ask Her Majesty's Government whether, in pursuit of their antiterrorism strategy, they will require preaching in the form of Oral Questions and debate in your Lordships' House to be monitored for hate speech and Islamophobia against Muslims? Does the Minister agree that Tommy Robinson, who has, to much disgust, been hosted in your Lordships' House for tea and lunch but is now serving time in, I believe, Her Majesty's Prison Hull, is now in a more appropriate place for someone who thinks, speaks, preaches and conducts himself as he does?

**Lord Bourne of Aberystwyth:** My Lords, my noble friend makes some powerful points, and I pay tribute to what she does in this regard. First, I agree with her about the importance of people in this House exercising discretion—of course, within the bounds of free speech—about what they say. Secondly, I am aware that Tommy Robinson is in Her Majesty's Prison Hull, and I was aware that he was hosted here recently. I was recently in Hull myself, not on prison visits but on faith visits.

**Lord Beecham (Lab):** My Lords, the Labour Party has been criticised—rightly, as it has now acknowledged—for failing to respond promptly to claims of anti-Semitism in its ranks. Recently, we have learned of a number of cases of Islamophobia in the Conservative Party, and today it has emerged that, four weeks ago, the Muslim Council of Britain wrote to Brandon Lewis, the party chairman, requesting an inquiry, to which it received no reply, prompting it to write again yesterday, saying:

"We cannot have an approach where you are hoping that the issue would magically go away so that (you) could avoid a bruising inquiry into anti-Muslim prejudice".

Will the Minister—held, as he is, in the highest regard in this House—use his best endeavours to ensure that his party and the Government respond constructively to the concern expressed on behalf of our Muslim fellow citizens?

**Lord Bourne of Aberystwyth:** My Lords, I first thank the noble Lord for his kind words and what he said about anti-Semitism, which needs tackling in all political parties, as does Islamophobia. I fully accept that. He will probably be aware that the Prime Minister answered a question on this in PMQs today and made clear our determination to deal with the issue. I cannot give him an update on a letter that was sent yesterday—that will probably take a bit longer—but there have been suspensions and expulsions and, wherever there is evidence of Islamophobia in our party, it will be dealt with severely, often with expulsion. I hope that we can look to other political parties to do the same with respect to all religions—this is something that affects all of us. I share the noble Lord's aspiration that this be properly dealt with.

**Baroness Pinnock (LD):** My Lords—

**Baroness Afshar (CB):** My Lords—

**Lord Taylor of Holbeach (Con):** My Lords, I think that we should hear from the Lib Dems and then there will be time for the Cross-Benchers.

**Baroness Pinnock:** Does the Minister agree that an attempt to stigmatise Muslims, as the original Question does, is unworthy of any Member of your Lordships' House, and that such language aids those who oppose cohesive communities and encourages hate crimes and attacks on both mosques and individual Muslims?

**Lord Bourne of Aberystwyth:** My Lords, I very much agree with the noble Baroness on that issue. She will know, as I do, that the great mass of people in this country want the cohesive communities that, for the most part, we have. As I go around the country, I see that. That is the norm, but we need to ensure that it is universally the case, which, sadly, it is not yet, across all our communities.

**Baroness Afshar:** My Lords, as a teacher of Islamic law, I should like to make a correction. Islam accepts all religions that preceded it—all religions of the book are accepted and respected. This is a Koranic teaching; therefore, there is no time or respect for anyone who demonises any religion, and that should include Islam as well.

**Lord Bourne of Aberystwyth:** My Lords, I am most grateful to the noble Baroness, who speaks with great authority on the issue. I am sure that the whole House will take note. As I said, as I go around the country and visit mosques and other religious institutions, evidence of what is happening up and down Britain is that it is exactly as she said.

**The Archbishop of York:** My Lords, does the Minister agree that pursuing anti-terrorism is the business not just of the Government but of all citizens of the United Kingdom? Therefore, if noble Lords do not mind an African saying, when two elephants fight, or make love, the grass gets hurt—what will not work is either side of the House thinking that it is doing a better job than the other. All of us are involved in trying to resist terrorism; it does not matter where it comes from. It is the duty of every citizen to pursue that particular reality. I lived in Uganda at one time when Idi Amin could just pick on anybody; it did not matter who you were or what you believed. What is critical, when we as citizens of the nation do not assist in the whole question of overcoming terrorism, is that it would be a mistake to think that it is purely an Islamic question.

**Lord Bourne of Aberystwyth:** I am most grateful to the most reverend Primate for his words. It is certainly something for all of us and all religions, as he has said. It is reflected in the integration Green Paper, on which we have been consulting. I was recently in Peterborough, which is one of our areas trailblazing integration, to see the good work being done there across all religions.

## Grammar Schools

*Question*

*3.16 pm*

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

To ask Her Majesty's Government what assessment they have made of the findings of Professor John Jerrim in his paper *The association between attending a grammar school and children's socio-emotional outcomes,* published in May, that grammar schools do not promote social mobility; and what continuing benefit they anticipate from the increased funding recently announced for grammar schools.

**The Parliamentary Under-Secretary of State, Department for Education (Lord Agnew of Oulton) (Con):** My Lords, the paper attempts to explore emotional outcomes of selective schooling and finds little difference between grammar school pupils and their peers at 14 in terms of well-being. It draws no conclusion about social mobility. Other research indicates that a grammar school education significantly reduces the attainment gap for disadvantaged pupils. It is a condition of approval under the selective schools expansion fund that schools seek to admit more disadvantaged pupils.

**Lord Bassam of Brighton (Lab):** My Lords, the £50 million extra for selective schools comes at a time when cash-strapped schools are asking parents for donations to make up funding shortfalls. Given that the noble Lord conceded in a written reply to me that there were no set numbers of places reserved for pupils from disadvantaged backgrounds, can he explain how the funding will benefit disadvantaged students? Does he also agree that, since the money provides just 4,000 extra places, it would be better spent reversing cuts to teaching assistant posts in primary schools, where research shows that the money would make a difference to social mobility?

**Lord Agnew of Oulton:** My Lords, the amount of capital allocated to the grammar school expansion fund is, as the noble Lord says, £50 million against the context of over £1 billion allocated to the mainstream state system, so the sums are not big. However, we should discriminate between capital and revenue funding. While there is some pressure on schools on revenue funding, they receive 6.5% more per pupil in real terms than under the highest level of Tony Blair's regime.

**The Earl of Listowel (CB):** My Lords, I welcome the additional funding that the Government are putting into pupil premium and pupil premium plus, to assist disadvantaged children. Is the Minister keeping his eyes front and foremost on the need to address the deficits in teachers, particularly in mathematics? We need the best teachers to help our most disadvantaged children to do the best they can. Does he agree?

**Lord Agnew of Oulton:** My Lords, it is a top priority of the Government to ensure that we have enough good maths teachers. Indeed, the noble Lord may be aware that we have now opened two specialist maths schools linked to universities, and are about to announce another one. They are producing some of the best mathematicians for the future generation, and I hope that they will go into teaching themselves.

**Lord Lexden (Con):** Does my noble friend agree that wide public attention could usefully be given to the Government's recent memorandum of understanding with the Independent Schools Council? It stresses

that its own bursary support, which amounted to nearly £400 million last year, should be targeted on families,

"on the lowest incomes as well as looked after children, to increase opportunities for these children and to support social mobility".

**Lord Agnew of Oulton:** My Lords, the noble Lord makes a very good point. We have recently signed this memorandum of understanding with the Independent Schools Council, which is reflective of its changing attitude to try to help more children from disadvantaged backgrounds into its schools. But it is also relevant—and I thank the noble Lord for his prompt—that we have just signed a memorandum of understanding with the Grammar School Heads Association. This is all about sharing the aims of seeing more pupils from disadvantaged backgrounds sitting the entrance test, applying to grammar schools and being admitted. That is already happening, and more than 90 of our 160 grammar schools are already prioritising pupil-premium children where they can.

**Lord Storey (LD):** My Lords, how on earth can grammar schools promote social mobility when, on the Government's own figures, only 2.6% of pupils are on free school meals? By extending grammar schools, all that will happen is that you will take pupils from successful academies and maintained schools and make the situation even worse.

**Lord Agnew of Oulton:** My Lords, first, grammar schools make up only 5% of the secondary cohort in the country, so I do not believe that they can have a very detrimental effect on mainstream secondary schools. Also, for those children from disadvantaged backgrounds who are admitted to grammar schools, the impact can be substantial. The Education Policy Institute recently found that disadvantaged children attending grammar schools see the attainment gap significantly reduced from 7 percentage points in non-selective to 1.7% in their own schools. The aim is to get more disadvantaged children into grammar schools, and we have some great case studies where that is already happening. King Edward VI in Birmingham has an open-doors campaign, and in January last year had 191 children eligible for pupil premium, an increase on the previous year, which was 123. It is now up to nearly 12% of its cohort with pupil premium.

**Lord Lea of Crondall (Lab):** My Lords, despite what the noble Lord, Lord Lexden, said about public schools, does the Minister not agree, on the record, that the position of public schools with regard to social mobility is not at all ambiguous? It is totally unambiguous.

**Lord Agnew of Oulton:** My Lords, I am not entirely sure of the noble Lord's question, but I reassure him that I have had a number of conversations with the chairman of the Independent Schools Council, which is committed to opening access for disadvantaged pupils. My noble friend behind me made the point that those schools are shifting the bursaries from scholarships, which are non-means-tested, to bursaries, and the number of means-tested bursaries has increased substantially over the last five years.

**Lord Hussain (LD):** My Lords, according to the BBC, 68,000 new teachers need to be recruited from the ethnic minorities to reflect the population. What are the Government doing to encourage teachers from the ethnic minorities?

**Lord Agnew of Oulton:** My Lords, we encourage applicants from all parts of this country.

## Turkey: Prisoners

*Question*

*3.22 pm*

*Asked by* ***Lord Balfe***

To ask Her Majesty's Government what impact they anticipate the outcome of the Turkish general election on 24 June will have on the government of Turkey's treatment of those in prison, and in particular on its alignment with the principles laid down by the European Court of Human Rights.

**The Minister of State, Foreign and Commonwealth Office (Lord Ahmad of Wimbledon) (Con):** My Lords, following the re-election of President Erdoğan and the majority control of Parliament by the ruling Justice and Development Party on 24 June, we expect Turkey to safeguard the human rights of all its citizens, including those in prison, in line with its international human rights obligations. We urge Turkey to make progress in these areas and to lift the state of emergency, and we stand ready to help Turkey in any way we can.

**Lord Balfe (Con):** My Lords, I thank the Minister for his answer. The European Court of Human Rights is of course a part of the Council of Europe, which this week has adopted a report showing that there are still thousands of prisoners in Turkey some two years after the coup. What is the Foreign Office doing in relation to individual representations? I have tabled a number of Questions about individuals, and I have been fobbed off with answers about general principles. Do we still make representations about individuals and, secondly, do we work in political co-operation with our EU partners? What are we going to do when we leave the EU? Will we be on our own, or will we still seek to work with them?

**Lord Ahmad of Wimbledon:** My noble friend raises three questions. First, he asked about the representations that the United Kingdom Government make. I assure him that, most recently when the Prime Minister met the President, we continued to raise various cases not only in general terms but in specific terms. He used the phrase "fobbed off", which is not a phrase that I am familiar with in the context of the Foreign Office. I assure him that we make representations to the highest level consistently and on individual cases. As for working with our European partners, we continue to—and, as my noble friend knows, we strongly support the important monitoring work of the Council of Europe.

**Lord Collins of Highbury (Lab):** My Lords, the fact is that, since the coup, 160,000 people have been arrested under the state of emergency and 152,000 civil servants have lost their jobs. The situation is getting worse and, while I note what the Minister is saying about representations—I welcome those made by the Prime Minister—what direct steps are the Government taking to ensure that the state of emergency is lifted as soon as possible?

**Lord Ahmad of Wimbledon:** As with any bilateral relation, as the noble Lord is aware, we have strengthened co-operation over a range of areas. We co-operate with Turkey on aviation security and counterterrorism, and those important relationships are valued both by us and by Turkey. It is the nature and strength of that relationship that allows us to be very candid, open and honest in our exchanges on human rights issues, including the detentions the noble Lord has referred to. We continually raise those concerns generally and, as I said to my noble friend, specifically.

**Baroness Hussein-Ece (LD):** My Lords, I acknowledge the remarkable 87% turnout at the elections at the weekend and President Erdoğan's victory, with 53% of the vote. However, will the Minister outline how Her Majesty's Government can influence President Erdoğan—now that he has the extra executive powers, of course—on the question of returning to the principles of human rights and freedom of expression, which are the cornerstone of a mature democracy?

**Lord Ahmad of Wimbledon:** First, we of course recognise that democracy is an important part of any continuing and sustaining Government. We congratulate the President on his re-election, but in his speech he also acknowledged that there was a strong showing for opposition parties in the parliamentary returns, including the Kurdish minority party. We were encouraged by his acknowledging that he has to work more extensively in the interests of all Turkish citizens. As a Human Rights Minister, I can give the noble Baroness the assurance that, through international fora but, most importantly, bilaterally, we continue to press for the lifting of the state of emergency and for the human rights of all citizens of all backgrounds in Turkey.

## National Probation Service

*Question*

*3.27 pm*

*Asked by* ***Lord Beecham***

To ask Her Majesty's Government what plans they have to review the effectiveness of the National Probation Service.

**The Advocate-General for Scotland (Lord Keen of Elie) (Con):** My Lords, the National Probation Service supervises the highest-risk offenders. The Chief Inspector of Probation has consistently found the overall performance of the National Probation Service to be good. The Ministry of Justice has no existing plans to review the effectiveness of the NPS.

**Lord Beecham (Lab):** My Lords, the Justice Committee's report is a damning indictment of the coalition Government's so-called transformation of the probation system, with its split between the probation service and community rehabilitation companies, and with privatisation involving the usual suspects such as Serco. The committee is,

"unconvinced that … the … model can ever deliver an effective or viable probation service",

and asserts that,

"Staff morale is at an 'all-time low'".

CRC performance has been "disappointing", and the voluntary sector is "less involved" than before. The committee also criticises the Ministry of Justice's ability to let contracts. One shocking revelation by the Chief Inspector of Probation was that 40% of offenders are supervised merely by six-weekly telephone calls. She agrees that the system is "fundamentally flawed". Do the Government intend at all to address these problems? And can the Minister reassure the House that the chairman of the Justice Committee, Sir Bob Neill, will not be dispatched to Afghanistan when these matters are debated in the Commons?

**Lord Keen of Elie:** My Lords, I am not aware of any Member of the other place having been dispatched anywhere. With regard to the Justice Select Committee report, we are of course aware of its terms, and we are taking action to consider the terms in which it has reported. As the committee observed, it is important to understand the effect that probation can have on those leaving prison. It is often a cross-government and cross-departmental issue; for example, it involves issues such as homelessness, as well as other through-the-gate services. With regard to the situation of the CRCs, there are some instances in which they are working effectively with the National Probation Service, but we accept that there have been challenges. It is clear to us that the CRCs' services need to be improved, and that is being addressed at the present time.

