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(HANSARD)

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

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

House of Lords

Tuesday 12 March 2019

2.30 pm

Prayers—read by the Lord Bishop of Southwark.

Children: Oral Health

Question

2.36 pm

Asked by ***Baroness Benjamin***

To ask Her Majesty's Government what plans they have to tackle the oral health problems of hard to reach children, especially those in deprived areas of the country, through the Starting Well Core scheme.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Baroness Blackwood of North Oxford) (Con): My Lords, Starting Well Core allows commissioners, where they identify local need, to establish schemes similar to the National Starting Well scheme, which runs in 13 high-need areas. Starting Well Core has a particular focus on children up to two years old; practices engage with a wide range of partners to promote the importance of early preventive care. Areas that have so far introduced the approach include London, the West Midlands, Shropshire and Staffordshire, Cheshire and Merseyside, and Greater Manchester.

Baroness Benjamin (LD): My Lords, too many five to 10 year-olds in deprived areas undergo general anaesthetic in hospitals to have their decayed teeth removed. Starting Well Core is therefore a welcome first step towards ensuring that children are seen by a dentist, preventing them from developing decay at a young age. Unfortunately, this scheme contains no educational element, only posters and leaflets available at dental practices, seen by those already attending. There are no measures to get the hard-to-reach children through the dentist's doors. How do the Government plan to encourage all carers to take their children to the dentist, even before their first birthday? Will they please introduce supervised tooth brushing in nurseries and primary schools to combat this epidemic?

Baroness Blackwood of North Oxford: The noble Baroness asks some very important questions. I am pleased to say that 77% of five year-olds now have no visible decay, compared to 69% in 2008, which is a welcome reduction. We accept, however, that while these figures represent a significant improvement, there are unacceptable inequalities in children's oral health. She is right that the Starting Well Core scheme is operating in areas of high need and the crucial issue is how children are sign-posted to these practices. Practices are using a mix of advertising, linking with other health professionals and actively engaging with local communities in schools and shopping centres and at local events. I hope that she is reassured by this answer.

Baroness Hollins (CB): My Lords, there are greater unmet oral health needs for people with learning disabilities. These are issues that start in childhood and continue into adulthood. Does the Minister agree that the educational methods proposed for children should be adjusted to be suitable for children with learning disabilities and extended into adult life, as suggested by the Faculty of Dental Surgery? I welcome the new government guidance that was published last week on the oral health needs of children and adults with learning disabilities.

Baroness Blackwood of North Oxford: The noble Baroness makes a very important point about ensuring that dental care is available and accessible to all. Dental commissioning responsibilities are for NHS England, which is responsible for ensuring that dental services meet local needs and helping individuals who are unable to access a dentist. She has raised a very important point about access for those with learning disabilities and I shall ensure that this is raised within the department.

Lord Colwyn (Con): My Lords, we will not reduce oral health inequalities if we do not ensure that every child is able to get their free NHS dental check-up. Dentists' morale is so low that every week NHS dental practices are closing, leaving some patients facing a 90-mile round trip to find a dentist. A recent survey showed that three in five of all NHS dentists are planning to scale down or leave the NHS in the next five years. Government funding has fallen in real terms and we are waiting for the rollout of the new dental contract, work on which started eight years ago. Will my noble friend comment on these important changes? Programmes such as Starting Well Core will not able to help any children if there are no NHS dentists left to deliver them. I declare my usual interests, which include vice-presidency of the British Fluoridation Society.

Baroness Blackwood of North Oxford: I thank my noble friend for his question; he is of course very expert in this area. We want NHS dental services to be attractive for the profession and we remain committed to reforming the dental contract, which should help, but we recognise that there are a range of reasons for contracts being handed back, whether it is retirement, a decision to concentrate on private work or, in some cases, reorganisation of the companies providing the service. It is important that NHS England works with other local dentists to ensure that patients can continue to access dental care. There is a level of concern about recruitment and retention of dentists, and those difficulties need to be addressed by NHS England in its role as the commissioner. It is continuing to ensure that it works collaboratively with the profession and the department is keeping a close eye on this.

Baroness Thornton (Lab): My Lords, tooth decay is a major source of health inequalities, as the noble Baroness has acknowledged, with 33% of the most deprived five year-olds having tooth decay, compared with 13.6% of the least deprived. In some parts of the

[Baroness Thornton]
country—the north-west, the West Midlands and Yorkshire—tooth decay rose for the first time in the last 10 years. How much investment will the Starting Well Core scheme have and for how long? When will we learn from the Government whether this has provided the right kind of remedial action for the most deprived children?

Baroness Blackwood of North Oxford: I thank the noble Baroness for her question. I shall write to her on the exact amount of investment, but there are some reassuring figures coming forward: 77% of all five year-olds now have no visible decay, compared to 69% in 2008; there has been a fall in the number of extractions per 100,000 finished consultant episodes for the first time in the last decade; and more children accessed dentistry over the last year. All this is reassuring and we are committed to improving access and equality of access to dental care—that is what the Children's Oral Health Improvement Programme Board, led by PHE, is intended to do. It brings together 20 stakeholder organisations specifically focused on oral health. There is a significant amount of activity targeting exactly the issue the noble Baroness raises.

Baroness Boycott (CB): My Lords, children get tooth decay because they eat too much sugar and too many sweets. How far are the Government getting with the commitments they made in chapter 2 of the obesity plan to restrict advertising of high-sugar products on TV before the watershed, and price and location promotions in supermarkets?

Baroness Blackwood of North Oxford: The noble Baroness is exactly right, in that improving children's oral health is a wider picture: it is about not just access to dentistry but a preventive approach, which is a core government priority. This is exactly why we introduced the children's obesity plan, one aspect of which is a consultation on advertising. Proposals on that will be brought forward shortly.

Baroness Janke (LD): My Lords, what is the Government's assessment of the number of children receiving dental care from Dentaid, a peripatetic charity that provides emergency care in third-world countries? Does she consider this an acceptable way of safeguarding children's oral health, and what will she do about children's lack of access to NHS dentists in many parts of the country?

Baroness Blackwood of North Oxford: I thank the noble Baroness for her question. I shall have to write to her about access via Dentaid, which I was not aware of; it is a very important point. We are committed to driving down inequality of access and are pleased that the number of young people accessing dentists has increased. One of the key measures in reducing inequality is the Starting Well Core programme, which has targeted areas of highest need, and its performance is encouraging. However, she is absolutely right: we must drive out inequality of access to children's dentistry and the Government are committed to doing that.

Prisons: Rehabilitation

Question

2.45 pm

Asked by ***Baroness Pidding***

To ask Her Majesty's Government what assessment they have made of the case for ensuring that prisons are places of rehabilitation.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, the Government are committed to ensuring that prisons are places of rehabilitation, which ultimately reduces reoffending. Evidence suggests that former prisoners who have undertaken learning in prison are materially less likely to reoffend. We are making ambitious reforms to the prison education system to ensure increased offender attendance, routine performance measures, and greater governor responsibility over the commissioning of education.

Baroness Pidding (Con): My Lords, I thank my noble and learned friend for that response. When an offender is released from prison, they are much less likely to continue committing crime if they have a job, yet only 17% of ex-offenders are in work a year after coming out of prison. Education, training and work are essential to prisoners turning their lives around. What more can the Government do to support our prisons in delivering these vital skills and opportunities?

Lord Keen of Elie: My Lords, we absolutely agree that education, training and work are central to prisoners turning their lives around and we believe it is right and sensible for ex-prisoner employment to come from a number of different sources. The corporate social responsibility agenda has an important place here. We have also launched the New Futures Network to engage and persuade employers to take on ex-prisoners and are developing a new policy of release on temporary licence to increase the opportunities available to prisoners to gain experience in the real workplace.

Lord Bird (CB): My Lords, next week I am going to a wonderful literary festival in Erlestoke prison. It is a brilliant idea and, even though there are problems of money, it shows that, if you have leadership in prison among governors, you can turn things around. It is called Penned Up, it is next week and I would love all noble Lords to come.

Lord Keen of Elie: My Lords, I might prefer to be there next week—I might even be available. Be that as it may, the noble Lord makes an extremely good point. That is why, from 1 April, one change we are bringing in is the delegation of responsibility in these areas to individual governors so that they can take this sort of initiative forward for the benefit of all prisoners.

Lord Brooke of Alverthorpe (Lab): My Lords, does the Minister agree that the drug problem—and prisoners going in and going on to drugs—is one of the most difficult that we have in prisons? Is not getting prisoners off drugs the best help we can give with rehabilitation? Does he know the organisation Narcotics Anonymous? Some of its members are ex-prisoners who have recovered

from drug addiction and go—or endeavour to go—back to prisons to help prisoners get off drugs. Is he aware that many governors will not permit them to go in and do this voluntary work? Will he explore this and invite representatives of that organisation to discuss with him how, voluntarily and free of charge, they can help prisoners to get off drugs?

Lord Keen of Elie: The noble Lord makes a very good point: the scourge of drugs in prisons is one that we must meet if we are to improve conditions for all prisoners across the prison estate. It undermines other efforts made in regard to education and rehabilitation—there is no question whatever of that. I am not familiar with the work of the particular body that the noble Lord referred to, but I will make inquiries about what the position is with regard to its initiative. Ultimately, it will be for individual governors to determine how this matter is taken forward, but, as I indicated to the noble Lord, I will look into how we respond to those initiatives.

The Lord Bishop of Southwark: My Lords, given the recent publication by the Ministry of Justice of figures showing a record level of the incidence of self-harm by prisoners, a record level of prisoner-on-prisoner assaults and a 29% rise in assaults on prison staff, will the Minister acknowledge that we need not only a major reduction in the size of the prison population but increases per capita in resources on a scale not yet contemplated by Her Majesty's Government? This would give rehabilitation the priority that many now see as an absolute imperative.

Lord Keen of Elie: The right reverend Prelate is quite right: safe and decent prisons are the foundation of any initiative that we wish to take in rehabilitation and the reduction of reoffending. There are very real challenges there, particularly in the context of prisoners who are inclined to violent behaviour. However, it has to be understood that we are dealing with a very difficult cohort of people and that control over that cohort can be demanding. We have increased the number of prison officers over the past two years by more than 4,700. It would be fair to say that more can always be done in the face of such challenges, but we are seeking to do what we feel is appropriate to improve matters and, as I said, we believe that the delegation of more direct responsibility to individual governors will also be a step in the right direction.

Lord German (LD): My Lords, the evidence that one can find shows that short-term prison sentences, rather than tough community sentences, lead to far more reoffending. Our prisons are overcrowded and prisoners are often moved from one prison to another, thereby breaking the training programmes that they may be engaging in. Meanwhile, the third sector is being locked out of the vast amounts of money that have been made available to it by the Government. Given these issues—I know that the Government are thinking about them—could the Minister tell us when the Government will bring forward the proposals on sentencing and reducing overcrowding in our prisons, so that we can have a new programme that will reduce reoffending and save the public some money?

Lord Keen of Elie: My Lords, the noble Lord is quite right that sentencing policy clearly has an impact on the numbers in prison. He is also right that we are looking at short-term sentencing in that context. I cannot say by what date we will have concluded our consideration of the matter but, clearly, it is important. However, it is also important that we should give confidence to the judiciary and to the public in general about the effectiveness of non-custodial sentences, so this cannot be looked at in isolation. It is necessary to look at the wider picture to arrive at a workable solution.

Unpaid Internships

Question

2.53 pm

Asked by ***Lord Holmes of Richmond***

To ask Her Majesty's Government what plans they have to eradicate unpaid internships in the United Kingdom.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, the Government are working to stop illegal unpaid internships. The law is clear that anyone performing work for an employer must be paid. HM Revenue & Customs has written to almost 13,000 employers in industries which often offer internships to draw their attention to the national minimum wage rules and help them avoid being non-compliant.

Lord Holmes of Richmond (Con): My Lords, last year the Government spent £1.48 million on raising awareness of NMW legislation, and £25.3 million on enforcement. Can my noble friend therefore say what reduction there has been in unpaid internships, and how many prosecutions?

Lord Henley: My Lords, I am not aware of any prosecutions, but I can confirm that we have spent considerable sums on enforcement in this area, as well as on other areas relating to the national minimum wage. As I made clear in my original Answer, it is important that we continue to try to enforce these matters but also to offer advice to employers to make sure that they are aware that it is illegal to offer internships that amount to work and not to pay for them.

Lord Anderson of Swansea (Lab): My Lords, it is extremely important that legal careers be open to all talents and to students from all social backgrounds. Knowing that pupillages at the Bar are the gateway to the profession of barrister, are the Government satisfied with progress in ensuring that pupillages are now paid?

Lord Henley: My Lords, pupillages at the Bar have changed considerably since the noble Lord's day and even since my day—which is also a very long time ago. In those days they were unpaid. I will take advice from

[Lord Henley]
my noble and learned friend sitting beside me, but I think the noble Lord will find that most pupils are paid now.

Baroness Burt of Solihull (LD): My Lords, in 2016 the Social Mobility Commission said that any work placements lasting more than four weeks should be classified as internships and that those doing them should receive at least the minimum wage. The Bill of the noble Lord, Lord Holmes, has progressed through the Lords unamended, so it is clearly the will of this House that it should pass. Will the Minister have a word with the usual channels in the Commons to get the Bill tabled there as soon as possible?

Lord Henley: My Lords, we will leave the last point to the authorities in another place. I appreciate that my noble friend's Bill went through this House unamended. The Government set out their views on it. As they explained at that time, the problem with the four-week rule was that it might risk giving employers the impression that all shorter unpaid internships are legal. We want to make it clear that this is not the case. The length of the internship is not an indication as to whether it is or is not work. It is the nature of the internship that matters.

Baroness Bull (CB): My Lords, unpaid internships are one of the factors contributing to the lack of socioeconomic diversity in the creative industries, many of which are clustered in London. The Sutton Trust estimates that it costs £1,019 a month to carry out an internship in London. This limits unpaid opportunities to people who can draw on the bank of mum and dad. Does the Minister agree that ending unpaid internships would level the playing field in the creative industries for people without the cushion of parental resource?

Lord Henley: The noble Baroness is right to draw attention to the creative industries as an area where unpaid internships are particularly prevalent. My honourable friend Kelly Tolhurst and colleagues in the Department for Digital, Culture, Media and Sport will hold a round-table meeting shortly with representatives of employers in the creative sectors. This meeting will be used to underline our policy on eliminating unpaid internships to sector leaders and to encourage them to take practical measures to stop their use in this sector.

Lord McNicol of West Kilbride (Lab): My Lords, on this side of the House our preference would be a ban on the use of illegal unpaid internships. The 2017 Taylor review said:

"The Government should ensure that exploitative unpaid internships, which damage social mobility in the UK, are stamped out".

I will try a different tack. If the Government are not going to ban them completely, will they undertake an analysis of the social class and background of those who get internships? I am sure it will further highlight the inequality which leads to those who have both the opportunity, as well as the means, being able to work for nothing.

Lord Henley: I note that the noble Lord says that his policy is to legislate in this area. He quoted Matthew Taylor, who made it quite clear that:

"There have been calls for a separate 'intern' status in employment law but we believe this is unnecessary. We believe that the law is clear as it currently stands. If a person is obtaining something of value from an internship, they are most likely to be a worker and entitled to the National Minimum or Living Wage".

We do not believe it is necessary to legislate. I will certainly look at whatever research we are doing in this area and let the noble Lord know.

Lord Hodgson of Astley Abbotts (Con): My Lords, in any action my noble friend takes, will he bear in mind the impact on the charity and voluntary sector? A lot of charity and voluntary groups like to take on interns, and do so to the mutual benefit of both sides, but not all charities—especially smaller ones—can afford to pay.

Lord Henley: I note what my noble friend says and that he feels that charities might not be able to afford to pay, but if people are offering something that amounts to work, the simple fact is that the law says that they should be paid. That is where I stand.

Fracking: Planning Guidance

Question

3 pm

Asked by ***Lord Greaves***

To ask Her Majesty's Government what steps they intend to take in response to the High Court ruling that their planning guidance on fracking is unlawful.

The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con): My Lords, the Government note the judgment and are considering their next steps.

Lord Greaves (LD): My Lords, I am pleased to hear that. Is this not yet another case where the Government seem to be lacking basic procedural competence? More widely, it seems rather strange that the Government want widespread extraction of methane from rocks in this country at a time when the climate crisis affecting the world is getting worse. Perhaps more pertinently to the Conservative Party, do the Government really think it is politically sustainable for them to cover large areas of the English countryside, which are often Conservative strongholds, with hundreds and thousands of fracking wells?

Lord Bourne of Aberystwyth: My Lords, in case people are misled into thinking that there are hundreds of such wells at the moment, there are not. Once again, this was a policy introduced under the coalition Government. We believe that the technology is worth looking at, because methane presents a bridge between fossil fuels and renewables, and is the best of the

hydrocarbons in terms of pollution. But we are committed to ensuring that it is also safe and environmentally sound and that there is a strong regulatory system.

Lord Kennedy of Southwark (Lab Co-op): My Lords, I draw the attention of the House to my relevant registered interest as a vice-president of the Local Government Association. How does the Minister respond to the suggestion that the Government have behaved irresponsibly and recklessly in these matters and that the consultation was a complete farce?

Lord Bourne of Aberystwyth: My Lords, I am not sure whether that is an accusation made by the noble Lord or somebody else: I do not recognise it as being from a neutral source, I have to say. Consultations are ongoing. There is a consultation on permitted development and on nationally significant infrastructure projects, as well as on compulsory community pre-application. The judgment itself came less than a week ago and, as I said, we are considering our position and will respond.

Baroness McIntosh of Pickering (Con): My Lords, will my noble friend make good the commitment made by my right honourable friend Amber Rudd when she was Energy Secretary that there would be no fracking in or near, above or below, a national park?

Lord Bourne of Aberystwyth: My Lords, I was a Minister in the department at the time, so I well recollect that and believe that it is still the current policy. That is important, but what is also clearly important is that we have safe, secure supplies of clean energy at affordable prices in this country. Those are the three guiding principles: they were then and they are now.

Baroness Jones of Moulsecoomb (GP): My Lords, I draw the House's attention to my interest in the register as I am also a vice-president of the LGA. I know that the Government find it difficult to change their mind on things such as this, but the High Court ruling is clear that fracking is not a low-carbon energy source. Why do the Government persist in giving subsidies to that source while cutting all subsidies to solar power, which is truly clean?

Lord Bourne of Aberystwyth: My Lords, what is important to grasp is that this has a lower carbon footprint than coal or liquefied natural gas. It enables us to transition to renewables. I will just let noble Lords know that there is no use of this commercially at the moment, but it is something that should be investigated, bearing in mind the need for security, safety and caution.

Lord Teverson (LD): My Lords, I am glad that the Minister mentioned the coalition, because, as the Government remind us, the energy world has moved on hugely since that time. The challenge now is the decarbonisation of heating and transport, so should we not forsake fracking at last, take the moral leadership on climate change back as a country and make sure that the world sees that climate change is an urgent problem and that this is part of the equation?

Lord Bourne of Aberystwyth: My Lords, broadening out the discussion, I welcome that. It is indeed the case that we need to address energy in relation to transport and the home. I believe that we have strong moral leadership on this, with our Climate Change Act and our records. That was true under the coalition and is true now.

Lord West of Spithead (Lab): My Lords, does the Minister not agree that the joy of fracking is that we can become self-sufficient in that type of energy, which means that we do not have to bring some 28% of our supplies by sea, as we do at the moment? Does he not agree that the risk there is that, unless we get more frigates, we will not be able to protect that supply in times of tension or war?

Lord Bourne of Aberystwyth: My Lords, as always the noble Lord makes a very powerful point about the Navy. He is absolutely right about domestic security, which also leads to security in relation to price, as it is much more likely to be consistent. We need diversity of supply, which is why we are looking to see if this can be delivered in a way that is environmentally sound and that transitions us to renewables, which of course is where ultimately we will need to be.

Baroness Andrews (Lab): My Lords, given the reply the Minister has just given to the noble Baroness opposite and the contestability of mineral extraction in national parks, which has often been quite complex—for example, with the revival of defunct licences—can he reassure the House that, while he may believe that fracking will not be allowed in national parks, he will present to the House, in the Library, a determined statement of the actual situation?

Lord Bourne of Aberystwyth: My Lords, I am always grateful to the noble Baroness for bidding up my stock. I will certainly write a position paper on the current situation to the noble Baroness, copied to other noble Lords, and put a copy in the Library. I reassure noble Lords that the essence is to ensure that we have diversity, that it is environmentally sound and that there is a strong regulatory system. The noble Baroness will be aware that licences are needed for all of this, in addition to planning permission.

Lord Wallace of Saltaire (LD): My Lords, given that the Government are committed to producing more energy at home, can they explain why they have removed the subsidies for micro hydropower? After all, the Industrial Revolution was driven by water power in the 18th century. In the last few years we have had one or two useful hydro schemes in Yorkshire, with small subsidies that have now been withdrawn. Could not harnessing the rivers across the north of England provide a useful additional source of natural power that would be much less damaging than fracking?

Lord Bourne of Aberystwyth: My Lords, I refer the noble Lord to the point made by the noble Lord, Lord Teverson, about the changes in energy over time. Of course, we do not need to provide subsidies in many areas, and to do so where it is not needed would not make sense.

Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2018

Designs and International Trade Marks (Amendment etc.) (EU Exit) Regulations 2019

Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019

National Minimum Wage (Amendment) Regulations 2019

Motions to Approve

3.07 pm

Moved by ***Lord Henley***

That the draft Regulations laid before the House on 19 December 2018, 28 and 31 January 2019 and 7 February 2019 be approved.

Relevant documents: 12th, 16th and 17th Reports from the Secondary Legislation Scrutiny Committee (Sub-Committee B). Considered in Grand Committee on 4 March.

Motions agreed.

General Food Law (Amendment etc.) (EU Exit) Regulations 2019

Contaminants in Food (Amendment) (EU Exit) Regulations 2019

General Food Hygiene (Amendment) (EU Exit) Regulations 2019

Specific Food Hygiene (Amendment etc.) (EU Exit) Regulations 2019

Motions to Approve

3.07 pm

Moved by ***Baroness Blackwood of North Oxford***

That the draft Regulations laid before the House on 31 January be approved.