**Lord Trefgarne (Con):** My Lords, can my noble and learned friend say how far the probation service has got with reviewing the cases of prisoners who are serving indeterminate sentences, many of whom ought now to be released?

**Lord Keen of Elie:** My Lords, we continue to make advances in dealing with IPP prisoners, and the numbers continue to reduce. However, I am not in a position to say what the present number of IPP prisoners is in detention. If my noble friend wishes to see that figure, I will arrange to write to him and will place a copy of the letter in the Library.

**Lord Marks of Henley-on-Thames (LD):** My Lords, the Question of the noble Lord, Lord Beecham, is about the remaining National Probation Service, but the Justice Committee severely criticised the private CRCs for failure through poor contracting, lack of resources and a half-baked payment-by-results system that does not incentivise good practice. So through-the-gate supervision has produced only a poorly functioning signposting service, and voluntary sector involvement

in rehabilitation, which we were promised would increase, has reduced instead. Will the Government now commit to implementing the Justice Committee's recommendations, and there are many of them, and take a long, hard look at reversing this failed part-privatisation?

**Lord Keen of Elie:** My Lords, the Justice Select Committee observes that the model that was introduced by the coalition Government has been disappointing in a number of respects, and we will of course address the terms of the Justice Select Committee report.

**Lord Laming (CB):** My Lords, would the Minister agree that we have a very high prison population, and one of the ways of reducing part of the population is to provide the courts with an effective probation service? Can he say how this report will be implemented to make sure that the courts have every confidence in the probation service?

**Lord Keen of Elie:** My Lords, we are conscious of the terms of the Justice Select Committee report which was issued last Friday, and we will give considerable consideration to its detailed terms. We agree that community sentences are often more effective than short prison sentences, particularly in reducing reoffending, and we certainly intend to look at that area in more detail.

**The Earl of Listowel (CB):** My Lords, as the Minister will know, local authorities have a duty for care leavers up to the age of 25 to provide support with education, training and housing. As he looks at the probation service, will he ensure that there is more connection with local authorities so that they can discharge that duty properly?

**Lord Keen of Elie:** My Lords, I agree with the observations of the noble Earl that there is a need to improve cross-government approaches to the needs and requirements of those leaving our prisons.

**Lord German (LD):** My Lords, whichever way you look at the report of Her Majesty's Chief Inspector of Probation on the community rehabilitation companies, it is clear that the contracting mechanism has led to people using a tick-box mechanism instead of proper rehabilitation. What steps are the Government taking to alter that contracting system, which has clearly failed to do the job for which they set out that ambition, and is it really better to have a much different system now in place?

**Lord Keen of Elie:** My Lords, I acknowledge the points made by the noble Lord. We are at present in the course of negotiations with respect to the CRC contracts.

**Lord Rooker (Lab):** Further to the question from the noble Lord, Lord Laming, what is the current prison population?

**Lord Keen of Elie:** I understand that the present prison population is in the vicinity of 93,000.

## Crime (Overseas Production Orders) Bill [HL]

*First Reading*

*3.34 pm*

*A Bill to make provision about overseas production orders.*

*The Bill was introduced by Baroness Williams of Trafford, read a first time and ordered to be printed.*

## Privately Financed Prisons

*Statement*

*3.34 pm*

**The Advocate-General for Scotland (Lord Keen of Elie) (Con):** My Lords, with the leave of the House, I would like to repeat the Answer to an Urgent Question given by my honourable friend the Minister for Prisons and Probation in the other place earlier today. The Statement is as follows:

"Mr Speaker, yesterday I attended the Justice Select Committee hearing on prison populations and confirmed that, in line with the 2016 White Paper and the 2017 manifesto, we remain committed to delivering 10,000 new prison places in order to replace the places in prisons which at the moment often have old, unsuitable and expensive accommodation.

During the committee testimony, I confirmed two things. First, we will be proceeding at Wellingborough with a publicly capital-financed prison, with work to begin at the end of this year or the beginning of next year, subject to the usual test of affordability and planning. I also confirmed that at the Glen Parva site we will be continuing with the current demolition and proceeding, again subject to the normal tests of affordability and planning, to a competition for a private finance initiative for the construction of the Glen Parva prison. We will then continue to push ahead with the four subsequent prisons, bringing us to the total of 10,000 places.

In addition, we are investing £16 million in further investment and repairs in the existing estate. All of this is absolutely essential because, as the shadow Lord Chancellor is very aware, much of our estate remains old, expensive and unsuitable for prisoners, and we must move to regenerate it".

My Lords, that concludes the Statement. But before I sit down, perhaps I may come back to the question posed by the noble Lord, Lord Rooker. I gave the figure of 93,000; it should have been 83,000.

**Lord Rooker (Lab):** It was in the newspapers.

**Lord Keen of Elie:** I am very pleased that the noble Lord knew it was 83,000, and now I can reassure him that I, too, know it is 83,000 and not 93,000.

**Baroness Vere of Norbiton (Con):** My Lords, I respectfully remind noble Lords that this is an opportunity to question the Minister. Therefore, questions rather than long statements would be appreciated.

*3.37 pm*

**Lord Beecham (Lab):** My Lords, of course I will follow the noble Baroness's advice—up to a point. We have one of the highest incarceration rates in Europe, exceeded only by those in some of the less advanced countries in the east of Europe. Yesterday, the Prisons Minister, Rory Stewart, said that prison numbers would rise from the current 83,000 to 93,000—the figure inadvertently quoted by the Minister—by 2022. The state of our prisons is a national disgrace as the Government struggle to recruit and retain staff, yet the Minister in the other place feebly states that he would like the prison population to go down but that it is not very likely to happen because he is not sure that there is a will among the people or Parliament to take measures to reduce the population. Given this craven approach to a critically serious problem, should not that Minister resign?

**Lord Keen of Elie:** My Lords, there is nothing craven about the approach that has been taken to the very real and challenging issues relating to our prison population. We are concerned that we should look more carefully at alternative forms of sentence, such as community orders, that would in themselves replace the requirement for sentences particularly of less than 12 months' imprisonment. That is a matter for consideration. In addition, I remind the noble Lord that we are in the course of taking active steps to provide not only additional but new and refurbished prison accommodation in order to improve the standard of our prisons across England and Wales.

**Lord Marks of Henley-on-Thames (LD):** My Lords, new, modern prison places are sorely needed, but do not the failed Carillion maintenance contract, the CRC contracts that we have just discussed and other MoJ contracts show how far the ministry needs to take a serious look at its contracting procedures, just as Rory Stewart accepted when he was before the Justice Committee yesterday and assess tenders in a realistic and much more rigorous way? How does the department propose to improve its contracting procedures for these new prisons? Furthermore, Mr Gauke's effort to get prisoner numbers down by cutting the number of short sentences, saving money in the process, is welcome. What proposals do the Government have to ensure that their prison building programme seeks to combine cutting numbers with transforming prisons, in both public and private sectors, to focus on rehabilitation and training rather than just containment and punishment?

**Lord Keen of Elie:** My Lords, the model of having both private and public custodial services and privately funded and publicly funded prisons has been in place for many years and has distinct advantages. On the maintenance of existing prisons, we have agreed an additional £16 million to start to improve conditions across the estate and not just to address the provision of new prison accommodation. On sentencing, as I indicated earlier, we are concerned to see a development with regard to community and non-custodial sentences. On the matter of contracts, we are pursuing and putting in place robust means of ensuring that contracts are analysed correctly and not simply on the basis of the lowest tender.

**Viscount Hailsham (Con):** My Lords, I welcome what my noble friend said about contracts. Will he ensure that contracts make explicit and enforceable provision for useful out-of-cell activities?

**Lord Keen of Elie:** My Lords, individual terms of contract make provision for appropriate facilities to be made available to those prisoners who are in private facilities. There is a system of management oversight by the Ministry with regard to the discharge of those obligations by private providers.

**The Archbishop of York:** My Lords, I began my ministry as a prison chaplain in a young offender institution, Latchmere House, where every day some 60 to 70 young men arrived. As a chaplain you had to see them, but sometimes you did not succeed in seeing them because the place was overcrowded. In those days, the prisons were put there by Her Majesty and run with taxpayers' money. Is the Minister confident that this private finance partnership will not create the same indebtedness from which the National Health Service is suffering? We owe a lot of money to private companies for our new hospitals. Are we walking into the same trap?

**Lord Keen of Elie:** I thank the most reverend Primate for his question. Competition for custodial services in England and Wales is well established and has been in place since the early 1990s. On the funding of new prison facilities, there are now 14 privately operated prisons in England and Wales. Some of them have been funded by PFI, but not all. We consider that the mix of public and private financing has worked and does work.

**Baroness Corston (Lab):** My Lords, I would like to place on record my thanks to the Lord Chancellor and the Secretary of State for giving me a private briefing yesterday on what he proposes for the women's prison estate. His announcement that there will be five women's centres rather than five women's prisons was very welcome. Will the Minister confirm that these, too, are to be privately run—and, if so, whether they could be run by charitable or not-for-profit organisations?

**Lord Keen of Elie:** My Lords, we are committed to working with local and national partners to develop the residential women's centres pilot on at least five sites, as indicated by my right honourable friend the Lord Chancellor. I understand that these residential women's centres pilots will be publicly funded.

**Baroness Redfern (Con):** My Lords, with the abandonment of the five community prisons for women in England and Wales, the trial residential centres to help offenders with issues of finding work and drug rehabilitation are welcome. Are the proposed residential centres for women all to be privately financed?

**Lord Keen of Elie:** My Lords, as I hope I indicated earlier, the intention is that the five residential centres should be publicly financed.

**Lord Davies of Stamford (Lab):** My Lords, is it not the case that you can achieve considerable savings in a prison system if prisons are designed and built from the start with a view to the maximally efficient use of staff, bearing in mind the need to achieve targeted levels of out-of-cell time and community time for inmates? Is it not the case that you do not get those savings unless the same organisation, be it private or public sector, is responsible for managing the prison—at least for the payout period for the necessary financing—as well as for the design and construction? Otherwise, there will be no incentive to build a prison to maximally efficient levels.

**Lord Keen of Elie:** My Lords, I do not accept that there is such a necessary link between the construction of the infrastructure and the operation of the prison. Nevertheless, we are committed to replacing our present prison estate with modern facilities to achieve the very outcome referred to by the noble Lord.

**Lord Faulks (Con):** My Lords, I welcome the various initiatives taken by the Government in relation to the prison population—one of which was mentioned by the noble Baroness, Lady Corston—and the reduction of the prison population from what it was a couple of years ago: 85,000. Does the Minister agree that it is important when thinking about building 10,000 prison places not to become too ideological? HM Inspectorate of Prisons has found examples of good practice in both the private and public sectors. As a Government, we should be looking for examples of good and satisfactory proposals from either source.

**Lord Keen of Elie:** My Lords, I entirely agree with my noble friend's observations. One of the reasons why we benefit from the competition between private and public provision of custodial services is that we can identify and take the best from each sector.

**Lord Cormack (Con):** My Lords, as one who has always believed that it is the state's duty to incarcerate and rehabilitate, could my noble and learned friend remind the House of the percentage breakdown between public and private prisons?

**Lord Keen of Elie:** My Lords, I do not have to hand the figures for the breakdown between the number of inmates who are subject to custodial sentence in privately run prisons as against those in the public sector. I can indicate that there are now 14 privately operated prisons—13 in England and one in Wales—which currently provide approximately 16,000 prisoner spaces. That is just under 20% of all prisoner spaces. As to the level of occupation between those spaces and the spaces in the public sector, I cannot give a precise figure.

## Civil Liability Bill [HL]

*Third Reading*

*3.47 pm*

***Clause 10: Assumed rate of return on investment of damages***

*Amendment 1*

*Moved by* ***Lord Hope of Craighead***

**1:** Clause 10, page 9, leave out lines 3 to 5

**Lord Hope of Craighead (CB):** My Lords, my amendment relates to the personal injury discount rate, which is the subject of Part 2 of the Bill. Clause 10(1) provides for new Section A1 of the Damages Act 1996. Two of its provisions are important to what I am about to say. One directs the court to apply a rate of return, as may, from time to time, be prescribed by an order made by the Lord Chancellor. The other, which I am concerned about, is new Section A1(2), which states:

> "Subsection (1) 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".

The Minister will recall that I raised this issue on Report when I moved what was then Amendment 50 on the Marshalled List. That amendment sought to tailor the wording of subsection (2) to address a problem that had been the subject—the result, I should say—of decisions in the Court of Appeal in the cases Warriner v Warriner and Warren v Northern General Hospital Trust, following the House of Lords case in Wells v Wells in 1999.

The problem that has arisen as a result of those cases in the Court of Appeal, which was expounded with some care by Lord President Carloway in his judgment in Tortolano v Ogilvie Construction Ltd in 2013, is that there is a very tight straitjacket on any use of subsection (2) in the Damages Act 1996, which is the predecessor of the provision in this Bill in cases where people seek a different rate of return from that prescribed due to the circumstances of the particular case.

Each of these three cases, the two from the Court of Appeal and the one from the Court of Sessions in Scotland, involved injuries of maximum severity—perhaps a prime example of cases where litigants would wish to have a more generous rate of return. However, in each of these cases, it was said that that could not be done on the ground that there had to be an exceptional case-specific factor before this could be achieved.

I was concerned that the provision in the Bill simply reproduces the language of the 1996 Act without any attempt to suggest that the approach the courts have mandated should be any different in this case. I was seeking a relaxation to allow a case where, if the court felt that the award was less than adequate after applying the prescribed discount rate, it could be altered to allow a better rate of return in recognition of the compensation needed to meet the loss incurred or to be incurred during the rest of the claimant's lifetime.

The noble and learned Lord may recall that in our discussion on Report, reported in *Hansard* on 12 June, he said that he wished to give further consideration to the matter I had raised so that he could come to a view on whether something might be done to tailor the wording of the provision to address what he described as "the almost complete guillotine" that is in place as a result of the two Court of Appeal decisions. As he put it, there was a balancing act to be achieved and he undertook to look at that.

It is fairly plain from the fact that there is no government amendment on this issue at Third Reading that he and his team have not been able to come up with a form of wording that would address my point without undermining the policy that underpins the scheme which this part of the Bill seeks to lay down.

[LORD HOPE OF CRAIGHEAD]
I am grateful to him and his team for meeting me to go over this point last week so that I could understand the position he has adopted, which I fully appreciate. It is a very difficult issue on which to find a form of words that would achieve what I sought to achieve. In the course of that meeting, I suggested that in view of that position it might be better to delete this subsection from the Bill altogether, which is what my amendment would do.

To elaborate a little more on the reasoning behind the amendment, the phrase which the noble and learned Lord used—"almost complete guillotine"—describes the situation very well, although in rather brutal language. I do not criticise that, because the Court of Appeal in its decision was building on what this House said in Wells v Wells in 1999. In that case, we said that the aim of the solution that we adopted in finding an appropriate discount rate was to create as much certainty as possible. Lord Steyn said that only in exceptional circumstances should a party be entitled to reopen the debate. The idea was to close down the expensive and time-consuming business of trying to present a different rate of return from that laid down by the court, the House or the Lord Chancellor.

The problem is that what such exceptional circumstances might be nobody has been able to discover in almost 20 years of the provision's existence. Any idea that they could be founded on the nature or gravity of the injuries seems to have been completely cut off by the Court of Appeal. My point is that it is very difficult to see what value, if any, can be achieved by retaining this provision if there is to be no change to its wording. It has been a dead letter for some time and it seems rather a pity to reproduce a dead letter in fresh legislation. Indeed, retaining it risks raising false hopes of achieving something that it cannot achieve—indeed, according to the Government's policy, something it ought not to be able to achieve—which is altering the discount rate in these cases. My suggestion, which I made at our meeting last week, was that it might be better to face the fact now and to delete the provision. Having made that suggestion, I thought it right to table the amendment for discussion so that the Minister could at least report to the House on the view he now takes, having had time to think about my suggestion.

It is right to draw attention to the fact that the Association of Personal Injury Lawyers has circulated a briefing among some of your Lordships in which it indicates that it opposes the amendment. As I understand its letter, that is for two reasons. One is that a court should retain the ability to apply a different discount rate, particularly in cases of injury of maximum severity. That is an example of wishful thinking in view of the decisions I referred to. It is clear that any attempt to do that in that kind of case will not succeed, which is why I am so concerned about the repetition of this amendment in the Bill.

The other reason is rather more fundamental. If I might read what the association says, it puts it this way:

"The ability for a judge to apply a different discount rate is an appropriate safeguard against any abrupt changes in the financial market. While the proposed legislation provides for regular reviews of the discount rate, a scheduled review could be too late if there is a sudden change in the market. The discount rate could be too high, and it could be years until the next review when the rate could be corrected. In the meantime, injured people will be undercompensated, and will be in fear of what happens when their money runs out".

As I understand the system that Part 2 of the Bill seeks to lay down, it is intended to have the process reviews carried out at regular intervals, with a view to having certainty between each review that the courts would be obliged to apply, subject to the provision I am concerned about. With respect, the Government have to consider very carefully whether the point the association raises is one they would be willing to accept—in other words, that it should be open ground for parties to seek to attack the prescribed discount rate between reviews because of changes in the market. We would get back to the kind of uncertain situation that we were so concerned about in Wells; we did our best in the reasoning in that case to address our seeking certainty and to have the matter addressed in only exceptional circumstances.

For what it might be worth, the wording of subsection (2) does not permit an across-the-board change to the discount rate because it talks about a different rate being taken if a party can show that it is,

"appropriate in the case in question",

which suggests that one is taking a particular case out of the generality that deserves special treatment, rather than something across the board, which is what I think the Association of Personal Injury Lawyers is addressing.

I have said enough to indicate that there are reasons for concern as to why this provision is still in the Bill, and to ask whether it should still be there and possibly whether, as the Bill proceeds through the other House, further thought might be given to its wording or its presence in the clause. I beg to move.

**Lord Mackay of Clashfern (Con):** My Lords, it is fairly plain that this phrase was used by me more than once around this time. One area in which it was used was fixed sentences in criminal cases, because there was a feeling that laying a particular sentence or assigning a particular rate tended to deprive judges of their inherent discretion.

In the two judgments referred to, the Court of Appeal indicated that it felt it was given no discretion. It was enough to get me through the difficulties that I had at that time. Therefore, whether it should remain is a question I find rather difficult. I am not keen to remove anything that gives the presiding judge in a particular case some degree of discretion. If the courts have held that such sentences do not give that, it is rather difficult. I cannot think of a better phrase; needless to say, it occupied my attention quite a lot at the time and was hotly debated. Obviously, my noble and learned friend the Minister has given the phrase consideration and I would be interested to hear what he has to say.

*4 pm*

**Lord Cromwell (CB):** My Lords, I invite the Minister to join me in wishing the noble and learned Lord, Lord Hope of Craighead, a very happy birthday today. That pleasurable duty discharged, I have to say that

I disagree with his amendment. I found very helpful his explanation of the constraints that surround it; none the less, the purpose of the clause, as the noble and learned Lord, Lord Mackay, alluded to, is surely as a safety valve for unforeseen circumstances. I accept, and said in an earlier debate, that courts have seldom, if ever, been able to exercise such a power, but we would be well advised at least to keep that option available, should any court be brave enough to do so at some point. For that reason, I feel that we should not support this amendment.

**Lord Faulks (Con):** My Lords, either there is a realistic power to vary the rate—I can see that there are some arguments in favour of that, which found favour with Mr Sumption, as he then was, when sitting in Guernsey—or it does not have any real meaning, as is the case following the decisions of the Court of Appeal. Although flexibility is desirable, if it is meaningless and if we as a legislative body decide that we are not going to overrule any decisions of the Court of Appeal, the noble and learned Lord, Lord Hope, is absolutely right about being accurate in the way that we legislate.

**Lord Beecham (Lab):** My Lords, I hesitate to take either side of this argument, given the wisdom and experience of both noble and learned Lords, who have given conflicting views. I am therefore perfectly content, for once, to allow the Minister to indicate the Government's attitude. After all, this Bill is not ending here; it is going to another place and there will be time for people with greater acumen than mine to look into the arguments advanced by the noble and learned Lord. It will be interesting to see what the Minister makes of them, but, of course, it is not the end of the day and perhaps this elevated discussion can take place with a more useful result than we are likely to see today.

**The Advocate-General for Scotland (Lord Keen of Elie) (Con):** My Lords, I am most obliged to the noble Lord, Lord Beecham, for his positive contribution to the debate, to all noble Lords and noble and learned Lords for their observations on this amendment, and to the noble and learned Lord for moving it.

From the very outset—I go back to the Law Commission's 1994 report on structured settlements—it was intended that a provision of this kind to depart from a prescribed rate should be very much the exception rather than the rule. Clearly, it recognised that it would be both expensive and time-consuming if the prescribed discount rate could regularly be the subject of challenge on the basis that there might be another more appropriate rate for any number of reasons. That goes some considerable way to explaining the position of the Court of Appeal in the case of Warriner v Warriner.

As the noble and learned Lord, Lord Hope, observed, I referred to a guillotine, but I qualified it with the words "almost complete"—this is a deficient guillotine; it is not a complete guillotine. I said that because, for example, the decision of the Inner House of the Court of Session, the appeal court in Scotland, in Tortolano v Ogilvie Construction, indicated that there may be cases in which the power to depart from the prescribed rate can be applied—but I accept that they will be wholly exceptional. In Tortolano, the court suggested that there might, for example, be a need to take account of a claimant who had to pay tax in a foreign jurisdiction, and that impacted upon the valuation of the award.

These are wholly exceptional circumstances, but the provision in Section 1(2) of the Damages Act 1996, which would be preserved by the words in subsection (2) of the proposed new Section A1, would allow for those wholly exceptional circumstances where the judiciary would be entitled to exercise an inherent discretion in order to achieve justice between the parties. It is in these circumstances that I would resist the amendment; I recognise that there may be room for taking this further, although I have been unable to identify it so far, to ensure that we can perhaps more clearly identify circumstances in which the exception would be applicable.

As the noble Lord, Lord Beecham, indicated, the Bill will be considered in the other place, and I and my officials would be content to explore further with the noble and learned Lord, Lord Hope, if he wishes to do so, whether the provision might be improved in some way. However, I have difficulty with that because I am concerned that if we intrude too much into this quite exceptional discretion, there is a risk of encouraging unnecessary and expensive litigation over the appropriate rate in individual cases.

On that basis, and recognising the point that the noble and learned Lord makes, I invite him to withdraw the amendment.

**Lord Hope of Craighead:** My Lords, I am very grateful to all those who have taken part in this short debate. I am grateful in particular to the noble Lord, Lord Beecham, for his suggestion that this might be considered a little further when the Bill moves to the other place. It is a very difficult issue and, as the noble and learned Lord, Lord Mackay of Clashfern, has indicated, it is very hard to find another form of words which can address it.

I am concerned about putting into the Bill something which raises false hopes. The circular from the Association of Personal Injury Lawyers indicates that it was trying to find something in the wording which is not really what the Minister was talking about. We are not dealing with cases of exceptional injury within the domestic system, which is what the association was talking about. I take it from the Minister's reply that he would not encourage people to have a go at changing the discount rate between reviews, which would be contrary to the idea of laying down certain rules for application while the reviews subsist.

It is a very tight issue as to whether there is a point in this provision at all. But having heard what has been said, and with particular thanks to the Minister for his reply today and for the way in which he has listened to me on two occasions, I beg leave to withdraw the amendment.

*Amendment 1 withdrawn.*

*Amendment 2*

*Moved by* ***Lord Faulks***

**2:** Clause 10, page 9, line 28, leave out "3" and insert "5"

**Lord Faulks:** My Lords, I return to a group of amendments concerned with the regularity of the review of the discount rate. I raised this matter at Second Reading, in Committee and on Report, so I will not weary the House by going over the arguments again. Suffice it to say that I entirely agree with what the Bill does in providing for the obligation to have regular reviews at a certain juncture, although the Lord Chancellor has the right to have an earlier review if necessary. My argument, which I am glad to say the noble Earl, Lord Kinnoull, supports, as I think others in the House do, is that it is important that the reviews be regular and there would be an obligation to hold them, but that they do not have to take place too frequently. Why is that? Because those involved in litigation, on both sides, will inevitably seek effectively to guess—however well informed that guess might be—what the discount rate will be after it has been determined.

If there is to be a change every three years, the period leading up to the moment of change is likely not to result in settlements or to result in adjournments—in other words, in perfectly legitimate gaming of the system. This will happen inevitably whenever a review is about to take place, but it will happen less often if it is five years than if it is three years. This will, I think, help to produce more settlements. There are always uncertainties in litigation, but this is a particular uncertainty in large cases, where the discount rate can have such an effect on the quantum of damages. My submission is that five years, for the reasons I have already advanced, remains a better provision than three years. I accept that any provision is arbitrary, but I hope that the Government will listen to me today, will take into account all the evidence they have obtained and decide that, after all, five years might be a better period than three years. I beg to move.

**Lord Beecham:** My Lords, I am slightly puzzled at the effect of amendment as moved by the noble Lord, because the Bill prescribes that the rate of return must be started within a period; not every three years, or every five years, but within that period. So potentially, it seems to me—perhaps the noble and learned Lord will either correct me or confirm that I am right—that you could have a review at less than five years, depending on the circumstances. If, for example, there were a crash, as in 2008, which affected rates of return and so on very significantly, you would not have to wait up to five years to deal with it; you could have that review within the period. In effect, any time within that five years could mean a three-year review, a shorter review or something with a maximum of five years. If that is the case, is that acceptable to the Government?

**Lord Keen of Elie:** My Lords, I am obliged to my noble friend Lord Faulks and to other noble Lords who raised this matter in Committee and on Report. On the point raised by the noble Lord, Lord Beecham, it is indeed the case that we are talking about a maximum period for review, and therefore it can be at any time within that period. What we are concerned to avoid is the situation that arose in the past where many years passed before a review was carried out.

The choice between the two periods, three years and five years, is essentially a pragmatic one, I suggest. The arguments for the two options appear to me to be quite evenly balanced. A number of noble Lords have made the point that there would be less likelihood of a gaming of the system if that period were extended to five years. It was a point made in particular by the noble Lord, Lord Marks, on Report, when he indicated that he would prefer a five-year period over a three-year period.

Following discussions with several of your Lordships after Report, we have given further consideration to the question of the length of the review cycle and we accept that a five-year maximum period could help to reduce the effect of the litigation practice of trying to game the system, as distinct from a three-year period. In light of the arguments that have been made, the Government propose to accept these amendments.

**Lord Faulks:** I am extremely grateful to my noble and learned friend for accepting the amendment and for listening generally to the arguments that have been advanced in your Lordships' House in this connection and, indeed, in other connections.

*Amendment 2 agreed.*

*Amendments 3 to 5*

*Moved by* ***Lord Faulks***

**3:** Clause 10, page 9, line 32, leave out "3" and insert "5"

**4:** Clause 10, page 9, line 38, leave out "3" and insert "5"

**5:** Clause 10, page 9, line 39, leave out "three" and insert "five"

*Amendments 3 to 5 agreed.*

***Clause 13: Commencement***

*Amendment 6*

*Moved by* ***Lord Sharkey***

**6:** Clause 13, page 15, line 39, leave out "This Part comes" and insert "Part 2 and this Part come"

**Lord Sharkey:** My Lords, a key focus of our discussions of Part 2 has been to reduce the time taken to reach the conclusion of the first review of the PIDR. In Committee, the Minister encouraged more discussion about how to do that, and on Report the Government accepted amendments that brought forward very substantially the first determination. We were very grateful for that and for their very constructive involvement.

There were, however, two remaining issues to do with the timing of the first review. The first was on the 90-day period from commencement that the Bill gives the Lord Chancellor before he must trigger the first review. The second was on the absolute discretion given to the Lord Chancellor to decide when commencement should take place.

*4.15 pm*

In her response to these points when they were raised on Report, the Minister said:

"The Government are … 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".

She went on to say that,

"we would be happy to discuss the detail of these amendments further … before Third Reading".—[*Official Report*, 12/6/18; col. 1683.]

She also agreed to discuss the issue of commencement itself.

Amendment 6 is the result of those discussions. It would remove the Lord Chancellor's absolute discretion over the date of commencement and substitutes that commencement of Part 2, the relevant part, will take place on the day on which the Act is passed. This means, as a consequence and in line with paragraph 1(2) of Schedule A1, that the first review must begin within 90 days of the Act being passed.

We understand the need to allow sufficient time for preparing the later stages of the first review but, ideally, we would have preferred a shorter period than 90 days. However, we noted the Minister's commitment to start the review as soon as practical within this 90-day period, a commitment which I hope the noble and learned Lord, Lord Keen, will be able to repeat when he replies.

I should point out that Amendment 6 is identical to the Amendment 90 tabled on Report by the noble Earl, Lord Kinnoull. It was he who spotted the commencement problem and first proposed the solution, so any credit really belongs to him. I am also deeply obliged to the Ministers and the Bill team for their thorough, extensive and always courteous engagement. I beg to move.

**Lord Monks (Lab):** My Lords, perhaps I might mark this Third Reading by drawing attention to what I regard as the significance of the Bill. It is not just a technical Bill about the many legal procedures and complications which we have debated. It is a Bill which, particularly in its relationship to the small claims limit, will have a profound impact on around 350,000 people a year, who we estimate will be left without the free legal cover that they now experience. That is as a result of the rise in the small claims limit. The Minister is looking a bit askance at me as I speak on this amendment, but it seems to me important that we mark the fact that this is a Bill of real significance to a lot of vulnerable people in this country.