Relevant document: 17th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B). Considered in Grand Committee on 6 March.

Motions agreed.

Business of the House

Announcement

3.08 pm

Lord Taylor of Holbeach (Con): My Lords, I thought it might be convenient for me to say a word about today's business. We will repeat the Attorney-General's Statement after the Report stage of the Healthcare (International Arrangements) Bill. We will then have two important Northern Ireland Bills to consider this afternoon. A small number of amendments have been tabled to the regional rates and energy Bill. While both Bills are urgent, as my noble friend the Leader of the House made clear last Thursday, we will ensure that proper time is made available for the consideration of any amendments. The usual channels have therefore agreed to make time available next Tuesday, 19 March, for the Committee stage of the regional rates and energy Bill and its remaining stages. The anticipation and adjustments Bill is a money Bill, so we intend to complete the remaining stages formally and without amendment, in the normal way, following Second Reading today.

Lord Foulkes of Cumnock (Lab Co-op): My Lords, I am grateful to the Government Chief Whip for making a business announcement. Will he deal with a point that I put to a Minister the other day—who said that it was not for his pay grade but up to the Chief Whip? When does he expect this Session to end, the House to be prorogued and the Queen's Speech to take place?

Lord Taylor of Holbeach: I do not know.

Healthcare (International Arrangements) Bill

Report

3.10 pm

Clause 1: Power to make healthcare payments

Amendment 1

Moved by ***Baroness Thornton***

1: Clause 1, page 1, line 3, leave out "outside the United Kingdom" and insert "in a European Economic Area country or Switzerland"

Baroness Thornton (Lab): My Lords, I rise to move Amendment 1 and speak to consequential Amendments 2, 12, 13, 14, 45, 46 and 47. The House will realise that these are the same amendments that we discussed in Committee. I am grateful for the support for them that I have received from across the House: from the noble and learned Lord, Lord Judge, the noble Earl, Lord Dundee —who, we learned yesterday, cannot be with us today—and the noble Baroness, Lady Jolly. I like to think that the reason for their support, and that of other noble Lords

in Committee, is the amendments' simplicity in revising the scope of the Bill to deal with the healthcare arrangements for the EU/EEA and not the whole world.

Like other noble Lords, I am very grateful to the Minister for the time and effort she and her team have put into discussing the Bill with noble Lords. We can see from today's amendments that the Government have listened to concerns expressed during the Bill's stages. That is to be welcomed. I am afraid, however, that on this issue—the scope of the Bill—we find ourselves some distance apart.

We need to remember that the DPRR Committee noted the Bill's breathtaking scope and commented that the scope of the regulations could hardly be wider. The committee said that it was one thing to introduce skeletal legislation needed in the event of no EU withdrawal agreement, but that this Bill was as much to do with implementing future reciprocal healthcare arrangements with non-EU countries—indeed, that it went much further than merely giving effect to healthcare agreements and covered the provision of any healthcare by anyone anywhere in the world. It concluded that the powers of the Bill were inappropriately wide and had not been adequately justified by the department.

This view was expanded in many ways by the Constitution Committee, which said that while the exceptional circumstances of the UK's departure from the European Union might justify legislation containing broader powers than would otherwise be constitutionally acceptable, this did not extend to giving effect to new policy unrelated to Brexit. It concluded that the Bill should be limited to future reciprocal healthcare arrangements with countries that participate in the existing European health insurance card scheme. We agree. These are the tests that need to be brought to bear on the Bill, as was so eloquently expressed by the noble and learned Lord, Lord Judge, in Committee.

During our discussions with the noble Baroness, it was suggested that it would be in some way inappropriate for this House to reduce the scope of the Bill. If the Constitution Committee and the DPRR Committee think that this revision is appropriate, we are bound to give the matter serious consideration. Surely it our job to offer the elected Chamber the opportunity to reconsider the breathtaking scope and powers of this Bill.

Then there are the issues of practicality and policy. On the practicality test, in this pre-Brexit period—and, my goodness, we are now at possibly the most exciting bit, with the discussions that are taking place in the Commons—surely it should be the Government's priority to ensure that the millions of British citizens currently benefiting from reciprocal healthcare agreements with the EEA and Switzerland, by virtue of our membership of the European Union, continue to do so. The same should be true for European citizens in the UK. A significant proportion of the many UK citizens living in the EU are pensioners, and they will be personally liable for healthcare costs after exit day unless a new agreement with the EU, or new bilateral agreements with individual member states, are in place. It would cost the UK taxpayer more to treat British nationals who have to return home for healthcare.

3.15 pm

We completely accept the need for a Bill to deal with these important issues, and we wish to support the Government in getting the appropriate Bill and powers to achieve the right protections and the transfer of access to healthcare. Furthermore, as this is an enabling Bill, the impact assessment cannot and does not indicate the potential costs of administering all sorts of new arrangements with the European Union, the EEA and the rest of the world. We suggest the administration of international healthcare agreements, but this is a herculean task, and we do not think this Bill is the appropriate way to do it.

In addition, surely we need to focus on the finances of the EU reciprocal healthcare arrangements. Many trusts struggle to recoup the money owed under current EU arrangements, and some costs are never recovered. The UK is getting back less than £50 million a year for the cost of treating European patients, while paying out £675 million for the care of Britons in Europe. It seems to me that the priority is to get on top of recouping EEA healthcare costs before we start thinking of making non-EEA agreements.

The policy issue is very serious. The scope of the Bill introduces new policy into the Brexit considerations. Last year, during the passage of the European Union (Withdrawal) Bill, the Government gave an undertaking not to introduce new policy. We do not believe the Minister has argued a compelling case for the urgency of global scope, and the global scale of the Bill flies in the face of that undertaking. The policy agenda that leads to a Bill with global scope, as this one does, does not, to my knowledge, even have the cover of having been in a Conservative manifesto. There has been no consultation and we have seen no compelling evidence of the urgency, need and demand, unlike that for European healthcare arrangements.

As I have said to the Minister, a global healthcare arrangements Bill may be a legitimate aspiration. Therefore, it should be included in the upcoming Queen's Speech. It would then have the necessary wide consultation with the many stakeholders involved that such a proposal deserves; there could be pre-legislative scrutiny; and it could be brought forward as a fully fledged Bill. That is what the global healthcare issue deserves. Trying to shoehorn an important issue such as this into a Bill that needs urgently to address EU matters, and to do so by giving the Secretary of State huge powers, is not the way to proceed. It leads to bad legislation and outcomes, as the noble Lord, Lord Wilson, told us in Committee.

I am aware that the UK currently has reciprocal agreements with several non-EEA countries, including New Zealand and Australia. The Minister has explained that these agreements are less complex, and that post exit the Government,

"may want to strengthen these to ensure that we are delivering important opportunities for UK nationals abroad".

In her letter to all Peers dated 8 March, she states:

"This is key to delivering greater security and certainty for UK nationals post-exit, and the powers of the Bill enable us to do that".

I agree with that aim, but this is absolutely the wrong way to go about achieving it. The Minister's colleague

[Baroness Thornton]
in the other place put it more bluntly. He said it was the Government's ambition to implement such agreements where it would be,

"cost-effective and support wider health and foreign policy objectives after the EU exit".—[*Official Report*, Commons, Public Bill Committee, 29/11/18; col. 22.]

We suggest that this aspiration for global healthcare arrangements needs to be left until post Brexit. Nothing in the statements by the Minister justifies the sweeping powers and the blank cheque from the taxpayer which this Bill as drafted contains. I beg to move.

Lord Judge (CB): My Lords, I thank the Minister for her efforts to improve the Bill and her courtesy in accommodating my concerns, meeting me and discussing various amendments. I am particularly grateful to her—I emphasise this—for her amendment, which we will consider later, that delivers us from the tyrannous shackles of King Henry VIII. Perhaps this might be the start of a new understanding that the ghost of that monstrous ogre should no longer walk about the corridors of power in this country. Chance would be a fine thing but I commend a little touch of Blackwood to the House.

However, although the Bill has been significantly improved, it is still not good enough. We are faced with nine major regulatory powers, which are put before us as examples of regulations that the Bill might have in mind, or extend to. It works on the basis that we must—as we must—recognise the need of our citizens living in the EU to have their healthcare properly attended to. That puts great pressure on all of us. If it were not for that pressure, I would not accept that the scope of the Bill should be allowed to extend as far as the EU and Switzerland but I understand why it must be so. We are brought, in effect, to face up to the creation of unacceptable powers, and we have no choice, so far as the EU and Switzerland are concerned.

However, we have a choice in relation to international places other than those in the EU. There are many countries to which these powers could be extended, payments made and so on. Last time I said I was being modest. My real worry is about the creation of legislation for such places as Guadeloupe and the Galapagos; and these powers would extend to Venezuela, where the present Government may not be in power indefinitely. We therefore need to think carefully. Introducing out of the blue nine regulations, which are only examples of the powers that would be given to Ministers, goes too far. It is not the way in which we should legislate.

My objection to the Bill, and the reason why I support the amendment, is simple. We must not legislate in this way. We need time to think, reflect and ponder on what limitations and constraints should be put on the power of Ministers. We are therefore being asked to go too far under the pressure of events surrounding Brexit.

Lord Marks of Henley-on-Thames (LD): My Lords, I have in my name Amendment 4, which has a great deal in common with the other amendments in the group. It is intended to achieve two objects, the second of which is to restrict the operation of the Bill to the EU, the EEA and Switzerland—as do other amendments of the group—by ensuring that the object of any regulations under the Bill would be limited to replicating existing arrangements. The first sentence of my amendment would delete subsections (2) to (4) and thereby drastically narrow the regulation-making power to replicating the reciprocal healthcare arrangements we have now. That part of my amendment fits more sensibly with the amendments in the second group, and I shall address it then. I will be brief in speaking about this group because I agree with every word that the noble Baroness, Lady Thornton, and the noble and learned Lord, Lord Judge, said.

This House has shown conclusively that it supports ensuring that we can continue to provide EHIC cards to the 27 million British citizens who enjoy them and guarantee continuing healthcare to British pensioners living elsewhere in the EU along with the other arrangements for reciprocal healthcare that we enjoy as members of the European Union. Those arrangements are in place. They work extremely well in providing guaranteed healthcare across the countries that they cover. They enjoy very wide public support and are clear. Millions of our countrymen and countrywomen would be very unhappy to lose them as a result of Brexit, but there is absolutely no urgency for introducing legislation now for healthcare deals around the world.

Throughout the debates on this Bill, the Government have not come up with a single reason why we should not now pass this legislation limited to agreeing the continuation of our existing reciprocal healthcare arrangements while deferring legislation for new healthcare agreements with third countries to another time, and then considering the Secretary of State's powers in the context of those arrangements in another Bill. Before we legislate for new international healthcare agreements, we should be able to consider in detail the criteria for making them, what should be their objects and limitations, what they should contain, who should be in charge of monitoring them and how we might seek to improve them. We should also have clear arrangements in place for their parliamentary scrutiny better than exists under the existing CRaG rules for consideration of treaties by the House of Commons.