Those of us who have been concerned with this issue have been hamstrung by the fact that we have not managed to secure the small claims limit to be within scope of the Bill. We did, in the end, find a way to debate it on Report and there was a vote on it, which I accept that we lost, but we had little time to brief Members of this House or to campaign more widely. I give notice that we will return to the small claims limit issues in any way that we can. I draw the Government's attention to the fact that one of their justifications for the rises has been to use RPI movements, but the national statistician is now on record as saying that the RPI is a very bad statistic. The CPI is certainly the way to go and it would produce a small claims limit, in the way that Lord Jackson recommended, of £1,500 rather than £2,000. That would make an appreciable difference.

Will the Government think a little further about this issue? Will they reflect on it again, even at this late stage as the Bill goes to the other place? I know that appeals to a Government's better nature do not usually get very far, but I hope that an exception will be made in this case, and that the right thing will be done after all the debates we have had. The Bill would be improved if the associated measure on the small claims limit was adopted in the way that we have been proposing.

**Lord Keen of Elie:** My Lords, I begin by thanking the noble Lord, Lord Sharkey, not only for his contribution to this part of the Bill but for his engagement since Report in addressing these matters. I extend those thanks to other noble Lords, including the noble Earl, Lord Kinnoull, who has also engaged extensively on these matters.

Just to be clear, the Government are fully committed to beginning the first review as soon as possible after Royal Assent and to completing it as soon as is practicable. I hope that I can extend that comfort to the noble Lord, Lord Sharkey. That is why we have no objection in principle to the amendment. The only remaining question for the Government was the practical one of whether the 90-day period will be sufficient to ensure that all necessary preparatory work can be finished before the 140-day period for the completion of the first review. The Government have begun this work and are making good progress and, although there are public expenditure rules that may affect the timing of its completion, the Government now consider that the 90-day period is sufficient.

In view of this and having regard to the strength of opinion expressed across the House that the first review should proceed quickly, I am pleased to indicate that the Government intend to accept this amendment as well. Perhaps I can refer back to the observations of the noble Lord, Lord Monks, when I move that the Bill do now pass. For the present purposes, we accept the amendment.

**Lord Sharkey:** I simply express my gratitude to the Minister and his team for accepting the amendment and their co-operation throughout the passage of the Bill.

*Amendment 6 agreed.*

*A privilege amendment was made.*

*Motion*

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

That the Bill do now pass.

*4.22 pm*

**Lord Keen of Elie:** My Lords, in moving this Motion I thank noble Lords across the House for their careful scrutiny of the Bill throughout its passage. Noble Lords have made not only detailed but informed contributions to the debate, and that has resulted in improvements to the Bill before it passes to the other place tomorrow for further consideration.

There have been extensive amendments to the whiplash provisions and appropriate amendments to Part 2 with regard to the discount rate. We consider that the Bill is in a better place as a consequence of your Lordships' contributions.

I have been asked by my noble and learned friend Lord Mackay of Clashfern to put on record a clarification that I provided in my letter to Peers following Report. This relates to a request by the noble Baroness, Lady Bowles, for confirmation that the words "different financial aims" in what was then paragraph 3(3) of the new Schedule A1 to the Damages Act 1996,

[Lord Keen of Elie]

"do not provide an override of the conditions laid down in the earlier new paragraph 3(2)".—[*Official Report*, 12/6/18; col. 1649.]

As I indicated in my letter, I can confirm that the words in question form part of the definition of the approach to investment that the recipient of relevant damages is to be assumed to take for the purpose of securing the objectives set out in paragraph 3(2) and that the words "different financial aims" cannot therefore override those objectives. It is perhaps appropriate that I put that on record.

Finally, the Government share with the House the view that insurers should be accountable for meeting their commitments to pass on savings from the reforms. Therefore, we have also committed to developing an effective means for reporting on the savings made by the insurance sector being passed on to consumers, making sure that insurers are held to account. We will bring forward an amendment to this effect as soon as possible in the House of Commons. It is quite a complex issue, having regard to, among other things, commercial sensitivity and competition issues.

The noble Lord, Lord Monks, referred to the proposed changes to the small claims limits. We consider that these are appropriate in the circumstances. Of course we are open to debate on these matters, and if the noble Lord wishes to engage with me further on them, I am content to meet with him for that purpose. He is fully aware of the Government's position on these issues. They form part and parcel of the overall package that we consider has to be delivered to address the issues referred to in the Bill.

Again, I thank all noble Lords for their contributions to the Bill.

**Lord Hodgson of Astley Abbotts:** Before my noble and learned friend sits down, could he possibly say a word about periodical payment orders, an issue which has occupied a number of us quite a lot? He said at the previous stage that he would confirm that the Government placed emphasis on the importance of PPOs as part of the array that is available to the courts when damages are decided.

**Lord Keen of Elie:** My Lords, I am obliged to my noble friend for that reminder. Clearly, it is our intention that this matter should be taken forward. As I indicated before, we are engaging with the judiciary on this matter, and we have engaged already with the Master of the Rolls to see what further developments can be put in place on the provision of PPOs. We share the view that the noble Lord has expressed that the appropriate use of PPOs should be encouraged, and we are grateful to the Master of the Rolls for his agreement in principle to the Civil Justice Council reviewing the law and practice regarding PPOs to see whether they can be improved. The timetable for that has not yet been agreed, but we hope it can begin towards the end of this year or early next year, with a view to completion in the summer of 2019. I hope that that reassures my noble friend.

I thank noble Lords again for their contributions to the Bill. I am content to carry on further discussions relating to the Bill during its time in the House of Commons if noble Lords so wish. Thank you.

**Lord Hunt of Wirral (Con):** My Lords, I congratulate my noble and learned friend on his expert handling of this Bill, together with his ministerial team, my noble friend Lady Vere, and their officials.

Part 1 has indeed proved to be more contentious than many of us expected, but I hope that all noble Lords have now recognised the true and serious nature of the problem that the Government need to tackle and also accept that the radical solution of a tariff is thoroughly justified. The social evil that we have discussed on many occasions, which this part is intended to address, will not completely evaporate as a result of these measures. There are too many vested interests at work for the compensation culture to vanish overnight. No doubt they will continue to set citizen against citizen and are already crafting new ways around any controls that we seek to impose. None the less, I feel that this Bill will certainly slow down the process and, I hope, end this great country being known as the whiplash capital of the world.

On Part 2, I am delighted at the consensus across the House that time is very much of the essence, as we lawyers would say. The overwhelming view of this House has been that change to the discount rate cannot come soon enough. I congratulate my noble and learned friend the Minister and noble Lords on all sides of this House who have all worked so hard to eliminate the scope for delays in reaching a first review.

**Lord Marks of Henley-on-Thames:** My Lords, on behalf of these Benches, I add my thanks to the noble and learned Lord the Minister and to the noble Baroness, Lady Vere, for their help, courtesy and consideration throughout the passage of this Bill. We have all approached the Bill with common purposes; on some of the issues, we have suggested different ways of achieving those purposes. With co-operation from Members across the House, in the Conservative Party and on the Labour and Cross Benches, we have produced a set of amendments that have now improved the Bill significantly as it goes to the Commons. If I may say so, it has been a model of co-operation. We are very grateful to the noble and learned Lord for the many meetings that he has held at which he has explained the Government's thinking and listened to us, and for the letters that he sent us explaining their thinking and, sometimes, changes in thinking. Thank you.

**The Earl of Kinnoull (CB):** I was not intending to speak, but I associate myself entirely with the remarks and thanks made and given by the noble Lord, Lord Marks. I was going to add only what fun it has been working with the Bill team, who have worked immensely hard. They have done a particularly good job on this Bill, which should be recorded.

**Lord Beecham:** My Lords, I am not sure I have enjoyed much fun as we have gone through this Bill but, as it leaves the House, I thank the Minister and his colleague on the Front Bench, and the Bill team for their readiness to discuss its provisions and respond to some, at least, of the concerns and suggestions that have been made from all sides of the Chamber. I also

express my admiration for those who have brought their professional expertise and knowledge to our debates and discussions. It has been quite an awesome experience to listen to some of those who have spent a lifetime dealing with these matters.

Nevertheless, from these packed Benches, we believe that the Bill is fundamentally flawed and hope that, when it returns to us, it will have been improved. In particular, we would like to see the definition of "whiplash" made by medical experts and the damages determined by the judiciary based on Judicial College guidelines, rather than by a tariff specified for whiplash injuries. If there is to be a tariff, the college should be involved in determining the levels.

The Law Society suggests that the Government should clarify what would constitute a failure to take reasonable steps to mitigate the effect of an injury, which is part of the Bill's proposition. It is also concerned about the provision in Clause 3 that means the capacity of the Lord Chancellor to allow discretion to increase the award in exceptional circumstances is by way of regulation, again, rather than being left to the judiciary to determine what constitute such circumstances.

Underlying the Bill and the proposals to raise the small claims limit for whiplash injuries to £5,000, and for other personal injuries to £2,000, is the effect of creating obstacles to justice likely to deter legitimate claimants from pursuing and receiving compensation. Where they do, they are likely to add to the growing difficulties experienced by the courts in dealing with unrepresented litigants. To most Members of this House, the sums involved are very modest; to many potential claimants, they are not. For our part, we will in future seek to oppose the intended increase of the small claims limit to all RTA cases to under £5,000 and for all other personal injury claims to £2,000, when the relevant regulations are laid.

We look forward to a review of the impact of this legislation on the much-vaunted claims of the insurance industry significantly to reduce insurance premiums—the noble and learned Lord has referred to that aspiration, as I would describe it—and, more positively, to a significant growth in the number of periodical payments orders in the most serious cases of injury, which are the subject of Part 2 of the Bill, which deals with the discount rate. That is the most positive part of the Bill, and it certainly has our support.

It has been an interesting experience to participate in these debates, and I hope that the Bill will return to us in due course, in an improved form. I await that moment with barely contained impatience.

*Bill passed and sent to the Commons.*

## Domestic Gas and Electricity (Tariff Cap) Bill

*Report*

*4.34 pm*

***Clause 1: Cap on standard variable and default rates***

*Amendments 1 and 2 not moved.*

*Amendment 3*

*Moved by* ***Lord Mackay of Clashfern***

**3:** Clause 1, page 2, line 20, at end insert—

"(8) Subject to subsections (9) to (12), sections 11C to 11H of the Electricity Act 1989 and sections 23B to 23G of the Gas Act 1986 apply to modifications of the standard supply licence conditions made under this section.

(9) Any appeal against modifications to the standard supply licence conditions made pursuant to this section—

(a) may not challenge the decision to impose a price control in principle; but

(b) subject to paragraph (a), may relate to—

(i) the principles applied in setting the tariff cap conditions in question,

(ii) the methods applied or calculations used or data used in setting the tariff cap conditions, or

(iii) what the provisions contained in the tariff cap conditions should or should not be (including at what level the tariff cap control should or should not be set).

(10) The decision of the Authority to modify the standard supply licence conditions to include tariff cap conditions is to have full effect pending the determination by the Competition and Markets Authority (CMA) of any appeal.

(11) Paragraph 2 of Schedule 5A to the Electricity Act 1989 and paragraph 2 of Schedule 4A to the Gas Act 1986 do not apply to modifications of the standard supply licence conditions made under this section.

(12) Notwithstanding section 11G(1) of the Electricity Act 1989 and section 23F(1) of the Gas Act 1986, the CMA must determine an appeal against modifications of the standard supply licence conditions made under this section within the period of 4 months beginning with the day on which it accepts the appeal."

**Lord Mackay of Clashfern (Con):** My Lords, we considered this amendment in Committee. My noble friend Lord Hunt of Wirral will be here in a moment, I think, but the noble Lord, Lord Carlile of Berriew, has let me know that he cannot be here because he is appearing in court in Birmingham. He thinks it is probably his last appearance in court, so it is an occasion for congratulating him on a long life of very great success in the courts.

I move this amendment, which is, as I say, the same as was moved at the previous stage. I want, first, to deal with a technical matter that my noble friend raised when he said that we needed 11 or so new clauses in the Bill. My understanding is that the cap will apply to electricity and gas and therefore that it is right that the electricity appeal provisions and gas appeal provisions are referred to and incorporated in relation to this matter in the Bill and that the appropriate procedures will apply in relation to that.

Your Lordships will recall the argument that I presented along with my colleagues last time on the relative suitability of the two possibilities for appeal against the decision of the authority to put the cap at a certain level. We were very much of the view that the technical nature of the appeal was such that it would be much better as an appeal to the CMA rather than a judicial review. One reason for that was that we were able in the amendment to control the form and timing

[Lord Mackay of Clashfern]
of that appeal in a way that you cannot do for judicial review, at least not very easily—and some would say not at all. At any rate, it is much easier to do it through the CMA.

We dealt with all the main objections that the Government had to the CMA appeals. However, my noble friend undertook to write to the CMA to see what it thought about this. I am not absolutely clear to what extent the CMA considered our amendment in detail, but it returned a pretty negative answer to the question of whether it would be appropriate for it. It thought that, on the whole, judicial review was more appropriate. The motivation is not entirely clear to me; the letter is not one of the most lucid that I have ever read, but the decision that the CMA has taken is lucid enough: it does not want anything to do with this particular process, if at all possible.

In that situation, my colleagues and I had a meeting with the Minister—my noble friend Lord Henley—and the Minister in charge of this Bill in the House of Commons. We had a very full meeting and they have persuaded me that the chances of this amendment being accepted by the House of Commons are such that we should not press it here, because it would just be a waste of time to press it here if we were sure that it would come back. All that would happen is that we waste time and money. We have therefore decided together that we will not press this amendment to a Division.

However, we emphasise that, although we have departed from our suggestion for a CMA appeal, there is still the possibility of judicial review, which is particularly important with regard to the procedures that are used. It is therefore very important that the authority, in conducting the consultation and the decision-making with regard to its task, does so in a procedure which properly takes account of the various matters that are put to it. Therefore, although we are sorry that the CMA appeal is not to go ahead, we believe that an effective appeal on matters that are important exists in the shape of judicial review. I beg to move the amendment and, as I say, I will withdraw it in due course.

*Amendment 4 (to Amendment 3) not moved.*

**Lord Stevenson of Balmacara (Lab):** My Lords, I will briefly address the substantive motion and explain why we are not moving Amendment 4. It is not from any wish to exculpate us from the needs that should apply to bodies which represent consumers in relation to appeals; it is simply that, given the news that the noble and learned Lord wishes to withdraw his amendment, there seems little point in moving an amendment that will have to be withdrawn in turn.

I congratulate the noble and learned Lord again on introducing his amendment with considerable skill and clarity. He made his case comprehensively. Like him, I am completely bemused by the Government's response to this, which seems to be more to do with protecting Ofgem than with the merits of the case he made. We are in a situation where the only appeal that will be available in this area is JR. We understand the defects in that and we think that it is probably wrong, not just because of the case that was well made by the noble and learned Lord but because it is an open invitation to seeing a greater amount of judge-made law rather than statutory law, which is a wrong thing. Nevertheless, we respect the decisions being taken by the movers of the amendment, and look forward to hearing a response from the Government.

**Lord Mackay of Clashfern:** My Lords—

**The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con):** I think my noble and learned friend would like me at least to respond before he seeks to withdraw his amendment. I echo his congratulations to the noble Lord, Lord Carlile, on his last appearance in the courts after many years. I hope that as a result we will see him in this House—but perhaps speaking to amendments where he might want to support the Government.

I hope that I can set out the Government's arguments in responding to my noble and learned friend and that in doing so it will be useful to the House to get our views on the record. As we discussed in Committee, Amendment 3 would insert a right of appeal regarding the price cap to the Competition and Markets Authority. As I said in Committee, we believe—as did the BEIS Select Committee when it looked at this, and others—that judicial review provides a sufficient means of challenge to ensure the provision of a fair and public hearing within a reasonable time by an independent and impartial body established by law. As I understand it, the belief is that the decision of Ofgem when it puts the cap in place should be reviewed by another body of experts—specifically the CMA—because Ofgem could get something wrong.

As my noble and learned friend made clear, in Committee I undertook to write to the CMA to seek its views on his amendment. I felt that it would be prudent to see what the CMA had to say about creating what would be a new right of appeal to that body relating to a decision taken in exercise of Ofgem's powers under the Bill.

The CMA's chief executive has been kind enough to respond with a letter, which I have already shared with some noble Lords, and I would be more than happy to make it available to your Lordships more widely if necessary. The letter makes three things clear. First, the CMA shares the Government's view that judicial review is an appropriate means of holding Ofgem to account and providing parties with a right to challenge. Secondly, the CMA shares the Government's view that judicial review is the appropriate means of holding Ofgem to account and providing parties with a right to challenge. Thirdly, the CMA makes it clear that it does not consider itself best placed to conduct such a review and questions whether doing so would benefit consumers.

*4.45 pm*

I have the greatest respect for the views expressed by my noble and learned friend and note that on the first point—that judicial review is an appropriate route of challenge in this context—there is no argument between us. However, where we differ is on the second point: whether judicial review is the appropriate route

of challenge. The Government's view, shared by the CMA, is that judicial review is the most appropriate form of judicial scrutiny in these circumstances. The price cap under the Bill is not the same as the existing long-term price controls, to which it is often compared. The price cap will be a temporary measure that stems from a government decision—a manifesto commitment—and not from the regulator's assessment. That is what distinguishes it from the price controls on regulated monopolies.

That subtlety is highlighted by the CMA when it says that the price cap Bill reflects,

"a policy intervention by the Government … to protect consumers, where there is no statutory or regulatory monopoly, and where the decision does not result directly from a market power assessment".

The CMA notes that,

"this distinguishes the Price Cap Bill from the existing price control regimes where the CMA is the appeal body".

As such, this price cap is very similar to the Government's intervention via the FCA in the payday loan market, which does not provide for an appeal to the CMA. My noble and learned friend's amendment would therefore make this price cap the exception, not the rule. Following on from that point, the CMA's letter makes it clear that, as a government intervention, it would be inappropriate for the CMA to reassess any issues already considered by the Government in developing the price cap policy.

Let us not forget that many of the key issues to which Ofgem should have regard under Clause 1(6) have already been reviewed and approved both here and in another place. Ultimately, it will be for Ofgem to consider those factors, bringing to bear the full weight of its experience as the regulator in this field. The courts will be able to assess whether Ofgem has got it so seriously wrong that it should reconsider its decision. It would not be right for the CMA to be introduced into the process to second-guess or fine-tune Ofgem's decision. That, ultimately, is what the suppliers who strongly advocate this approach would want. I cannot imagine that the suppliers who support the approach set out in the amendment would advocate that if they thought it would make it more difficult for them to challenge Ofgem's decision.

The Government note that Ofgem has a complaints procedure in place for suppliers to make representations to the regulator to address concerns or errors. The regulator, in turn, has the powers under the Bill to change the licence conditions, should such change be necessary. All this may take place without recourse to legal means.

The third point in the CMA's letter concerns the expertise of the CMA. The letter states:

"While … the CMA agrees that the Judicial Review route is the most appropriate form of judicial scrutiny for any interim price cap decisions made by Ofgem, it does not consider itself to be any better placed than the courts or specialist tribunals to conduct such a judicial review".

The letter goes on to declare:

"The CMA does not consider that a review role for it in this regard would benefit energy consumers".

Although presented with a series of complex legal issues—on which, I am sure your Lordships are not surprised to hear, there is obviously room for lawyers to disagree—this boils down to a relatively straightforward question of policy: what is the preferred standard of review and who should conduct that review? I have made clear the Government's position, with which the CMA agrees.

I am grateful to my noble and learned friend for moving the amendment—on which we have had useful discussions—and to the CMA for writing in response to my request and making its views clear. My noble and learned friend brought forward his amendment to hear again for the record what the Government's position was, and I am grateful to him for making it clear that he does not intend to press it.

**Lord Mackay of Clashfern:** My Lords, I wish to withdraw my amendment.

*Amendment 3 withdrawn.*

### *Clause 2: Tariff cap conditions*

*Amendments 5 and 6 not moved.*

### *Clause 7: Review of competition for domestic supply contracts*

*Amendment 7*

*Moved by* ***Baroness Neville-Rolfe***

**7:** Clause 7, page 5, line 3, leave out paragraphs (b) and (c)

**Baroness Neville-Rolfe (Con):** My Lords, our concern is to ensure as far as possible that the cap ends in 2020. Many people are unconvinced of the value of price caps, which are against most economic theory and can have unintended consequences. There is also a strong consensus that the cap should be temporary, as we discussed in Committee and as the Energy Minister, Claire Perry, noted in the Commons. Moreover, a price cap where the case is strongest already exists. This covers prepayment meters in 4 million households and 1 million vulnerable consumers following action by Ofgem. This in turn followed recommendations by the CMA, which did not favour an overall price cap.

A number of us are also concerned that the tariff cap could have an adverse effect on competition. Its existence might prevent or deter Ofgem or the Secretary of State from finding that the conditions for effective competition are in place and so the cap would have to be extended in 2020, frustrating the purpose of the discretion in the Bill. BEIS officials have helpfully suggested that this is not a risk. They know that the cap might in practice damage competition and say that the judgment to be made is that the Secretary of State considers that the conditions are in place for effective competition for domestic supply contracts—not that effective competition is in place.

Has the Minister been able to think further about these matters and how to respond to my amendment, which I am retabling following the helpful discussion

[Baroness Neville-Rolfe]
in Committee and his helpful comments about the direction of travel on the cap? Can he agree that the cap will end in 2020, all being well; and, given the concerns expressed by many distinguished industry experts, which I have sought to summarise, can he also confirm on the parliamentary record the BEIS interpretation of the conditions for any extension? I beg to move.

**Baroness Featherstone (LD):** My Lords, I support the amendment, to which I have added my name. The first basis on which I do so is that, like the noble Baroness, Lady Neville-Rolfe, I regard the cap as an unfortunate necessity. The ambition and the emphasis must be to end the cap as soon as possible. Therefore we need to focus minds on the creation of that effective marketplace.

**Baroness Vere of Norbiton (Con):** My Lords, the amendments in this group tabled by my noble friend Lady Neville-Rolfe would ensure that the price cap comes to an end in 2020 with no provision to extend it. The Bill allows a temporary and targeted price cap on poor value, standard variable and default tariffs. Fixed tariffs that are not default tariffs will not be affected by the cap as these are where the most competitive rates can be found. The price cap is only necessary to protect consumers on poor value tariffs until the conditions for effective competition are in place.

The Bill has a sunset clause at 2023 and the cap would fall at the end of 2020 if, at that point, the conditions for effective competition are in place; I think that my noble friend wanted a response on that issue. The Bill is constructed in this way because the Government do not want an open-ended intervention, which would not be good for competition and, therefore, consumers.

At this point, I want to address the communication received by many noble Lords about the way the Bill is drafted, potentially preventing the cap from being removed, as the cap itself may have an impact on competition. That point was not lost on the Government when the Bill was drafted, which is why the judgment on removing the price cap, as set out in Clause 7(5), depends on whether,

"the Secretary of State considers that conditions are in place for effective competition for domestic supply contracts".

In its recent consultation, Ofgem stated:

"We interpret 'conditions for effective competition' as meaning that the right market framework is in place for competition to be effective for currently disengaged consumers once the cap is removed".

In assessing whether the conditions for competition are in place, Ofgem said that it would expect to analyse both the demand side and the supply side of the market, consider whether the market structure will promote good outcomes for disengaged consumers and consider whether there are remaining barriers to engagement. It refers to market conditions, not current market outcomes, for example on the rate of switching.

Coming back to the amendment, it is clear that the Government want the cap to be in place for as short a time as necessary. Ofgem will report on the conditions for effective competition and make a recommendation. Ofgem's recent consultation points towards a number of factors that might indicate that the conditions for effective competition are in place. On the supply side, these include more innovative business models and the rollout of smart meters. On the demand side, they include making it easier for customers to share their data securely with third parties—meaning that they do not have to look up and enter lots of data on websites when they want to switch—and promoting engagement to help customers identify the best deal. These measures will need time to be established but it is right that we ensure protections are in place until the conditions for effective competition are in place. That is why the Bill enables the price cap to be extended, one year at a time, up to the end of 2023 at the latest.

I am grateful to my noble friend for her amendments. I can confirm that, all being well, the price cap will fall away in 2020—but as we have noted, if all is not well, it will not. With that, I hope that my noble friend is assured and will withdraw her amendment.

**Lord Mackay of Clashfern:** It seems that the Secretary of State has to make a decision before the end of 2019, in respect of 2020. At that stage, it must be assumed that the price cap will not continue because, unless the Secretary of State continues it, it will stop at the end of that year. There is an extra argument, as it were, to the argument about the cap stopping then: the cap will not be in contemplation in examination of the situation because we will have to assume that it has stopped. Therefore, any effect that it has on reducing competition is out of the equation at that juncture. I hope that noble Lords follow me.

**Baroness Vere of Norbiton:** My Lords, I was doing really well until the last sentence. I tried to follow my noble and learned friend. Of course, there will be a period leading up to the point at which the Secretary of State has to make the decision on whether to keep the cap. At that time, he will look at the information that is available to him and make a judgment on whether the conditions for effective competition are in place.

**Baroness Neville-Rolfe:** My Lords, I thank my noble friend for her full and helpful answer. I was very clear when she sought to sit down that all was well. I will need to read my noble and learned friend Lord Mackay's intervention before we come back at Third Reading. My expectation is that we can find a way through this to meet my concern that, conditions permitting, the cap can end in 2020, and to meet the concerns that have been expressed by a number of learned experts from the industry on the correct discretion on the extension of the cap. I beg leave to withdraw my amendment.

*Amendment 7 withdrawn.*

*Amendment 8 not moved.*

***Clause 8: Extension and termination of tariff cap conditions***

*Amendments 9 and 10 not moved.*

*5 pm*

*Amendment 11*

*Moved by* ***Lord Grantchester***

**11:** After Clause 8, insert the following new Clause—

"Ongoing relative tariff differential

(1) The Authority must, during the term of the tariff cap conditions being in place, develop, ready for implementation, a relative tariff differential.

(2) A relative tariff differential is a requirement on supply licence holders that the difference between the cheapest advertised rate and the most expensive standard variable or default rate shall be no more than a specified proportion of the cheapest advertised rate.

(3) The Authority is responsible for setting the proportion referred to in subsection (2).

(4) The relative tariff differential takes effect on the termination of the tariff cap conditions."

**Lord Grantchester (Lab):** My Lords, Amendment 11was previously moved in Committee. It may be the last but it is certainly not the least of those being debated today. Perhaps it is the most crucial, because it proposes an on-going condition in the energy market that the electricity and gas suppliers will always operate fairly and proportionately between customers and tariffs.

Labour is in favour of the Bill. The energy market has been broken for some time. My right honourable friend in the other place, Ed Miliband, first proposed that price caps should be in place to protect consumers from excessive gas and electricity prices. Customers have been paying on average up to £300 more than they would have paid if the market operated more competitively. The excess weighs more heavily on more vulnerable households—those less able to bear it.

While it is flattering to see our policies recognised and implemented by the Government, they have to be implemented right, and preferably right first time. While accepting and applauding what the Bill achieves, it is nevertheless not quite there. It does not tackle the scourge of "tease and squeeze" by the utility companies. This amendment calls out the behaviour of energy suppliers where they tease customers to nominate a cheaper, more attractive tariff in the first instance, only to move them slowly over time to a higher tariff when the customer will be squeezed again.

This feature of the market has been operating for some time. The effect is that those customers who do not ceaselessly monitor and challenge what is happening, once again move back to being in a more disadvantaged position vis-à-vis the more nimble and fleet of hand and foot customers. Those whom the Government call disengaged are protected by the price cap mechanism on the standard variable tariff and default tariffs of the Bill, while it is in operation. Once these mechanisms are withdrawn, ultimately no later than 2023, this protection will fall away. The loyalty penalty is a self-perpetuating dynamic of the market. This is perverse.

The Bill is only a short-term measure. It professes that whatever happens, however competitive the market may or may not be, the price cap will cease in 2023. Clause 8 provides for this to happen at an even earlier date should the Secretary of State be advised that effective competition has returned to the market. However, the default mechanism of 2023 does not mean that competitive conditions will be operating at that date. Indeed, under amendments proposed by the noble Baroness, Lady Neville-Rolfe, the default date would be sooner.

It would be risky and optimistic to expect competition to return. We do not know whether the Bill will be enough. Notwithstanding that, Labour wants to outlaw tease and squeeze from the market, which could generate a more competitive market altogether hereafter. Under Ofgem's determination of a relative tariff cap operating in relation to the lowest price tariff, this behaviour can be removed from the market.

This measure does not indicate that Ofgem must look both ways. By this I mean it cannot be claimed, if it is determined that the market is operating competitively and therefore that the cap may be removed in 2020, 2021 or 2022, that the amendment is contradictory—that the market is operating competitively. There is no contradiction as the competitive market would be operating within a relative price differential: the more competitive, the narrower the differential would be. It would be up to Ofgem to determine that differential.

The market could look very different by 2023. The House has just passed the Smart Meters Act, in which the Government gave strong assurances that the UK's infrastructure will have been transformed by that date. The Government are on notice to make those changes. Here, we have the means to outlaw tease and squeeze for all time without the need for new legislation at some later date. It is a priority now and we cannot be sure that it will remain a priority under whatever market conditions might pertain at a later date, or even should the market move away again and back towards a less competitive environment where this kind of behaviour thrives. Not only must it be clarified that Ofgem will have the power through the amendment; Ofgem must act to underline that tease and squeeze behaviour will not be tolerated. It is an open goal for the Government to score. I beg to move.

**Lord Redesdale (LD):** My Lords, while I understand where the amendment is coming from, it is not one I can support. The problem is that while we are asking the authority, Ofgem, to set a maximum price, we are now also specifying that there must be a minimum price. It would then be almost impossible for the authority to have a competitive marketplace to operate with.