It may be, as the noble Baroness, Lady Thornton, said, that international healthcare agreements could be beneficial to Britain and British citizens, but they could also be detrimental, with unacceptable increases in pressure on the NHS and with the potential for healthcare agreements being offered without proper scrutiny in exchange for trade deals on terms that many would find offensive. All we are asking on this side of the House and, as we have heard, from some of the Cross-Benchers, is to give this Bill a fair wind and pass it quickly only to enable the reciprocal arrangements that we have to be continued but giving Parliament a chance to consider carefully the far wider and more difficult issues involved in agreeing new healthcare agreements across the world. This Bill does not do that.

Lord Foulkes of Cumnock (Lab Co-op): My Lords, I support my noble friend Lady Thornton who has done a splendid job in dealing with this Bill, in analysing

it and bringing forward amendments for consideration by the House. According to the Delegated Powers Committee, this Bill has "a breath-taking scope". I have not heard that said about any other Bill coming before the House. All the other Bills and statutory instruments that we have considered deal with providing exactly the same arrangements that we have at present in the event of no deal. They have been precautionary for that. This is the only one, as I understand it, and this is the only department that is trying to include something completely new, very wide and extensive, as the noble Lord, Lord Marks, and my noble friend Lady Thornton said.

If the Government want to do that, as my noble friend said, they can wait until the Queen's Speech. We know that the Government Chief Whip does not know when that will be, but there has to be one eventually and that is the right time for us to consider it. We can then look at the proposals in detail and, as the noble Lord, Lord Marks, said, examine them then. These additional powers are opposed by the trade unions, the BMA and a whole range of people. Indeed, I have not found anyone except Conservative Members and Ministers in favour of this wide extension, this "breath-taking scope", of the Bill. I hope that the House today will support my noble friend's amendment and reject the proposal put forward by Her Majesty's Government.

3.30 pm

Baroness Jolly (LD): My Lords, I too support the amendments in the names of the noble Baroness, Lady Thornton, and my noble friend Lord Marks. I repeat the view that he and the noble and learned Lord, Lord Judge, expressed: we should be producing only legislation resulting from the decision to leave the EU. I thank the Minister very much for meeting us and for the government amendments—particularly to those Henry VIII clauses, which have absolutely no part in modern legislation.

I agree with previous noble Lords, but any Bill dealing with healthcare agreements outside the EU is different. I would be happy to look at these issues in another Bill at another time. As has just been said, the expansion in scope of the Bill looks opportunistic and is completely inappropriate at the moment.

Baroness Chisholm of Owlpen (Con): My Lords, I cannot agree with these amendments. As we pointed out during the progression of the Bill, we live in a global world, with more people travelling internationally for all kinds of reasons. There is obviously a huge demand for healthcare systems between countries, giving the traveller peace of mind that the foreign country they are in can respond to healthcare needs.

As was also mentioned, we already have simple reciprocal agreements with non-EU countries. The domestic implications are limited, and our current powers to charge domestic overseas visitors, and the regulations under such powers, provide for domestic implementation. Importantly—

Lord Foulkes of Cumnock: May I interrupt the noble Baroness?

Baroness Chisholm of Owlpen: No, let me finish. The Bill will not replace or limit the prerogative power to enter into international healthcare agreements. My understanding is that agreements will still be subject to appropriate parliamentary scrutiny.

It is surely right for us to take advantage of the Bill and look at the opportunities it can offer us. We are not trying to shoehorn something dastardly into it. It could offer all kinds of things. It seems to me that planning ahead is a refreshing thing to do. Many of the arguments raised have nothing to do with protecting or giving peace of mind to travellers. As a nurse, my main priority will always be those needing care. The Bill allows them reciprocal healthcare outside the EU and just that. Should there be a Division, I hope that noble Lords will keep in mind those people who, under the Bill, will be able to travel globally with renewed peace of mind about their healthcare.

Lord Ribeiro (Con): My Lords, this is an enabling Bill and no more. In a letter to the chairman of the Delegated Powers and Regulatory Reform Committee on 8 March, the Minister confirmed that these powers would be used only in the exceptional circumstances of EU exit. We will discover the outcome of that tonight.

In these circumstances, the regulations' implementing powers would be subject to parliamentary scrutiny. The assurances and clear message from our debates in Committee—when the Minister was very clear, in answer to a question from the noble Lord, Lord Brooke of Alverthorpe, that reciprocal healthcare arrangements with the United States would present significant challenges because of the different payment systems and such an arrangement was unlikely—should surely be enough to satisfy those who believe that the Government still have a cunning plan to sell the NHS to Donald Trump and others.

As I said in Committee, I believe that the implementation of our international arrangements should be phased, giving priority to our overseas territories, as has been noted; our Commonwealth partners, of which Australia and New Zealand have already been mentioned; and our important international partners, perhaps excluding Venezuela and the Galapagos Islands from that list, as suggested by the noble and learned Lord, Lord Judge.

Anything enabling this to happen should be considered seriously, given the risks of what I believe is likely to be a no-deal Brexit. I do not support these amendments and I hope that the Minister will be able to come up with suggestions for how this can be implemented to overcome some of the concerns expressed from the other side.

Baroness Brinton (LD): My Lords, both the noble Lord, Lord Ribeiro, and the noble Baroness, Lady Chisholm of Owlpen, are missing the point of these amendments. While this is only an enabling Bill, it increases the scope of reciprocal health agreements with countries outside the EEA and Switzerland to include trade agreements. The noble Lords, Lord Lansley, and Lord O'Shaughnessy, at earlier stages of the Bill, raised exactly this point about setting up trade agreements.

[Baroness Brinton]
We are extremely concerned, for all the reasons given by the noble Baroness, Lady Thornton; this is the sort of large change that requires considerable consultation with the public prior to Green Papers, White Papers and bringing it through the House. We should not try to rush it through as one of the Brexit Bills, which it is, regardless of what happens over the next few days. This is one of the Bills that we were told must be passed by 29 March. Increasing the scope of the Bill means that we are moving into another area that the country, let alone this House, has not had a chance to consider.

I do not believe that reducing the scope would prevent some of the agreements already made; in fact, as the Minister has said when summing up previously, a number are already available. What it does is protect the NHS from being a bargaining tool, particularly—although not only—with the United States. Until the country has a chance to have that debate, it is important that we reduce the scope.

I endorse entirely the comments made by the noble Baronesses, Lady Thornton, and Lady Jolly, the noble and learned Lord, Lord Judge, and the noble Lords, Lord Marks and Lord Foulkes. Our task is solely to replicate the arrangements that may become out of date on 1 April; it is important that we remain focused on that.

Lord Judd (Lab): My Lords, I too find this amendment imperative. The Bill as it stands has some exciting prospects, which are worth looking at, but if we are to go down that road we must recognise that the implications are highly complex and potentially demanding economically. It is quite unthinkable that we should move along that road without primary legislation that has been properly considered by a wide cross-section of Britain, including the professions. It is extraordinary to bring in exciting, challenging ideas of this kind on the back of a Bill concerned with making sure that the excellent arrangements that exist within the European Union are protected.

The most imperative words that we have heard in the remarks so far—apart from the, as usual, exemplary speech by my noble friend Lady Thornton—came from the noble and learned Lord, Lord Judge, who, with all his experience, said that this is just wrong and that we cannot pass major legislation on this basis. That is exactly how I feel. To dilute our commitment to those in the European Union and, indeed, to people from the European Union living in this country—arrangements will be reciprocal—would be very unfortunate. I hope the House will warmly endorse the amendments.

Lord Wilson of Dinton (CB): My Lords, I am glad to follow the last two speakers; they have eloquently made the case for supporting the noble Baroness's amendment, as I do. This is not about supporting Brexit or wanting to remain; it is about the tension that exists between the Executive and Parliament, and the duty of this House, and of Parliament, to scrutinise the proposals of the Government to ensure that good government, as far as possible, is provided in this country.

I am very glad that the Minister has tabled the amendments that will follow later. However, I agree with the noble and learned Lord, Lord Judge: they are a step in the right direction, but that is not enough. The sweeping nature of the powers proposed in the Bill are in many ways offensive to the proper conduct of legislation. I accept that they are needed in the current situation in relation to the EU and Switzerland, but to go wider than that is wrong, I think. We have to insist on legislation being properly prepared, properly debated, properly scrutinised and properly consulted on. If, in the middle of the current turmoil, we let go of some basics of legislation, we will do ourselves harm and set a bad precedent. I shall support the noble Baroness's amendments.

Lord O'Shaughnessy (Con): My Lords, although I do not agree with it, a lot of scepticism about the scope of the Bill has been eloquently expressed at every stage of the debate on this group of amendments so far. However, I remind noble Lords of the human consequences of restricting the Bill in the way proposed by these amendments. I think we all agree in general on the benefits of reciprocal healthcare agreements—many noble Lords have paid testament to those—and we all want to see continuity of arrangements with the EEA and Switzerland. So far, so good. However, we have also debated and agreed in principle—in Committee, at Second Reading and in this group—on the desirability of having such arrangements with more countries. Indeed, the noble Lord, Lord Foulkes, talked in Committee about the opportunities of travelling to the USA, which people with long-term conditions can no longer do because they are now uninsured.

Let us be very clear what is at stake. Accepting the amendments in this group would mean that we miss out on a golden opportunity to achieve a shared goal. What are the reasons for that? I do not agree with them, but very good reasons have been given about the kind of procedure and scrutiny that ought to be applied to the new reciprocal healthcare arrangements that we may strike with countries outside the EEA and Switzerland. This is not a disagreement about the principle of having such arrangements; it is a disagreement about the process of agreeing such arrangements. However, the consequence of these amendments is not to deal with these issues by changing procedure, scrutiny and process, but instead to strike them out on principle. That does not seem to me the right approach to very well substantiated and perfectly reasonable, but ultimately procedural, concerns. By changing the Bill in this way, we will lose the opportunity to deepen relationships with key partners such as New Zealand and Australia, as my noble friend Lord Ribeiro said. We will miss out on the opportunity to give people with long-term medical conditions the chance to travel outside the EEA to visit family or to work, and for young people to broaden their experiences. We will miss out on the opportunity to deepen—

Baroness Brinton: Please allow me to intervene; I am afraid I cannot stand up to do so.

Is the noble Lord suggesting that by passing the Bill, existing arrangements outside the EEA and Switzerland would become null and void?

Lord O'Shaughnessy: I think the noble Baroness knows that that is not what I am saying. We will miss out on the opportunity to turn the fairly shallow arrangements that we have at present into the kind of deep arrangements that we enjoy with the EEA and Switzerland. We would also miss out on the opportunity to deepen relationships with EU accession countries and to provide reciprocal healthcare arrangements that would underpin any other international arrangements that we may want to strike in the future. All this would be lost if we were to accept these amendments.

There are other factors that we must also take into account. Amendment 9 provides greater opportunities for scrutiny and restrains the Government's powers. The noble and learned Lord, Lord Judge, spoke of the untrammelled ability to organise agreements with countries such as Venezuela and others, but there are natural limitations—not simply the scrutiny available through the processes my noble friend Lord Ribeiro talked about, but also the need for data adequacy. We will not be able to strike such arrangements with any country we want, and they would have to be under the aegis of an international agreement scrutinised and passed in the other place and this House.