The second problem inherent in this—a problem with the whole Bill—is that, while I understand the problems the bigger companies have because they do not have some of the obligations of the small companies, it will be an issue for Ofgem to try to work out where the cap will be in the first place. That will cause problems. We are also in a period where wholesale prices are rising. Therefore, there might be a slight problem if the companies, for different financial reasons, have to raise their prices. Would Ofgem then have to set a date at which all the companies raise their prices at the same time so that they do not break the cap? At that date, would it also then say that the minimum price has to be raised at the same rate?

I understand the idea that vulnerable customers should be protected. However, we are ending up with a marketplace in which there will be one default tariff

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that every single supplier will have to put forward. If there is a vote, I will vote against this, which is very much against my views—obviously my Front Bench will have a different view on this. This, however, is an area where what we want to happen and the reality on the ground vary substantially.

I should also declare an interest as the CEO of the Energy Managers Association. We represent all energy managers. It is rather unfortunate that while we are looking to protect vulnerable customers, we are not doing the same to protect SMEs and micro-businesses. There is an enormous amount of bad practice in the industry, with TPIs that have no code of practice, and Ofgem failing to enforce or even to have the power to protect SMEs in this marketplace. We are looking at protecting one sector of the marketplace while non-domestic customers will be hammered under bad practice. I raise this as this is the tail end of the Bill, although I spoke at Second Reading. I hope the Government can bring forward a Bill further down the line to regulate the whole third party, intermediary and energy broker marketplace for the non-domestic, but obviously it might be beyond the Minister's ability to bring that forward.

**Baroness Kennedy of Cradley (Lab):** My Lords, I wish to speak in favour of Amendment 11, in the name of my noble friend Lord Grantchester. Millions of people who stay with the same energy supplier are being overcharged, ripped off and paying hundreds of pounds more for the same gas and electricity because they are cross-subsidising deals for new customers. There are recent examples of companies charging new customers as little as £800 a year and existing customers more than £1,200 for exactly the same product. In this way, the energy market is not harnessing competition to bring about low prices for all customers, because suppliers are able to exploit and overcharge their existing customer base to subsidise time-limited, often loss-leading, tariffs designed to scoop up new customers. This "tease and squeeze" behaviour is becoming the standard business model for some energy companies and it means that the most reliable customers face a hefty loyalty penalty.

While the Bill marks an important first step in protecting customers from the worst excesses of this failing market, it is clear that political consensus is emerging that, until the cause of this detriment is addressed, it will be only a sticking plaster. It is also clear that there is growing support for a relative price cap as the only way truly to reform the market and harness competition to the benefit, and not the detriment, of customers. Indeed, the tease and squeeze dynamic will become only more pressing as society becomes more digital and customers more distant from the point of sale in consumer markets. As well as accepting this amendment, I ask the Government to meet those experts calling for a relative price cap to find a way truly to address the tease and squeeze dynamic in energy and build a regulatory structure that will be fit for purpose for all consumer markets.

It would be a wasted opportunity to allow this legislation to pass without also addressing the cause of the loyalty penalty, which is why I support Amendment 11, to bring in a relative price cap. Such a cap would force energy companies to link their teaser rates to their underlying default tariff. The Government's solution is to encourage switching, but if 100% of customers switched every year, administration costs would go up and undoubtedly be passed on to the customer. Where is the incentive for companies to build quality relationships with their customers when they know that they will leave them in 12 months' time?

In well-functioning consumer markets, such as groceries, loyal customers get low prices even when they do not switch, because new customers are offered the same price as loyal ones. Switching may have increased, but a recent YouGov poll found that 33% of people did not feel that they knew enough to select the right tariff or supplier for them. Data from the energy regulator, Ofgem, reveal that an even higher percentage of people, 42%, are not confident comparing the different energy deals available.

Only a relative price cap will bring an end to exploitative overcharging once and for all. It will give customers the choice to stay where they are without fear of being exploited and remove the need to hunt every year for a fair price. Introducing a fairness mechanism into the UK energy market is long overdue and will benefit everyone, from those who buy energy to the suppliers who are forced to improve efficiencies to compete. A relative price cap is a good idea for everyone. I hope that the Government will support the amendment and agree to meet those in the energy market who are confident about the benefits to consumers of a relative price cap.

*5.15 pm*

**Lord Hunt of Wirral (Con):** My Lords, I listened with great care to the noble Lord, Lord Grantchester, but I have to tell him that I do not think that this amendment makes sense. I very much agree with the noble Lord, Lord Redesdale.

The noble Lord, Lord Grantchester, stressed the importance of getting this right. It takes me back to our earlier debates on the Bill. Noble Lords will be aware that I have broad concern that the Government, in partnership with Ofgem, are facilitating a major regulatory intervention into the energy market without proportionate oversight. I have on several occasions during the proceedings of the Bill drawn attention to the absence of any mechanism whereby the CMA can adjudicate on whether, in the words of the noble Lord, Lord Grantchester, a cap is placed in the right place. I remind noble Lords that the CMA is there for a clear purpose. The Government set this out in the consumer markets Green Paper, saying:

> "We have an independent expert competition body, the Competition and Markets Authority … to promote competition in the interests of consumers and business across the economy".

We all agree with that, but where is the role of the CMA in adjudicating on this cap, however long it lasts? There are huge dangers in setting off in the wrong direction. Noble Lords may say that Ofgem does get it right. However, we have already seen examples whereby the CMA has had to roll back poor regulation around the retail market review; it had to deliver £105 million back to consumers through their scrutiny of network pricing. That is just one example of why we need the CMA.

Once again, my noble and learned friend Lord Mackay of Clashfern—I put my name to the amendment to which he spoke earlier—had it absolutely right about how important it is for technical experts to scrutinise this cap. I have reservations about having a cap in the first place, but what I am sure about is that it has to be right. I am much more concerned about the start of this process than about looking forward, as the noble Lord, Lord Grantchester, is doing, to what will happen further down the line. It will be a huge tragedy for consumers if the cap is put in the wrong place. The situation is fraught with extensive difficulties and dangers.

Although I can understand why the noble Lord has proposed the amendment and why the noble Baroness, Lady Kennedy, said what she did, it does not make sense, particularly if the whole technical process has not been managed properly, with adequate control mechanisms and oversight scrutiny. Therefore, I will vote against the amendment.

**Lord Teverson (LD):** My Lords, it seems to me that the noble Lord, Lord Hunt of Wirral, should have voted against the Bill at Second Reading because he clearly does not believe in it. I have my own reservations about how this absolute price cap will work, but the relative price cap proposed in the amendment is a much better way of doing things. Ofgem will not have to set a cap under that regime; the companies themselves will set the cap by their entry rate. That is why this system works.

The only reason I disagree with the amendment, although I support it because it would make the Bill much better than it would be otherwise, is because we should have a relative cap immediately and not worry so much about the absolute cap. In fact, we could have both at the same time. At least the amendment would introduce a relative cap. As the noble Baroness, Lady Kennedy, has said, it would remove the "tease and squeeze" factor, which is one of the worst aspects of the energy market and price comparison sites. We would achieve our long-term aim of having rates that reflect market conditions, leading to competition on an even playing field that people can understand. It seems to me that the relative price cap is hugely superior to the absolute price cap that Ofgem is being asked to implement.

I support this amendment. I just wish that the relative price cap could be brought forward to now rather than after the present price cap ends, but this is a way for the future and the right approach. All Ofgem has to decide is what the maximum differential should be, and then the energy companies would decide their own cap. What could be better? I cannot understand any argument against a relative price cap. It just makes so much sense.

**Lord Henley:** My Lords, the noble Lord, Lord Grantchester, has put forward his amendment and it is quite obvious that he is in favour of it. I have to warn him that if he is intending to press this amendment to a vote, it would possibly create further delay and uncertainty and, whatever anyone's views on the Bill, we on these Benches and noble Lords opposite feel that it is important to get it on the statute book as quickly as possible so that those whose duty is to do so can get on with finding the appropriate cap and get it in place before the cold weather arrives. It might be that in this wonderful spell the noble Lord has forgotten what cold weather is, and I will remind him of that come November. We want Ofgem and others to be able to get on with their work, and any delay which this amendment might create would be unfortunate.

I am grateful to hear from various elements on the Liberal Democrat Back Benches. I do not know what the official view of the Liberal Party is, but I am grateful to the noble Lord, Lord Redesdale, who gave very concise and encouraging reasons why this amendment ought to be opposed and emphasised that the situation is changing and we are facing a time when wholesale prices might rise. We also had an intervention from the noble Lord, Lord Teverson. I normally find the noble Lord a breath of clarity, but if I wrote his remarks down correctly, I think he said that he disagrees with the amendment but supports it and went on to say that he agrees with it—anyway, I was confused by his lines.

**Baroness Featherstone:** For the avoidance of doubt, the party's position is to support the amendment.

**Lord Henley:** I am grateful to the noble Baroness, Lady Featherstone, for giving that clear and concise explanation of why the Liberal Democrats will support the amendment. I am also grateful that the noble Lord, Lord Redesdale, is prepared to stand up against the might of his party whips and explain why he thinks it is not such a good idea. I am also grateful to the noble Baroness, Lady Kennedy of Cradley, for her remarks. I agree.

**Lord Redesdale:** I am grateful to my noble kinsman—I always like saying that; it is so rare to be able to say that in this House now. For the avoidance of doubt, I do not support this Bill in any shape or form. I think it is a very bad piece of legislation. However, I think this amendment might make a very bad piece of legislation somewhat unworkable.

**Lord Henley:** I thank my noble kinsman for that explanation, and make it quite clear that I am sure the reason for his support is nothing to do with the fact that we happen to be related, but he does bring a breath of fresh air to his Benches.

Turning to the remarks of the noble Baroness, Lady Kennedy of Cradley, I will come on to "tease and squeeze" later, but I agree with her that that is a problem, and we think there are ways to deal with that. She made it clear that she would like certain experts from the industry to talk to Ministers, and if she gets back to me I will certainly make sure that that is possible. I would be more than happy to talk to them as the Bill continues its passage—but we are near the end of it—about life post the Bill and under the new arrangements.

The noble Lord, Lord Grantchester, is seeking to place a duty on Ofgem to develop a relative price cap that would come into effect on the termination of the tariff cap conditions which are set out in this Bill. The noble Lord is nodding in assent, so I think that I have got it right. That would cap each supplier's most

[Lord Henley]
expensive advertised standard variable and default-rate tariffs as a proportion of its cheapest fixed-term deal, and again, Ofgem would set the differential. The new clause would be inserted by the amendment and its effect would be to introduce an indefinite relative price cap. It remains the Government's position that this amendment is not necessary, and I hope to set out why we believe that that is the case.

It is not the intention of this Bill or the Government to put in place a permanent market-wide cap, as I have explained on earlier occasions, and I would pass that on to my noble kinsman Lord Redesdale. I know that the intention of the amendment is to stop the practice of "tease and squeeze", whereby customers are lured in with a cheap fixed rate and then fall into an expensive default rate at the end of the fixed term. However, as with any relative cap, there is a risk that under this proposed amendment suppliers would raise their least expensive tariffs rather than decrease their most expensive standard variable rates. That is the Government's fundamental concern about any kind of relative price cap.

The Government and others, which includes the detailed work done by the BEIS Select Committee during its pre-legislative scrutiny of the Bill, believe that a relative price cap would not work. Indeed, a relative cap as a permanent feature of the market risks undoing the work of the temporary absolute cap, because it would remove the incentive for the market to innovate and reform. I would emphasise in particular those points to the noble Baroness, Lady Kennedy of Cradley, who I think possibly did not understand how markets work. It also puts in place a solution to a problem that is anticipated some years hence. We believe that it is better for Ofgem to consider what measures may be needed once the price cap is lifted rather than prejudge the situation now and tie Ofgem's hands in a way that might damage consumers or be ineffective.

The key way of ending the practice of "tease and squeeze" will be the detailed work that Ofgem is undertaking to develop better ways of securing customer engagement. The work was emphasised by the noble Lord, Lord Grantchester, when he talked about smart meters. It will make switching quicker and more reliable, so smart meters and other programmes will help to make the market work better.

I recognise the concerns of noble Lords opposite in this area and the need for action to protect consumers following the removal of the price cap, should that be necessary. In acknowledging this, I can confirm a triple commitment by the regulator on this issue. I can confirm that Ofgem has committed to assessing whether ongoing protection will be needed for vulnerable consumers beyond the end of the price cap. I can confirm that Ofgem considers that it can implement price protection for selected consumers should that be appropriate. I can also confirm that, ahead of the price cap ending, Ofgem has committed to producing a report on what additional protection might be needed, who needs that protection—we are thinking of vulnerable consumers—and what form that protection should take. Following the production of that report, Ofgem will act accordingly. I repeat: Ofgem will act accordingly having produced a report on what additional protection might be needed, who needs the protection and what form that protection should take.

The House might also have seen Dermot Nolan, the chief executive officer of Ofgem, giving evidence to the BEIS Select Committee during its pre-legislative scrutiny of the Bill. He was asked whether a price cap or other protection might be needed for vulnerable consumers upon the removal of a market-wide price cap. Mr Nolan responded:

> "In my view, yes. … I would envisage a very possible situation in which if a full, marketwide price cap was removed, Ofgem would continue with the price cap for vulnerable customers".

I hope that those commitments from the regulator, alongside the comments of its chief executive officer, would go some way to reassuring noble Lords, including the noble Lord, Lord Grantchester, of Ofgem's capabilities and stance towards protecting consumers beyond the life of the Bill. I hope that my explanations have been helpful and that the noble Lord will therefore see fit to withdraw his amendment.

*5.30 pm*

**Lord Grantchester:** I thank all noble Lords who have spoken on this amendment. I am very grateful for the support of my noble friend Lady Kennedy of Cradley, who has underlined most forcefully how egregious this behaviour is and how widespread it has become, with the effects landing on those least able to counter it.

I certainly understand the remarks of the noble Lord, Lord Hunt, that we must get the Bill right. However, I did rather think that his remarks might be more pertinent to the appeals section amendment that had already been debated. Nevertheless, I agree with him that we must get it right, which means, I take it, that he is looking for further improvements, such as this amendment, to be brought forward.

I suggest that the noble Lord, Lord Redesdale, has perhaps misunderstood the relative price mechanism, in that the relative price mechanism will not be applied across the piece; it applies only to the standard variable tariff and default tariffs, as the Bill does. Ofgem would not necessarily apply a minimum tariff; it is setting a differential that will apply between tariffs. In that regard, I am grateful to the noble Lord, Lord Teverson, for correcting his noble friend in his explanation of the amendment.

I also thank the Minister for his response, to which I have listened most carefully. However, I do not believe that it will cause any delay in the implementation of the Bill, as this proposal would come in only at the end of the price cap conditions.

I wanted to understand more how this tariff would operate in practice and how much work Ofgem had put into examining how it could be brought in. In this regard, I am very grateful to David Gray, chairman of Ofgem, who responded so promptly to our request for a meeting, following an invitation from my noble friend Lord Lennie. It is my understanding that Ofgem already has the power to set a relative cap mechanism via individual licences. It is often, though, perceived that in these licensing caps Ofgem fails to take action—to the dismay of so many, especially consumer bodies.