It was suggested by the noble Lord, Lord Wilson, in Committee that I had unwittingly made the case for another Bill, and the noble Baroness, Lady Thornton, talked about that. Another Bill is easier said than done, and anyone who has been in Government knows that you cannot just pitch up with a Bill. There is a complicated and often painful process of going through the PBL Committee and other committees to get such Bills. This Government are constantly accused of doing nothing other than Brexit, and here they are doing something other than Brexit. Surely this is a welcome opportunity to do something beyond the thing that, frankly, we are all a bit tired of talking about.

If not now to extend the scope of our powers to strike these arrangements on a global basis, then when? We cannot assume that another opportunity will come this way soon, and what will the human consequences of that be?

3.45 pm

Viscount Bridgeman (Con): My Lords, I am privileged to follow my noble friend Lord O'Shaughnessy, and I am sure that Peers from all sides of the House will have been impressed by the thoughtful letter which the Minister has sent to us all. In it, there are a number of concessions, which will be subject to later amendments in this debate. The insertion of a sunset clause is a valuable safeguard, as are the requirements that arrangements are limited to a public authority, and the statutory duty to report to Parliament on an annual basis. All of these are important concessions. Finally, on the Henry VIII clause, the Minister's letter refers to removing the powers in the Bill to make regulations containing consequential amendments to primary legislation. Individual healthcare waits for nobody.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Baroness Blackwood of North Oxford) (Con): My Lords, I am grateful to the noble Baronesses, Lady Thornton and Lady Jolly, and to the noble and learned Lord, Lord Judge, the noble Lord, Lord Marks, and the noble Earl, Lord Dundee, who I am sorry could not be with us today, for giving me the opportunity to deal with the important matter of the global nature of the Bill. We have already had a good deal of debate about this during our progress on the Bill, but it is a pleasure to return to it today yet again.

It is important that the Government explain why we believe it appropriate to seek powers which are global in nature. As I mentioned in my response in Committee, the EU Home Affairs Sub-Committee of this House, which is very wise, remarked that:

"Reciprocal healthcare oils the wheel of the day-to-day lives of millions of citizens",

and brings the,

"greatest benefit to some of the most vulnerable members of our society".

I am grateful to noble Lords from across the House, not only in the debate today but during the progress of this Bill, who have been clear that there is widespread cross-party support for the current EU arrangements, and for providing the people who rely on these arrangements with the assurance that the Government are taking all the necessary steps to support them in these uncertain times.

We clearly all support the arrangements we have with the EU. It therefore does not seem logical to preclude the possibility of seeking new arrangements or strengthening existing ones outside the EU. Where the Government have a good policy in one place, it seems logical that we should want to extend it to others. Reciprocal healthcare agreements promote tourism and facilitate economic exchange and growth by enabling people to study, travel and work abroad without worrying about their ability to access healthcare, or the cost of doing so. As we have discussed in our debates on this issue, reciprocal healthcare arrangements are particularly important for older people, people such as me with chronic conditions, or people with disabilities, for whom access or costs can be a genuine barrier to travelling.

Reciprocal healthcare agreements enable people to travel overseas for planned treatment, which enables patient choice. One of the genuine benefits of the current EU arrangements is to enable mothers to travel to a home country to give birth close to their families and support networks. That is available only to EU citizens at the moment, not to those from other countries who live here. Our existing arrangements with the EU enable around 1,350 UK residents to receive planned treatment or maternity care in another EU member state. We do not want to be forced to limit choices only to EU countries in the future.

Reciprocal healthcare agreements can also help to support international healthcare co-operation through fostering closer working relationships between countries and states. We can be proud that the UK is a prominent voice in the global healthcare community and is a key driver in global attempts to raise standards of patient safety. We could help to further drive that agenda through developing even stronger relationships with our close partners. I have heard the concerns raised by noble Lords about the costs of these arrangements. Reciprocal healthcare agreements enable countries to

[Baroness Blackwood of North Oxford]
reimburse one another on a fair and transparent basis. Noble Lords, particularly the noble Lord, Lord Foulkes, have queried why we cannot simply rely on waiver agreements. Fair reimbursement is the key reason why. Without this Bill, we would be restricted to waiver agreements outside the EU without a way to establish fair and transparent payment and cost-recovery mechanisms.

Agreements with other countries predate the EU and have never been limited to Europe. This is one reason why the concept of restricting the Bill to the EU does not make sense. We have agreements outside the EU now and will continue to have them in the future. The noble and learned Lord, Lord Judge, and my noble friend Lord Ribeiro raised the matter of scope—the countries which the Bill would apply to. As Clause 4 sets out, data can be shared only in accordance with the GDPR and our data protection regulations. This means that no reciprocal healthcare agreement could be reached with a country that does not meet data adequacy standards. Over and above that, as my noble friend rightly noted, this scope would be further narrowed by the need to agree reciprocal healthcare arrangements only with countries that have a compatible healthcare system. This would mean that countries such as Venezuela, raised by the noble and learned Lord, Lord Judge, would simply be out of scope for an international healthcare agreement. Safeguards built into the Bill would be in place.

I make it clear that I have heard the concerns raised at Second Reading and in Committee about the global scope of the Bill and the breadth of the delegated powers. We have taken considerable steps to address the concerns about the breadth of the powers—the root cause of the concern about the global scope. As has already been referred to, we have tabled a large package of concessions, which I worked hard to try to deliver. The first was to remove the consequential Henry VIII powers; I am taken by the terminology for this now being a "Blackwood amendment". We have limited the ability to confer functions to public bodies. We have provided greater parliamentary scrutiny over regulations relating to data processing and greater transparency over the financial aspects of future reciprocal healthcare policy in the form of an annual report. I hope that this reassures the noble and learned Lord, Lord Judge. We have placed a statutory duty to consult the devolved Administrations where regulations make provision within devolved competence. Finally, and very significantly, we will sunset two of the three regulation-making powers at Clause 2, so that they can be exercised only for a period of five years after exit day. This final amendment means that it is not possible for the Secretary of State to set up any kind of long-term scheme to unilaterally fund mental health treatment in Arizona or hip replacements in Australia, as the DPRRC proposed. In tabling these amendments, we have limited the delegated powers and therefore the scope of what can be done under the Bill around the world. We have also provided additional parliamentary scrutiny mechanisms and greater transparency.

During the debate on Amendments 1, 2, 11, 12, 13, 27, 28 and 29, from the noble Baronesses, Lady Thornton and Lady Jolly, the noble and learned Lord, Lord Judge, and my noble friend Lord Dundee—who cannot be in his place—I have not heard any concerns raised on the fundamental principle of reciprocal healthcare in countries outside the EU. Rather, I have heard the need for reassurance that in implementing agreements with other countries we seek to appropriately cost such arrangements, protect the NHS, and ensure that those countries which we strengthen or make new agreements with have appropriate healthcare systems and are able to process data appropriately. We are firmly committed to all these principles.

When the Bill was debated in the other place, questions were raised concerning the possibility of a reciprocal agreement with Guernsey, which is something we will need to look into following EU exit. This was seen as a positive possibility of the Bill; it is just one example of how our relationships might evolve and how the Bill can offer people new opportunities which they are currently denied under our legislative framework. If the scope of the Bill is limited to matters relating only to EEA countries and Switzerland, the Government would be unable to implement a reciprocal healthcare agreement with countries such as Guernsey where we are able to reimburse one another fairly. We would also be giving up the opportunity to support people, to bring them confidence and comfort outside the EU.

As the UK considers its relationship with the rest of the world, it is appropriate to take this opportunity to consider strengthening our existing agreements while exploring possible agreements with other countries. The powers under this Bill allow us to fund healthcare overseas to support UK nationals who live in, work in, study in, want to visit or give birth in other countries, while ensuring that we also have appropriate scrutiny powers within this Bill. They also allow us to extend similar opportunities to overseas nationals to use the NHS funded by their own country, making the NHS more sustainable and fit for the future. This is what we would be giving up with these proposed amendments.

There has been much debate in this House and outside it about whether there should, in fact, be two separate Bills: one to provide for implementing agreements with EU, EEA countries and Switzerland, and the other at a later date to provide for countries outside that group. I believe that this is the intent of Amendment 4, in the name of the noble Lord, Lord Marks. That would not be an effective use of parliamentary time; it would prove a barrier to the development and implementation of policy in this area that is clearly in the interests of the people whom I have already discussed. I am also not clear how different a different implementing Bill would look, as it would simply be for the implementation of international healthcare agreements and would be rather similar, whether they are for the EU country or for a country in another part of the globe. It seems to be doing the same work twice.

With the Bill, we seek to ensure that we have an implementing mechanism for reciprocal healthcare now and into the future. While it may be appropriate in other policy areas for the Government to seek new primary powers to implement specific, individual international agreements, it is simply not the case with reciprocal healthcare agreements. These agreements are not far-reaching in nature and are very limited in

subject matter: they are about reciprocal healthcare. As has already been discussed, the Government already rely on the royal prerogative to enter into these agreements with other countries. This Bill is simply a smarter implementing mechanism for these agreements.

I also have concerns that Amendment 4 risks our ability to effectively implement a future relationship with the EU. Recognising the broader benefits of reciprocal healthcare, we want a long-term relationship with the EU but, as with any area of policy, we must have flexibility as to how we negotiate with the EU and how we arrange our broader relationship with it. EU law evolves and, as we discussed in Committee, there are proposals currently before the European Parliament that would mean that elements of that model might change in the near future. This amendment would prevent the UK from implementing that evolved arrangement even if that was the desired negotiating position of the UK. If we put this on the face of the Bill, we would have no flexibility on how we would do that, including agreements already concluded with Switzerland and the EEA and EFTA states. The noble Lord himself acknowledges in his amendment that flexibility is needed, but through this amendment that flexibility would be difficult to apply in practice.

In relation to all the amendments in this group I firmly believe that, in pursuing future reciprocal healthcare policy with close partners outside the EEA and Switzerland, the Government are providing hope and opportunity to people. Our colleagues and friends in the other place overwhelmingly supported this endeavour. We have introduced significant restrictions on what this Bill can do globally. However, I regret that these amendments would prevent us from being able to look to the future and embrace an opportunity for EU exit. It would be a great shame to miss that opportunity.

I recognise the valuable contributions from many Members of the House on enhancing and improving many elements of this Bill; I thank them for the time that they have given me, but I am unable to accept these amendments. I hope noble Lords will feel able not to press their amendments on that basis.

Baroness Thornton: I thank the Minister for her remarks and for the attention that she has paid to this matter all the way through. Everybody appreciates that enormously. In a way, she has made my argument for me, as has the noble Lord, Lord O'Shaughnessy, because nothing in the Bill says that healthcare agreements have to be reciprocal. In a way, that proves that we do not need an international healthcare arrangements Bill: we need a European Union-EEA healthcare Bill to deal with reciprocal arrangements and do the job that we have in front of us.

I do not accept the argument put by the noble Lord, Lord O'Shaughnessy, tugging at our heartstrings, about the human consequences of this. Actually, there is nothing to stop the Government bringing forward a global healthcare Bill. I am absolutely sure that the Minister and her colleagues, with the help of the noble Lord and others, could get this into the Queen's Speech in two months' time, when we could have all these discussions about how it might work. He said that we do not have any disagreements in principle about this. Actually, we do not know whether we have any disagreements in principle about international healthcare because we have not had that discussion: that is the discussion we would have if we were dealing with a Bill that was being consulted upon, going through pre-legislative scrutiny and all those other things that we have been arguing need to happen if we are to have a Bill of the scope that the Minister and her party wish to have.

I thank the noble and learned Lord, Lord Judge, the noble Lord, Lord Marks, the noble Baronesses, Lady Brinton and Lady Jolly, and my noble friends Lord Foulkes and Lord Judd for their support. In particular, I thank the noble Lord, Lord Wilson, who, in his brief remarks got the argument absolutely right yet again. As I was preparing for this, I looked at the agreements we have with Australia and New Zealand, for example. These things are complicated—of course they are— and in a way that is why they deserve and need further consideration. I fear that we are not convinced by the Minister's arguments and I would like to test the opinion of the House.

4.01 pm

Division on Amendment 1

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Amendment 1 agreed.

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4.16 pm

Clause 2: Healthcare and healthcare agreements

Amendment 2

Moved by ***Baroness Thornton***

2: Clause 2, page 1, line 8, leave out "outside the United Kingdom" and insert "in a European Economic Area country or Switzerland"

Amendment 2 agreed.

Amendment 3

Moved by ***Lord Marks of Henley-on-Thames***

3: Clause 2, page 1, line 10, at end insert—

"and may not exercise the power conferred by section 1 otherwise than in accordance with such regulations."

Lord Marks of Henley-on-Thames: My Lords, as I should have done at the beginning of the first group, I thank the Minister for her help and courtesy in discussing this Bill and in engaging with Peers across the House to see how we should proceed with it. I echo the words of the noble and learned Lord, Lord Judge, including his tribute to the Blackwood amendment in respect of Henry VIII powers. As the Minister will have appreciated and has recognised by her actions, there is a real concern about the use of delegated legislation to amend or revoke primary legislation and EU legislation.

Amendment 3 is intended to bring a constitutionally acceptable structure to the Bill. It will ensure that the powers of the Secretary of State can be exercised only within the context of regulations. I will start with a word or two about the other amendments in this group: Amendment 5, on the words "for example", and government Amendments 6, 7 and 8, which limit the delegation of powers to public authorities.

As we have heard, Clause 2 contains the principal regulation-making powers. We had considerable debate, both at Second Reading and in Committee, about how unacceptably wide those powers are. The use of "for example" at the beginning of Clause 2(2) speaks volumes as to the disrespect shown in the Bill for the proper restriction of ministerial powers. The Delegated Powers Committee and the Constitution Committee have exposed how outrageously broad these powers are.

My amendment is directed at the absence of anything in the Bill that would limit the Secretary of State to exercising his Clause 1 powers only in accordance with regulations. One does not have to read far into the Bill to appreciate that, under Clause 1:

"The Secretary of State may make payments, and arrange for payments to be made, in respect of the cost of healthcare provided outside the United Kingdom".

This is wholly without restriction. It is this glaring deficiency—the failure to tie the Secretary of State to the exercise of powers in accordance with limitations either in the statute or contained in regulations—that my amendment is intended to cure.

The Minister frankly and commendably, if I may say so, recognised on our first day in Committee that the effect of Clause 1, if not amended in the way I suggest, would be to enable the Secretary of State to make or arrange payments without any regulatory limitation. She justified this untrammelled power—which, frankly, I find frightening—on the basis of urgency. She said that the Bill was unlikely to secure Royal Assent before March, so regulations would not be laid before the summer. If there were no deal, she explained, Ministers might need to use the powers before then. She mentioned—again, frighteningly—sharing data as well as making healthcare payments before the Government had a chance to get regulations passed to deal with these matters "more transparently", as she put it.

[Lord Marks of Henley-on-Thames]

This clause alone, unamended, would justify this country ruling out a no-deal exit and ensuring that our leaving date is delayed. It is an extraordinary travesty of the notion of the United Kingdom Parliament taking back control that we are asked to pass a Bill which involves ceding to Ministers an entirely unconstrained power to pay money out across the world on the sole professed ground that the Government failed to introduce legislation in a timely way, and to permit Ministers to spend public money and make arrangements of great public importance without any parliamentary scrutiny or authorisation.

I turn briefly to the other amendments in the group. Many of us still take the view that their scope is breathtakingly and unacceptably wide. The Government's proposal to limit possible delegation of the Secretary of State's powers so that such powers may be conferred only on a public authority is of course welcome; so is the limited five-year sunsetting provision, to which we shall return later, but, taken together, they barely scratch the surface of the massive transfer of unrestrained power from the legislature to the Executive set out in Clause 2. Of course, the sunsetting clause should be more restrictive—at least as restrictive as proposed by the noble and learned Lord, Lord Judge. Again, we will come to that later.

It goes without saying that the ridiculous and offensive restriction-busting words "for example" should be removed, as proposed in Amendment 5. However, the only satisfactory way to restrict the Government's power to what is necessary and acceptable is for the House of Commons to now accept the amendment we just passed restricting the use of the Bill to replicating the arrangements we have with the EU, the EEA and Switzerland. We hope that it does that.

This Government and future Governments must show more restraint and respect for the proper limits to the scope of delegated legislation. In the Bill, as in others to do with Brexit, they have not done that. It is to be hoped that they return to a wiser path in future.

Baroness Thornton: I thank the noble Lord, Lord Marks, for his exposition, which saves me from exploring yet again the powers in the Bill. I shall speak to Amendment 5, which is a simple amendment but one that we think might be quite clever in its intent. It states that regulations under the Bill can be made only for specific purposes.

When the clause was debated in Committee, noble Lords discussed the nine regulation-making powers mentioned by the noble and learned Lord, Lord Judge, which brought comment from the DPPRC, about the widest possible scope. However, as drafted, Clause 2(2) appears to bestow infinite powers on the Secretary of State to make regulations by virtue of the seemingly innocuous phrase "for example", which effectively grants the Secretary of State carte blanche to bring regulation forward outside the listed examples in relation to pretty much anything and everything. Just deleting those words will assist with the accountability that needs to be built into the Bill.

Amendment 5, which has the support of the noble and learned Lord, Lord Judge, and the noble Baroness, Lady Jolly, would ensure that regulations can be brought forward under the Act only for the purposes specified. We will, of course, support the Minister in the amendments she has tabled in this group—Amendments 6, 7 and 8—and I think the combination of our amendment and hers significantly improves the Bill, so I hope she will accept it. I probably need to say that, unless there is a very good reason why she does not want it and why it should not be there, we will seek support from the House for this amendment.

Lord Judge: My Lords, we have here a new example of constitution-making. We have now got rid of Henry VIII in this Bill and we have something rather more subtle—not something that that great, mighty ogre could have conceived of for himself.

The new example is:

"Regulations under subsection (1) may, for example".

Those of your Lordships who were in the House when we discussed the Trade Bill last week will remember another regulation-making power—another blockbuster like this one—only the words used were not "for example" but "among other things", in relation to regulations under whichever subsection it was. What kind of primary legislation is this? It is really rather alarming. The primary legislation provides:

"The Secretary of State may by regulations",

do this, that and the other: (a), (b) and (c). Well, fine. The regulations "may" do nine things—there is an amendment to one of them to come later, but this is not relevant to present purposes—specifying just about anything you can think of.

Why do we not say, even in relation to the EU, that the regulation-making power should be defined as widely as it is in Clause 2(2) but not extend further? The reality is that, with these words, in truth there is no limit to the regulation-making power. I find that astonishing, and I suspect that many Members of your Lordships' House will find that astonishing. So we now have within the terms of the Bill—subject to the Henry VIII point, which is going—in effect an undefined, unconstrained power given to the Secretary of State to make regulations. It will not do.

Lord Tyler (LD): My Lords, I am delighted to follow the noble and learned Lord, Lord Judge; he has been totally consistent in this field, and I very much sympathise with the point he has just made.

I serve on the Delegated Powers and Regulatory Reform Committee and, although I cannot speak on its behalf, I think it would share with me the view that the way in which the Minister has responded to our concerns and corresponded with us has been exemplary. We thank her, I am sure, for that; it is very valuable. However—she probably anticipated a "however"—in our report of 14 February there were two critical paragraphs to which she has not responded in the various exchanges we have had with her. I hope your Lordships' House will not mind if I read them, because they are extremely important, not just for this Bill but for a whole series of Bills that have been coming before us in recent weeks. The paragraphs refer to some of the correspondence we had with the Minister, and go as follows:

"The Minister repeatedly refers to the need for 'flexibility', given that reciprocal healthcare arrangements remain subject to negotiation. She says that there must be flexibility as to the meaning of healthcare, as to the persons who can be funded and as to the persons to whom functions can be delegated. The Minister says, at paragraph 19: 'This is a forward-looking Bill and so flexibility is key'".

We then put in our report, in heavy type:

"Powers that are too wide are not the more attractive for being part of a 'forward-facing' and 'forward-looking' Bill".

We continued:

"At paragraph 29, the Minister says again that the Bill is a 'forward-facing Bill', this time to justify taking powers to go beyond replacing current EU arrangements".

Again, in heavy type the report continued:

"Given that post-Brexit reciprocal healthcare arrangements are the Bill's principal target, the powers in clause 2 to make law governing the provision of healthcare by anyone anywhere in the world could have been more effectively circumscribed".

Those two paragraphs are not just appropriate to this Bill but demonstrate how, on many occasions in recent weeks, we have been effectively offered a skeletal Bill, with very considerable primary legislation made subject to largely unspecified future executive powers. Very often, it would seem, there is good reason, because of urgency or expediency. We are, however, establishing precedents for the post-Brexit situation. At the moment this can be used as an excuse—perhaps only for a few more days before the other place decides that the timescale is ludicrous—but it is not acceptable that we are constantly given legislation for a particular purpose and told that Ministers must have very wide-ranging, unspecified future powers simply for reasons of urgency. As the noble and learned Lord, Lord Judge, and the noble Lord, Lord Marks, have said, if we are not very careful we will establish precedents in this way.

I hope that when the Minister responds—having not previously done so in her exchanges with the Delegated Powers and Regulatory Reform Committee—she will comment on the particular points that were made in the report's recommendations.

4.30 pm

Lord Hope of Craighead (CB): My Lords, I think that the noble Lord is right in saying that we are establishing a precedent, but I have been looking at the word "example", and wonder whether the Minister has examples of this kind of legislation being used elsewhere. I cannot think of any. I examined the withdrawal Bill, which was very wide-ranging, and as far as I can recall this phrase does not appear in it even though it contains many provisions about delegated legislation. It would, therefore, be helpful to me if it was demonstrated that this is not the kind of precedent that has been described. In general, however, I congratulate the Minister and her Bill team on going a very long way to meet our objections in later parts of the Bill. I am, however, worried about this bit of it and would like to be reassured.