Britain's consumer regulations are some of the best in the world, but here we have opaqueness that can be remedied immediately by this amendment. Not only must Ofgem be assured that it can do this, but it must implement it at the end of the price cap conditions, within which competition will thrive.

I stress once again that, the more competition there is, the narrower the gap will be. Against the charge that the market would move up in tandem, I suggest that the market is then not working competitively and that Ofgem would have the power, by this setting of the differential, to counteract that behaviour. I understand that Ofgem has begun to look at the various measures needed to be implemented.

I repeat again that, as the noble Lord, Lord Hunt, said, we must get this right. The Bill is before your Lordships' House today, and I am very grateful to the Minister for the triple commitment he outlined in his remarks, but I stress that it is somewhat vague at this stage and nothing that could not have been done in any case. That being so, I beg leave to test the opinion of the House.

*5.35 pm*

*Division on Amendment 11*

*Contents 193; Not-Contents 192.*

*Amendment 11 agreed.*

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*5.46 pm*

*Sitting suspended.*

## Immigration (Guidance on Detention of Vulnerable Persons) Regulations and the Detention Centre (Amendment) Rules 2018

*Motion to Regret*

*6 pm*

*Moved by* ***Lord Ramsbotham***

That this House regrets that the Immigration (Guidance on Detention of Vulnerable Persons) Regulations and the Detention Centre (Amendment) Rules 2018 were made before Stephen Shaw CBE had completed his review of the implementation of the report, *Review into the welfare in detention of vulnerable persons*, preventing his concerns about the definition of torture from being taken into account, and resulting in a definition too complex to be easily applied by caseworkers and doctors being included (SIs 2018/410 and 2018/411).

**Lord Ramsbotham (CB):** My Lords, I will not beat about the bush. The purpose of my regret Motion is to ask the Minister whether the Government will consider the immediate withdrawal of these two statutory instruments before they can do harm to certain vulnerable individuals, and until a number of preconditions, of which the Home Office has been made aware and which I will outline, have been completed. Statutory Instrument 410 introduces the Immigration (Guidance on Detention of Vulnerable Persons) Regulations 2016, enacting the draft updated guidance contained in the Immigration Act 2016. Statutory Instrument 411 introduces a new definition of torture into detention centre rules. Together, they provide the statutory footing for the adults at risk framework, introduced in September 2016 to improve safeguards for people who are particularly vulnerable to harm in detention. As neither instrument is due to come into force until 2 July, there is still time to withdraw them and initiate the alternative action that I will put forward. If this appears a little tight on timing, I should explain that I tabled my Motion some weeks ago, but its date was confirmed by the Whips' Office only last week. The remainder of my contribution will be an explanation of why I am making this request.

In a recent debate on the vulnerable persons resettlement scheme, tabled by the noble Lord, Lord Scriven, I mentioned that the Independent Asylum Commission, which reported in 2009 and of which I was a commissioner, characterised the attitude of the Home Office to any asylum seeker, or indeed any

outside advice or information, as a "culture of disbelief". This was triggered by our hearing of a Sri Lankan victim of torture whose case was not believed by the Home Office, which resulted in him being sent back to Sri Lanka, where he was tortured again. Luckily, when he returned here for the second time, his case was believed.

In 2015, in response to growing concerns about the use of immigration detention, the Home Office commissioned Stephen Shaw to carry out a review of the welfare of vulnerable people in immigration detention. In his report he highlighted the lack of safeguards for vulnerable detainees and recommended a drastic reduction in the use of immigration detention. The Immigration Minister's broad acceptance of Shaw's recommendations was given statutory footing in Section 59 of the Immigration Act 2016, the purpose of which is to ensure that all individuals, particularly those who are vulnerable to harm if detained, are identified and protected. In the event, neither statutory instrument, nor the adults at risk guidance, delivers that purpose.

The proposed definition of torture is far too complex to be easily applied by Home Office caseworkers and doctors in the identification of vulnerable persons, and its concepts are clinically nebulous. For example, it invites doctors to make subjective judgments as to whether a victim did enough to resist ill-treatment or whether he or she was sufficiently robust to cope with it. Extracting the necessary information will require intrusive investigation of a vulnerable person that far exceeds the safeguards and the standard of proof that applies. In particular, the concept of powerlessness is ill suited to the determination of vulnerability to harm in detention, as both doctors and caseworkers will struggle to form a consistent and fair interpretation of such complexity.

The definition in SI 2018/411 seeks to distinguish between torture and ill treatment. That is an important distinction in international law, but entirely unnecessary and inappropriate when identifying those vulnerable to harm in detention. Even when applied correctly, the definition will exclude a whole cohort of victims of severe ill treatment who do not fall within the indicators of risk. These include victims of interpersonal violence on grounds of race, ethnicity, sexuality, tribal groups, blood feuds or clan origins, none of which presents an obvious situation of powerlessness in relation to the perpetrators of violence.

In fact, the adults at risk guidance has raised the threshold for a decision not to detain by increasing the evidentiary burden on vulnerable individuals. Under the previous policy, and not subject to the culture of disbelief, victims of torture needed only to show independent evidence of their history of torture in order to be considered unsuitable for detention, except in very exceptional circumstances. The new guidance, however, includes an additional requirement to present specific evidence that detention is likely to cause harm in order for release to be seriously considered. That evidence is extremely hard to come by before harm has actually occurred. By introducing a much wider range of immigration factors that have to be considered before a decision not to detain can be justified, the guidance has also weakened the protection offered to vulnerable people.

A number of NGOs working with immigrants immediately raised serious concerns about the adults at risk guidance, including the changes to the definition of torture, which previously had been based on case law and was not defined in government policy. This had been proved to be wide enough to include victims of torture, who, evidence showed, were particularly vulnerable to harm in detention. The charity Medical Justice and seven detainees challenged these changes in the High Court, the judge finding them to be unlawful and ordering their suspension. In addition, the judge instructed the Home Office to review and reissue the policy in a reasonable time, but did not place any obligation on the Home Secretary to define torture in the updated policy.

In parallel with this, Stephen Shaw carried out a second review—this time, of the Government's progress towards fulfilling the recommendations in his first—which he delivered to the Home Secretary at the end of April this year. Despite promises that it would be published by the end of this month, it has still not appeared. Indeed, the Minister, who had clearly seen it when he responded to a recent Early Day Motion on the subject in another place, did not disclose any of its conclusions or recommendations to those taking part in the debate, which left them in the dark as to what he was saying. He also back-pedalled on the promised date of the report's publication. Therefore, I ask the Minister to clarify the situation regarding the date of publication of Shaw's second report and to tell the House when we can expect both it and the Government's response.

The statutory instruments were laid before Parliament on 27 March this year, following a wholly inadequate and expedited consultation on the new definition of torture with a limited group of NGOs. They cautioned that no further definition should be considered in isolation from the necessary revisions to other elements of the safeguards, such as detention centre rules and the adults at risk guidance. They also asked the Home Office to await publication of the second Shaw review, to allow consideration of his findings before laying changes before Parliament. Their cautions were studiously ignored. I cannot help contrasting the Home Office's unseemly rush to publish what is so clearly flawed with its unseemly procrastination over the short-term detention rules, taking over twice as long as World War II to publish in 2018 something originally promised in 2006. The noble Lord, Lord Dubs, whose letter on immigration of 28 March I co-signed, was also studiously ignored when he proposed the same action.

So what to do about this mess? As I put to the Minister at the start of my contribution, the statutory instruments should be immediately withdrawn and any changes to existing policy regarding the safeguarding of victims of torture or ill treatment postponed until after the publication of the second Shaw review, and subject to a proper consultation, subject to government guidelines. There is no need to define torture in either the adults at risk guidance or detention centre rules, so the proposed definition should be withdrawn from both. The broad range of immigration factors used to justify detention of those identified as being particularly vulnerable to harm should be replaced by a return to the previous threshold of very exceptional circumstances. There should be no need for a victim of torture or ill

[Lord Ramsbotham]
treatment identified as likely to be vulnerable to harm in detention to demonstrate any further why he or she is likely to suffer harm in detention. I beg to move.

**Baroness Lister of Burtersett (Lab):** My Lords, I am grateful to the noble Lord, Lord Ramsbotham, for bring forward this regret Motion on such an important subject. He has already made the case against the new definition of torture in the regulations extremely persuasively. I shall simply do two things: first, ask the Minister some questions; and, secondly, underline why this is so important.

In her letter to me of 24 April drawing the regulations to my attention, the Minister acknowledged concerns raised by some NGOs about the Government pressing ahead with these changes in advance of the publication of Stephen Shaw's review into the implementation of his previous report into the welfare of vulnerable people in detention, already mentioned. She sought to reassure me that the changes made at this point are,

"purely for the purposes of implementing",

the High Court judgment on the definition of torture. But that is no reassurance at all; it is the very fact that this judgment is being implemented in this way that concerns the NGOs that have years of experience of working with people who have suffered torture.

Even if the Home Office were correct in its view that it needed to act swiftly, why did it need to do so by introducing a new definition of torture in the face of well-grounded objections from these organisations? As the noble Lord, Lord Ramsbotham, said, the High Court did not require a new definition of torture in response to its decision. Why could not the Home Office revert to the status quo ante until after the publication of the Shaw review and then consider the question as part of the wider review of the treatment of vulnerable people?

The same question was asked by my honourable friend Joan Ryan MP at the end of the debate she initiated in the House of Commons on 14 June. However, the Minister, while acknowledging that the current adults at risk policy is far from perfect—which is welcome—did not really answer the question, even though she said that she would. She said she was not seeking to turn the clock back without explaining why, in answer to Joan Ryan's question, and I would be grateful if the Minister could do so now.

In doing so, could she also explain why the Home Office has seen fit to disregard the views of organisations such as Freedom from Torture and the Helen Bamber Foundation, which know more than anyone about the cruelty of torture and its terrible effects? It is the evidence from these and other organisations, such as the BMA, Women for Refugee Women and, most recently, the British Red Cross, that underlines why this Motion is so important.

I find it difficult even to imagine what it must be like to have been be subjected to torture. It is too easy for it remain a rather abstract concept and to lose sight of what it means to have been deliberately harmed by a fellow human being with often devastating consequences. Yesterday I attended the 10th anniversary celebration of Survivors Speak Out. One of those survivors spoke of his time in detention. He said, "We have already suffered so much", and compared the experience of detention with the torture that he and fellow survivors had lived through.

In its report on health and human rights in immigration detention, the BMA noted:

"Pre-exposure to trauma is a key contributor to the rates of mental health problems in the detained population. One theme that emerges from the literature is that of the 'retraumatisation' detention can cause—in particular for those who may have experienced trauma in the form of detention or at the hands of authority figures in their home country".

It also noted that the detention environment can be particularly retraumatising for LGBT individuals who have faced persecution and women who have suffered sexual assault and gender-based violence.

*6.15 pm*

Evidence of such retraumatisation is provided in the Women for Refugee Women's report, *We Are Still Here*, which said that,

"the women we spoke to for this report talked about the trauma of being arrested and locked up, and how this had triggered memories of their previous experiences".

A recent British Red Cross report provides further evidence not only of the damaging mental health effects of detention—the original Stephen Shaw report also provided a lot of evidence for that—but of how they persist long after detention. One of its recommendations, which others have also made and which I hope the Home Office will consider in its forthcoming review, is that the Home Office should adopt a vulnerability screening tool to screen individuals prior to the decision to detain and identify vulnerabilities that may develop while people are in detention.

Surely it is shaming that detention policies are causing harm to a group of people already so vulnerable because of the harm from which they have fled. Surely we have a responsibility to protect them from harm, not add to it. We have been warned by the organisations that work with torture survivors that these regulations will cause further harm, as the noble Lord, Lord Ramsbotham, said. That is why they should be withdrawn.

**Baroness Hamwee (LD):** My Lords, I am grateful to the noble Lord, Lord Ramsbotham, for bringing this Motion forward. I start from the position that immigration detention does not do anybody any good. I find it hard to think that one would be liable to be harmed, whether one is vulnerable—a term I do not find easy—or not. Which of us would be robust enough?

In a previous debate, I quoted from *Never Truly Free*, a recent British Red Cross report on the humanitarian impact of the UK's immigration detention system, including the mental health of detainees after release. It concluded:

"Immigration detention has a known negative impact on mental health. Most detainees will have experienced some form of trauma in their life before detention, the effects of which can be exacerbated in detention".

It also stated:

"The damage done by detention does not simply go away once someone is released and the negative impact on mental health persists long after detention".

I say this because I do not want to belittle, by implication, the experience of detainees who are not vulnerable—or at any rate, not "particularly vulnerable", as per the phrase in Section 59—and to make the point that the definition of torture might be a little less difficult if we detained fewer people and for no longer than a maximum fixed period.

I have some sympathy with those who struggle with that definition, but this will always be a problem when you start from the wrong place and grapple with something that is not necessary. As has been asked, why is it necessary to distinguish torture from ill treatment for this purpose? The noble Lord, Lord Ramsbotham, and the noble Baroness, Lady Lister, referred to Shaw—like Leveson, he must have got used to becoming a noun. It prompts me to ask whether he had any input in the content of these statutory instruments. Indeed, has he approved the definition?

As we have heard, we have been briefed by organisations with considerable experience of both working with victims of extreme cruelty and advancing the understanding of torture. They are very critical of the Government's approach, both the detail and the principle. As we have also heard, the court did not require the Home Secretary to define the term.

What are we to make of the paragraph on "Consultation outcome" in the Explanatory Memorandum to the two instruments? It states that,

"the Home Office has discussed the proposal"—

that is, the definition—

"with interested non-governmental organisations (NGOs). The Home Office has considered comments made by NGOs and has committed to engaging with them as the detailed guidance and training for decision makers are developed".

I was not aware that NGOs had the limited opportunity described to give their views to the Home Office, but those views are not reported in the memorandum. I take it that they were not accepted. As a matter of good practice, it seems to me that the memorandum should be much clearer on this.

My confidence in the process was not helped by the Explanatory Note to both instruments. It states:

"A full regulatory impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen".

I do not know about a financial impact, but by definition there will be an impact on those undertaking Rule 35 assessments and on the numbers held in detention. There must be an impact. Medical practitioners have a difficult enough task in making assessments with time and other constraints and in a place and in circumstances which are far from the safe and supportive environment needed to work with such patients—I use the term deliberately—and which are likely to contribute to ongoing trauma, to exacerbate symptoms and to impede the healing process.

I am also interested in the concepts of control and powerlessness in the definition. At any rate, they certainly allow for the argument that a victim with a particular history of being controlled and powerless will experience detention as torture. With regard to that history, what is meant by powerlessness? The noble Lord has raised this point. Will the Minister confirm that the definition is not confined to a physical situation and that control and powerlessness may be different for different people?