Baroness Blackwood of North Oxford: My Lords, I thank the noble Lord, Lord Marks, for tabling Amendment 3 and the noble Baroness, Lady Thornton, for Amendment 5, both of which seek to place limits on the powers in the Bill.

I will first address the noble Baroness, Lady Thornton, the noble Baroness, Lady Jolly, and the noble and learned Lord, Lord Judge, on Amendment 5, and clarify the purpose of Clause 2(2). We have had some debate about this already but this will be helpful. Clause 2(2) is intended to be an illustrative list of examples of the type of provision that may be included in regulations made under Clause 2(1). It is not itself intended to be a delegated power. The intention has always been to be prudent and transparent in the use of the delegated legislation, and the list was included to be helpful, by demonstrating the types of provision that the regulation-making powers at Clause 2(1) could enable, in order to effectively implement international healthcare regulations in the same way as under reciprocal healthcare regulations. This is not uncommon in primary legislation.

The list is reflective of the kind of provision already included in our current, more comprehensive, reciprocal healthcare arrangements with the EU, and it is intended as a guide to how the powers in Clause 2(1) can be exercised. Regulations under this clause need to be able to do everything that they might need to do to provide healthcare outside the UK, or to give effective agreement. I described in some detail during our debate on this clause in Committee why each of the descriptive lists were included and what they would be used for.

This amendment could mean that future Administrations would be unable to effectively implement reciprocal healthcare agreements with the EU, individual member states or other countries. The reason for this, which has already been alluded to in the debate, is that we have not yet concluded those negotiations and so it is not possible to rule out what we may need to provide for in regulations to give effect to an agreement. In addition, it would not be appropriate to circumscribe in the Bill the Government's negotiating mandate with the EU, EU member states or countries outside the EEA and Switzerland.

The examples in Clause 2(2) are not exhaustive, but they are useful pointers to aid understanding of how Clause 2(1) is capable of being exercised. I think they have served their purpose, given that we have had such robust debate about them. They offer additional transparency and assistance in understanding how the regulation-making powers in Clause 2(1) would work for the purpose of implementing reciprocal healthcare agreements. This is not an unusual statutory construction; there are examples of where regulation-making powers are accompanied by illustrative lists of what may be included in regulations in order to provide assistance in the understanding of what the powers are capable of doing. As to whether those illustrative lists include the words "for example", I have an example from Clause 11(2) of the Automated and Electric Vehicles Act 2018, which states:

"Regulations under subsection (1) may, for example—",

include paragraphs (a), (b) and (c). That is perhaps a helpful example for the noble and learned Lord, Lord Hope.

As this important policy area continues to develop and progress both in the EU and outside the EU, it is appropriate for the Government to be able to respond to protect the continuity of care of those already in

[Baroness Blackwood of North Oxford]
receipt of reciprocal healthcare, as well as to explore whether we would like to extend it to others. Were we to accept this amendment, it would, as I said on the previous group, restrict the implementation of reciprocal healthcare arrangements to current processes. That is clearly inappropriate when implementing dynamic agreements in which there are two parties.

Regulations under Clause 2(1) need to be able to do everything they might need to do to provide for healthcare outside the UK or give effect to a healthcare agreement. One small example of why it is right that the Government retain the ability to do this is developments in IT or new technology. As technological change continues to gather pace, it is right that the Government should be able to make the best use of those changes and ensure the most effective and efficient systems for the people accessing these arrangements. That is why we might need to bring in another regulation-making power. I hope the noble Baroness, Lady Thornton, as a former Health Minister, would agree that technology has the power to change the way people access healthcare and can make a real difference in people's lives, especially perhaps those who are restricted from accessing healthcare because of long-term conditions or distance from services.

While the illustrative list at Clause 2(2) does not expressly make reference to this matter, it may well be necessary to make arrangements to ensure that the most effective and efficient technological processes and systems are incorporated into the implementation of future reciprocal healthcare agreements. The Government are working, through this Bill, to ensure that we have the necessary ability to implement future international healthcare agreements with both EU and non-EU countries.

Amendment 3 in the name of the noble Lord, Lord Marks, speaks to concerns about the breadth of the powers in the Bill. Clause 1 follows a long line of general payment powers found in primary legislation, further to the Public Accounts Committee's concordant that government expenditure should flow from a specific Act of Parliament. It is a free-standing payment power and needs to be so. Notwithstanding that, we have deliberately chosen to include a power in Clause 2(1) that can be used to support the exercise of the payment power. Therefore, it is not possible for the Government to accept this amendment. Indeed, the DPRRC recognises that general payment powers are not delegated powers.

As I said in my response to this amendment in Committee, the Bill is making good progress through Parliament but clearly will not have Royal Assent until later this month. So, with the best will in the world, we will not be able to lay regulations until the summer. However, in the undesirable, unprecedented situation of no deal, we may need to use these powers before then. That would be specifically for a scenario concerning citizens' rights agreements with the EFTA states and with Switzerland, which will protect reciprocal healthcare for people living in those countries on exit day, or in other specified cross-border situations.

It is good news that we have operative agreements in the context of no deal, as they will guarantee healthcare for those covered by them. It is likely, though, that we will need to use the power in Clause 1, together with Clause 4, to temporarily implement those agreements. We cannot therefore accept the amendment because we would not be able to protect the healthcare arrangements of people in those countries. We will bring forward further detail in coming weeks when we can be clearer about bilateral agreements, and on the need for any further arrangements. I hope that noble Lords will agree that the Government must have the ability to provide for people at this unprecedented time. I emphasise that stand-alone funding powers such as those in Clause 1 that operate without the need for delegated legislation are not unusual—so this is not being brought in simply because of a no-deal situation.

I have listened carefully and considered the comments of noble Lords about concerns about the scope and breadth of the power. That is why we have sought to address concerns about it, with a large package of amendments to which I have already referred. We have specifically limited the delegated powers and the scope of what can be done under the Bill, and provided additional parliamentary scrutiny mechanisms and greater transparency.

Finally, I will speak to government Amendments 6, 7 and 8. They are in direct response to the concerns raised that regulations under the Bill could be used to confer functions on anyone, anywhere. It is understandable that noble Lords raised the possibility that the regulation-making powers in Clause 2 could be extended to confer functions on private bodies. There is not and has never been an intention to confer functions on private bodies in order to implement reciprocal healthcare arrangements. This was always the case but, given the concerns raised, we are taking action to make this clear.

The proposed government amendments limit Clause 2 to the operation of Clause 2(1) to ensure that any conferral or delegation of functions may only be to a "public authority". The definition of "public authority" is a person who exercises a function of a public nature. This ensures that public bodies maintain autonomy over how services are procured, contracted and delivered. When making regulations to implement such healthcare agreements, we wish to confer relevant functions on appropriate public bodies according to their part, giving them clear legal responsibility and an operating mandate. Our amendment does not prohibit us from doing this.

I therefore hope that noble Lords will withdraw or not move their amendments.

Lord Marks of Henley-on-Thames: My Lords, I shall seek leave to withdraw my amendment, because I feel very much under pressure from what the Minister has just said. It is the case that the free-standing power is needed, as she said, because of the delay that there has been in order to ensure that the payment power can be used before regulations can be laid. My amendment would therefore imperil the continuation of our current European arrangements. I feel under pressure because it the wrong way to do this. It is a great shame that this legislation was not introduced timeously, but I do not wish to divide the House on my amendment and I beg leave to withdraw it.

Amendment 3 withdrawn.

Amendment 4

Tabled by ***Lord Marks of Henley-on-Thames***

4: Clause 2, page 1, line 11, leave out subsections (2) to (4) and insert—

"(2) Regulations under subsection (1) may be used only to the extent necessary to replicate so far as possible the model of reciprocal healthcare for the European Union, the European Economic Area and Switzerland in place before the withdrawal of the United Kingdom from the European Union."

The Deputy Speaker (Baroness Garden of Frognal) (LD): Amendment 4 is, I think, consequential on Amendment 1.

Lord Marks of Henley-on-Thames: I am not sure that Amendment 4 is entirely consequential, so it is probably better if I do not move it, now that Amendment 1 has been agreed.

Amendment 4 not moved.

4.45 pm

Amendment 5

Moved by ***Baroness Thornton***

5: Clause 2, page 1, line 11, leave out ", for example"

Baroness Thornton: I listened very carefully to the Minister and I am not convinced, partly because the regulations under Clause 2(2) are very helpful. They give the Government everything they need to take forward the negotiations on reciprocal healthcare, and as the Minister herself said, we have put the regulations in place to help with a no-deal situation, which I hope will not occur. But the noble and learned Lords, Lord Hope and Lord Judge, made the point that those words are, while dangerous might be an exaggeration, certainly not appropriate.

Lord Woolf (CB): Does the noble Baroness agree that, with "for example", you may not be extending the jurisdiction of the regulations but actually limiting their range? That is what the Minister was seeking to tell us in her eloquent description of her case. If you say "for example, cows", you have the example of animals that fall within the range of cows. Without that phrase, some cases would not apply to cows.

Baroness Thornton: I hate to disagree with the noble and learned Lord, Lord Woolf, but the words "for example" expand the list rather than decrease it. That is the point of this amendment. Given the huge weight of regulations that we are dealing with in this House, if something is not included in that list, I am sure that that can be remedied. We are getting very good at remedying those situations. We on these Benches think—and other noble Lords have certainly agreed—that "for example" expands the range and that is not necessary or appropriate, so I beg to move and wish to test the opinion of the House.

4.46 pm

Division on Amendment 5

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Amendment 5 agreed.

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4.59 pm

Amendments 6 to 8

Moved by ***Baroness Blackwood of North Oxford***

6: Clause 2, page 2, line 1, leave out "on the Secretary of State or on any other person"

7: Clause 2, page 2, line 3, at end insert—

"(2A) But regulations under subsection (1) may not confer functions on, or provide for the delegation of functions to, a person who is not a public authority."

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

"(5) In this section "public authority" means a person who exercises functions of a public nature (but does not include a person who does so only because of exercising functions on behalf of another)."

Amendments 6 to 8 agreed.

5pm

Amendment 9

Moved by ***Baroness Blackwood of North Oxford***

9: Clause 2, page 2, line 8, at end insert—

"(6) No regulations may be made under subsection (1)(a) or (b) after the end of the period of five years beginning with exit day."

Baroness Blackwood of North Oxford: My Lords, the Bill's delegated powers and their global application have been a source of spirited debate since this Bill's introduction, and noble Lords have rightly given considerable scrutiny to this matter. A number of amendments were tabled in Committee, including those by the noble Baronesses, Lady Thornton and Lady Jolly, the noble Lords, Lord Patel, Lord Kakkar and Lord Marks, and the noble and learned Lord, Lord Judge. This issue has concerned Peers across the House. I am pleased to say that the Government have listened carefully and tabled an amendment that significantly curtails the scope of the delegated powers in the Bill.