Under the draft guidance, an individual is regarded as at risk—we discussed this at Questions the other day—if they are,

"particularly vulnerable to harm if placed or remaining in detention".

Why is this in addition to the history? Why has it been added? In fact, as a matter of the construction of paragraph 7, is that something that the individual needs to declare, or is it an objective matter for the third party? I have read the paragraph several times and I am not sure.

I understand that the guidance introduces a wider range of immigration factors than before, placing far greater emphasis on non-compliance. My final question is: does this not of itself affect the balance, which we are told is sought, between,

"protecting the vulnerable and ensuring the maintenance of legitimate immigration control"?

That comes from paragraph 1, on the purpose of the guidance.

In summary, these Benches support the Motion. We share the noble Lord's regret and our regret goes much wider, too.

**Lord Rosser (Lab):** I add my thanks to the noble Lord, Lord Ramsbotham, for providing us with this opportunity to debate this issue of concern over the Government's actions and decisions on the welfare of vulnerable people in immigration detention. We agree with the concerns that the noble Lord expressed about how the Government are dealing with this matter and his proposals for addressing the situation.

As I understand it, it is meant to be Home Office policy that vulnerable people, which includes the victims of torture, should be detained only in exceptional circumstances, for example, if they are likely to offend or cause a public safety risk. However, that does not always appear to be the case, because in the year ending last March there were apparently well over 26,000 exceptional circumstance cases in immigration detention. Once again, as I understand it, these are not even people whose removal is imminent, since about half are released back into the community.

In his first review, Stephen Shaw said that detention in and of itself undermines welfare and contributes to vulnerability. Half a dozen court cases in the last few years have drawn attention to the unacceptable treatment of detainees. I believe that the death rate among detainees in immigration detention has risen. Last year, 11 people died in custody.

The situation reached such a state that in 2015 the now Prime Minister, then Home Secretary, asked Stephen Shaw, the former Prisons and Probation Ombudsman, to conduct a review of the welfare of vulnerable persons in detention. His report concluded that the safeguards for vulnerable people were inadequate, that immigration detention was used too often and for too long, and that the impact on mental health increases the longer detention continues. However, in implementing their adults at risk policy, the Government did not fully address the concerns raised by Stephen Shaw. Indeed, the Government's detention centre rules and guidance on the detention of vulnerable persons seemed to increase the risk of harm. In its first 10 weeks of implementation, the Government's adults at risk policy

[Lord Rosser]
was applied incorrectly in almost 60% of 340 cases. Torture survivors continue to be detained and torture is one of the 10 indicators of risk in the adults at risk policy.

The guidance on the detention of vulnerable persons increases the burden of providing evidence on the vulnerable individual, since specific evidence will be needed that detention is likely to cause harm and the risk of harm in detention has to outweigh a range of immigration factors, such as the risk of absconding. In effect, it requires a person to prove that they will not abscond, which one would have thought was extremely difficult to do. The guidance already includes a broad range of immigration factors that can justify detention, even of torture survivors.

The result has been that the release rate, following a report designed to screen torture victims out of detention, has fallen considerably. In the third quarter of 2016, before the policy change, nearly 40% of those in the report in question were released. In the first quarter of 2018 that number had fallen to just 12.5%. Those figures were borne out in a 2017 High Court ruling in a case brought against the Home Office that the adults at risk policy unlawfully imprisons through immigration detention hundreds of victims of torture. The Home Office had previously decided to narrow the definition of torture so that it refers only to violence carried out by state actors. Apparently, it now excludes vulnerable survivors of non-state abuse, such as by ISIS, Hezbollah or the Taliban.

The Government have tabled the two statutory instruments we are discussing in response to the High Court's ruling. However, the organisation that brought the successful case against the Home Office has said that the new torture definition is inappropriate and too complex for caseworkers and doctors to apply to specific cases, and that even when applied correctly the definition will exclude a group of victims of severe ill treatment who do not fall within the other indicators of risk.

As I understand it, the Government were actually asked by NGOs to await the publication of Stephen Shaw's re-review into the welfare of vulnerable people in detention to allow consideration of his findings before laying changes before Parliament. The Government have now had the Shaw re-review for some two months, but others have not been given a chance to consider his latest recommendations since, subject to the Minister saying otherwise, it has not been made available by the Government.

The Government's argument for not allowing consideration to be given first to the findings of Stephen Shaw's re-review appears to be that they could be in difficulty if they have not produced a revised adults at risk policy within 12 months of the October 2017 High Court judgment. But did the judgment specifically say that, and did it say that the Government should not await the outcome of any re-review before revising their adults at risk policy? The Government have had the Shaw re-review for two months. There is nearly a further four weeks to go before the Summer Recess, without taking account of the two-week short sitting in September. If this Government want to speed up processes, they have previously shown that they can do so. They could have, and still can, in this case and ensure that there is an opportunity to consider these two statutory instruments while they are still drafts in the light of the findings of Stephen Shaw's re-review. Doing so might avoid the Government having another uncomfortable day in court.

*6.30 pm*

**The Minister of State, Home Office (Baroness Williams of Trafford) (Con):** I thank the noble Lord, Lord Ramsbotham, for securing this debate. I want to say at the outset that I appreciate his insight into this issue of immigration detention and the concern that he has consistently shown for the welfare of detainees. I also thank other noble Lords from all sides of the House for their contributions.

We put significant effort into encouraging individuals to comply with the Immigration Rules and to support those with no right to remain to leave the UK voluntarily. Unfortunately, a minority of individuals refuse to comply, and detention can be a necessary and proportionate tool for enforcing their return.

As I have said, detention is used sparingly, and we operate a strong presumption in favour of not detaining. At any one time, of those people with no lawful basis of stay in the UK and who are liable to removal, 95% are managed in the community and not in detention. The number of individuals whom we detain has decreased. In the year ending March 2018, there was an 8% reduction in the number of people entering detention compared with the previous year.

For every individual detained, there must be a realistic prospect of removal within a reasonable timescale. As part of the decision to detain, there should be an assessment as to the likely duration of detention. In addition, alternatives to detention will have been considered, or will have failed, in each case.

The majority of people are held for short periods. Ninety-one per cent of those leaving detention in the year ending March 2018 were detained for less than four months and 64% for 28 days or less.

As the noble Lord, Lord Rosser, mentioned, the welfare of vulnerable people in immigration detention is of the utmost importance to the Home Office. Where it is necessary to detain people to remove them, a number of safeguards are in place. One of these is the adults at risk in immigration detention policy, referred to by the noble Lord. Others include the presence of healthcare staff in all immigration removal centres and residential short-term holding facilities; a comprehensive suite of published guidance and operating procedures to govern conditions in centres and support the well-being of detainees; regular reviews of detention by senior officers to ensure that detention remains appropriate; and independent judicial oversight of immigration detention.

The adults at risk policy, implemented in September 2016, provides a vital safeguard. It was a key part of our response to Stephen Shaw's review of the welfare of vulnerable people in immigration detention commissioned by the Prime Minister when she was Home Secretary. Under this policy, vulnerable people are detained, or their detention continued, only when the immigration considerations in their case outweigh

the evidence of vulnerability—the balance that the noble Baroness, Lady Hamwee, talked about. Detention decisions are made on the basis of all available evidence. Cases are reviewed at regular intervals and whenever new evidence comes to light in respect of removability and vulnerability.

That brings me to the new definition of torture in the context of immigration detention. I do not think that anyone would dispute that victims of torture—and, indeed, all those identified as vulnerable—should be considered to be particularly at risk of harm in immigration detention. But it is not, and has never been, government policy that such individuals should never be detained. There is no absolute exclusion from detention for any category of person. However, for individuals considered to be at risk, the policy strengthens the presumption against detention. It carefully balances an individual's vulnerability considerations against the immigration considerations so that detention is considered in individual cases only when immigration considerations outweigh the risk identified.

The way in which torture is defined in the context of immigration detention has a long history. We currently use the EO definition established in case law in 2013. This is a broad definition which led to some cases being inappropriately considered as torture, thereby diverting attention from the most vulnerable. As a result, the Home Office brought into force the United Nations Convention against Torture definition of torture, with the introduction of the adults at risk in immigration detention policy in 2016. Following a judicial review of the policy, and as an interim relief measure, the High Court ordered the Home Office to revert to the EO definition, and we did so in December 2016. The court subsequently declared the UNCAT definition to be unlawful when used for the purposes of immigration detention. However, it declared that the adults at risk policy was inherently sound and lawful.

In addition, the court further stated that the EO definition was deficient for the purposes of immigration detention. The judge set out his carefully considered view of what a rational definition should look like in this context, taking into account the impact of acts of harm on those in detention. He came to this view having heard a wealth of expert evidence, including that provided by experts associated with the litigants, Medical Justice. We have used the judge's clearly expressed view as the basis for the definition set out in the statutory instruments laid before Parliament on 27 March 2018. In answer to the question "Why can't we withdraw the SIs?", we cannot withdraw them and revert to the old definition of torture as laid out in EO as that was judged to be deficient for the purposes of immigration detention. It was too broad and led to some cases being inappropriately considered, diverting attention from the most vulnerable, as I have said.

The court also said that the broad safeguarding provisions were not effective and the guidance needed to be amended. The statutory instrument bringing into force the revised statutory guidance meets this requirement.

Noble Lords have said that the Home Office should have waited for Stephen Shaw's follow-up report to be published before making any amendments to the definition of torture. Let me be clear: the changes we are making are to implement the court's judgment in full, with the reasonable timescales it set out. Until Mr Shaw's report has been formally published, I cannot discuss its contents. However, I can say that officials kept Mr Shaw's team informed of the work they were doing to implement this new definition while they engage with the NGOs on this issue.

**Lord Rosser:** In the light of the Minister's comment that officials had informed Stephen Shaw of what they were doing, is she saying, or seeking to imply, that in fact his re-review has given the Government's proposals in these statutory instruments a clean bill of health? If that is what it has done, why not publish it now?

**Baroness Williams of Trafford:** I will get on to when it will be published. I am simply saying that officials kept the team informed of the work they were doing to implement the new definition while they were engaging with NGOs. We will carefully consider all of Stephen Shaw's recommendations, as we did last time, and take them into account when we review detention centre rules, including the operation of the rule 35 reporting mechanism later this year. We will publish his report with a full government response before the House rises in July, in answer to noble Lords' questions.

As I said, the current imperative is to ensure that, in the light of the court's very clearly expressed view, we implement a lawful and effective definition of torture for the purpose of the adults at risk policy. There is no reason to delay this. It is separate to, and not dependent on, Mr Shaw's report.

It has been suggested that the new definition of torture in the context of immigration detention is too complex to be applied by caseworkers and doctors. I do not accept this. It fully reflects the guidance handed down by the High Court. The court, in turn, had the benefit of a large amount of expert and clinical evidence, much of which was submitted by the litigants, Medical Justice. So there is no reason to believe that caseworkers and doctors will find the definition of torture set out in the statutory instruments too complex.

The noble Baroness, Lady Lister, asked whether the consultation with NGOs was sufficient. There was no legal obligation to run a consultation, but officials willingly engaged with them on the definition of torture and on caseworker guidance and training.

The noble Baroness, Lady Hamwee, asked—

**Baroness Lister of Burtersett:** I think the Minister might be getting us a bit mixed up, because the noble Baroness, Lady Hamwee, spoke more about consultation. What she wanted to know, and therefore what I will ask now, is: what was the response? That was not made clear in the Explanatory Memorandum. The response to us was that the organisations are very unhappy about this, which is why this Motion has been brought this evening.

**Baroness Hamwee:** Perhaps I may come back on that. I quoted the paragraph on the consultation outcome because the implication of the Home Office saying it has considered comments from the NGOs is that there is no difference between them, or at least nothing

[Baroness Hamwee]
substantial, and that we should not be worried about whether the NGOs made critical comments—which we have discovered they did.

**Baroness Williams of Trafford:** I take both noble Baronesses' point. We did engage with the NGOs. What are the differences between us? I will get back to the noble Baronesses and place a copy of the letter in the Library in due course, because I do not have the information on what the feedback was.

The noble Baroness asked about powerlessness being confined to physical situations. It is also a consideration in cases where no physical harm takes place, so it could apply in a situation in which, for example, an individual is subjected to psychological abuse.

Perhaps I may conclude with a word on training. Over the past six weeks, officials have delivered an extensive training programme for caseworkers making detention decisions and for healthcare staff based in immigration removal centres and residential short-term holding facilities. One thing that NGOs have been able to do is observe that training and provide feedback, which the trainers have taken on board.

On the broader question, I hope that both noble Baronesses will allow me to get back to them on that. New and comprehensive guidance will be provided for caseworkers and healthcare staff. I hope that we will be able to provide caseworkers with the guidance and the knowledge that they need to make consistent and fair decisions, which is what we all seek. We will keep the guidance under review.

The Government are committed to discharging their duty to control immigration effectively and to secure our borders, but I can assure noble Lords that of course at the same time we are absolutely committed to the welfare of all detainees and to protecting the victims of torture and other vulnerable people in immigration detention. Those aims are not incompatible, and it is to these complementary ends that we are implementing the court's judgment now.

*6.45 pm*

**Lord Ramsbotham:** My Lords, I thank the Minister for her comments. I note that many of them are more general than the point of my Motion to Regret, which is to do with detention. I shall pick up on her last point about the training of caseworkers. I would be most grateful if she could put a copy of the training programme for those caseworkers in the Library, because in the past the training of caseworkers has been one of the weak spots in the whole immigration system. I can well remember that, when inspecting immigration removal centres, I would find that the director was absolutely appalled at the low standard of training of his staff. I would pick up in particular the point made by the noble Baroness, Lady Lister, about the assessment of vulnerability and the register for that.

I should also like to thank the noble Baronesses, Lady Lister and Lady Hamwee, and the noble Lord, Lord Rosser, for their comments. If I was the Home Secretary and I looked at the *Hansard* report of this debate along with the *Hansard* report of the debate on the two Early Day Motions in the other place, frankly I would be appalled at the amount of evidence presented in both places of officials, on whom I rely for advice and for the preparation of legislation affecting those for whom I am responsible, not listening to or taking account of the expert views of people who know far more about those they are dealing with than they do. I would be extremely alarmed at the thought of the situation continuing like that, with no plan to implement the recommendations of the second review which I had commissioned into the conduct of detention. I am glad that we will see that review before the Recess.

I am saddened that there is no likelihood of these statutory instruments being withdrawn and I recommend that in the future, after the Shaw report has been published, the Home Office should carry out the consultation it has never done with the experts just to go through everything in order to make certain that the regulations are tight and ensure that caseworkers and doctors can implement them as intended, if not as laid down. I beg leave to withdraw the Motion.

*Motion withdrawn.*

## Automated and Electric Vehicles Bill

*Returned from the Commons*

*The Bill was returned from the Commons with the amendments agreed to.*

## Haulage Permits and Trailer Registration Bill [HL]

*Returned from the Commons*

*The Bill was returned from the Commons agreed to with amendments. It was ordered that the Commons amendments be printed. (HL Bill 114)*

*House adjourned at 6.48 pm.*

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