Amendment 9 directly addresses the concerns raised by restricting the exercise of the delegated powers, and, as we have already discussed, limits the global scope. The Bill is intended to support the implementation of comprehensive reciprocal healthcare arrangements with countries within and outside the EU, and to implement possible future partnerships. It was drafted to fulfil this purpose in a number of different scenarios, and that remains the Government's intention, but we have listened closely to the points raised by Peers both inside and outside of this Chamber, as well as to the views of the DPRRC and the Constitution Committee, and concluded that the regulation-making powers that can be used to set up schemes for unilateral healthcare overseas should be time-limited.

The powers in Clause 2(1)(a) and Clause 2(1)(b) would primarily be needed, in the event of a no deal, to mitigate any detrimental effects of a sudden change in healthcare access for UK nationals living in the EU. These powers would be required in the event that reciprocal arrangements are not in place. Our aim remains to reach an agreement on reciprocal arrangements, but as a sensible Government, we need to plan for all eventualities.

In the unprecedented event of leaving the European Union with no deal, we would need to have the option of establishing support mechanisms for people in exceptional circumstances where there would be a serious risk to their health should any member state not agree to maintain reciprocal healthcare. However, we have listened, and want to ensure that while the Government have the ability to provide for people in this unprecedented time, we are still respectful of the constitutional roles of Parliament and the Executive. In response, we feel that the delegated powers that implement healthcare arrangements outside of reciprocal healthcare agreements with other countries should be sunsetted.

During the five years before the sunset, we will retain the flexibility to deal with exit scenarios using regulations under Clause 2(1) as appropriate. These powers can be used to offer UK nationals reassurance and certainty, which we intend through this Bill. After the sunset, making use of the regulation-making powers under Clause 2(1) would be limited to Clause 2(1)(c) only, which provides the Government with a mechanism to give effect to future complex global healthcare agreements. However, it is important to state that this amendment will mean that it is not possible for the Secretary of State to set up any long-term scheme to unilaterally fund mental health treatment in Arizona or hip replacements in Australia, as has been suggested. Of course, this is not something a reasonable Government would intend to do, but I am happy to provide that reassurance. However, we would want to remove any perceived risk regarding this power, and that is the intention of this amendment.

In tabling the amendment, the Government have sought to clarify the intended use of the important powers in Clause 2(1)(a) and (b). This represents a significant restriction of the Government's use of delegated powers, in direct response to concerns raised

[Baroness Blackwood of North Oxford]
by parliamentarians across this House. It also represents a significant check on the global scope of the Bill. On that basis, I beg to move.

Lord Lansley (Con): My Lords, my noble friend will forgive me if I ask for a point of clarification. If Amendment 9 is passed, after the sunset clause is implemented, powers could only be made in relation to a healthcare agreement. However, Clause 3 says that a healthcare agreement can concern either healthcare provided outside the United Kingdom and paid for by the United Kingdom, or healthcare provided in the United Kingdom with another country paying. It does not require reciprocity. Is that quite the restriction my noble friend was suggesting, since it could still be unilateral, not reciprocal?

Baroness Thornton: I thank the Minister for tabling this sunset clause; she is quite right to do so. I had not thought of the question asked by the noble Lord, Lord Lansley, but it is a good one. However, we support the amendment.

Baroness Blackwood of North Oxford: I thank my noble friend Lord Lansley for his question. This power enables a unilateral scheme, so it does not require reciprocity and is intended to be used only in an emergency scenario where a group of individuals are in difficulty. That is why it is appropriate to sunset it in this way.

I thank the House for its support for the amendment and hope that the noble and learned Lord, Lord Judge, will withdraw his amendment on that basis. I beg to move.

Amendment 9 agreed.

Amendment 10

Tabled by ***Lord Judge***

10: Clause 2, page 2, line 8, at end insert—

"( ) No regulations may be made under subsection 1(a) or (b) in relation to countries outside the European Economic Area or Switzerland after the end of a period of two years beginning with exit day."

Lord Judge: Given the result of the Division earlier this afternoon, I do not intend to move this amendment. If we have to reconsider the issue, however, I may have to come back to it.

Amendment 10 not moved.

Clause 3: Meaning of "healthcare" and "healthcare agreement"

Amendments 11 to 13

Moved by ***Baroness Thornton***

11: Clause 3, page 2, line 16, leave out "outside the United Kingdom" and insert "in the European Economic Area or Switzerland"

12: Clause 3, page 2, line 18, leave out "outside the United Kingdom" and insert "in a European Economic Area country or Switzerland"

13: Clause 3, page 2, line 22, leave out "outside the United Kingdom" and insert "with which the agreement has been made"

Amendments 11 to 13 agreed.

Clause 4: Data processing

Amendment 14

Moved by ***Lord Clement-Jones***

14: Clause 4, page 2, line 38, at end insert—

"( ) The processing of personal data in accordance with subsection (1) must comply with—

(a) the seven Caldicott principles outlined in the Caldicott Committee's Report on the Review of Patient-Identifiable Information and subsequent reports;

(b) the Government's Data Ethics Framework."

Lord Clement-Jones: My Lords, I beg to move Amendment 14, and your Lordships will be pleased to hear that I will be brief.

During the passage of the Bill, considerable concerns have been raised by a number of noble Lords about the use and sharing of data within the NHS. It is a hotly contested subject, and one of the best briefings on it is from our Library, prior to a debate on 6 September initiated by the noble Lord, Lord Freyberg. It unpacks a number of the concerns and issues about data within the NHS, and I am sorry that I have been unable to be at Second Reading or in Committee to expand on some of those issues.

During our Select Committee inquiry into artificial intelligence, there were a number of witnesses who talked about the use of data in the NHS, and we drew a number of conclusions, namely that the data was not in good shape to be utilised for beneficial purposes such as research, diagnosis and screening. That is another issue, however; what concerns noble Lords is the question of sharing. Now that we have seen Amendment 1 pass, maybe we will deal only with countries where there is a level of data adequacy which gives us an assurance about the use of NHS data. As the King's Fund said last year in its report, *Using Data in the NHS*:

"National policy has to keep a balance between responding to legitimate public concern about the security and confidentiality of data and enabling data to be shared and used by NHS organisations and third parties. It is also essential that NHS national bodies are transparent with the public about how patient data is used".

It went on to suggest that the level of opt-outs for patients would be key to the quality and validity of future research, and that NHS England and NHS Digital should keep this under review. One of the issues in the NHS is that there are several organisations responsible for NHS data. It is not just NHS England, NHS Digital, the National Information Board and Public Health England. The Caldicott Guardian—the national guardian for health and care—has a responsibility as well. It is quite a disparate, rather balkanised issue.

I was reassured on reading what the noble Baroness, Lady Manzoor, had to say when she responded, as the Minister, to this set of amendments in Committee:

"Under the Bill, personal data can be processed only in accordance with UK data protection law, namely the Data Protection Act 2018 and the general data protection regulation, which will form part of UK domestic law under the EU withdrawal Act 2018 from exit day".

I am not going to go into all the questions about data adequacy and so on. I take what she said as quite reassuring, but it was less so when she later responded to what was then Amendment 23—this amendment is identical. She said:

"I assure the Committee that the Government are committed to the safe, lawful and responsible processing of people's data".

However, she then said:

"As the noble Baroness, Lady Jolly, and my noble friend Lord O'Shaughnessy noted, the Caldicott principles and the Government's Data Ethics Framework are admirable standards to apply to the handling of patient data. Both of these non-legislative frameworks are in line with the Data Protection Act and the GDPR, which are enshrined in the Bill".—[*Official Report*, 19/2/19; cols. 2261-63.]

That is not unequivocal in terms of those standards applying. As the Minister knows, we discussed this between Committee and Report. I had hoped to receive correspondence from her, but sadly I have not done so. She may need to repeat whatever text of the letter she may be able to find in her outbox. I hope she can give the House reassurance that the national data ethics framework and the Caldicott principles will apply to any sharing of data. The data ethics framework is a cross-government standard, of course, but the Caldicott principles are specific to the NHS. It is important to make sure they apply both domestically and internationally.

Lord O'Shaughnessy: My Lords, I am grateful to the noble Lord, Lord Clement-Jones, for giving the House the opportunity to talk about this issue again. He has been deeply involved in this topic and, as he said, I spoke on it in Committee. Compliance with this country's very robust data protection rules is critical in general and particularly important in healthcare. This was discussed in the debate instigated by the noble Lord, Lord Freyberg; it has been a topic of conversation in this House, both in and out of the Chamber, on many occasions.

The noble Lord talked about the number of bodies that have some responsibility: he called it balkanised. It is important that we do not create a balkanisation in the law, even if a small one is in operation. One set of law should take precedence over all data protection, security and connected issues. That is, and should be, the Data Protection Act 2018. This means that there are operational guidelines, frameworks, principles and so on about how these ought to operate within individual contexts. That is precisely where the Caldicott principles come in. They take a general piece of legislation and translate what good practice in interpreting it ought to mean in a health setting. In that sense, it is important to say that we should not put those principles in a legislative setting. They are interpretive of the core, primary legislation and may need to change over time. They may need to adapt; there may be an eighth principle as we get into interesting questions about the value of data and so on.

It is important to recognise that the Caldicott principles bring to life what the Data Protection Act ought to mean in health settings. It would be a mistake to create competing law. Of course the Government agree with the noble Lord about the importance of giving force to the principles. That is one reason why we supported the Private Member's Bill brought into this House by my noble friend Lady Chisholm to put the national data guardian on a statutory basis. I hope that that gives him the strength of reassurance about the way that the framework is constructed, which is not to create an opportunity to do funny stuff at the edges, but rather to make sure that there is primacy of one set of legislation.

5.15 pm

Lord Clement-Jones: My Lords, the noble Lord used the expression, "giving force". If those principles are given force, it means that the Government treat themselves and put on the record that they are bound by those principles. That is what giving force would mean in those circumstances, because these are novel circumstances set out in the Bill. That kind of reassurance is needed with the data ethics framework.

Lord Patel (CB): My Lords, I had amendments that the Minister responded to at the Dispatch Box and I accepted her explanation at the time. Now I take the point that the noble Lord, Lord Clement-Jones, is trying to raise, that those principles that she enunciated about data protection included the Caldicott principles. As that reassurance was given at the Dispatch Box, I think it will cover the issue.

Baroness Thornton: My Lords, I added my name to the amendment in the name of the noble Lord, Lord Clement-Jones, and I am grateful that he has made the argument so I do not need to repeat it. Of course, I spoke about this in Committee and, like other noble Lords, I was reassured at the time by the explanation given by the noble Baroness, Lady Manzoor. Since then, however, the Bill team has actually made available the Bill data processing factsheet, which is very useful. It explains things in great detail, so I wondered whether it might be a good idea if this was given to everybody involved with this Bill. I do not know whether the noble Lord has seen this, but it is a very useful piece of information. Otherwise, I was satisfied in Committee, and if the Minister answers the questions, I am sure that I will remain satisfied.

Baroness Manzoor (Con): My Lords, I thank the noble Lord, Lord Clement-Jones, and the noble Baronesses, Lady Jolly and Lady Thornton, for tabling Amendment 14 and raising the issue of the lawful and responsible processing of data. I start with an apology to the noble Lord, Lord Clement-Jones. My noble friend Lady Blackwood did write to the noble Lord, and I am sorry that he has not yet received the letter. We will endeavour to send him another copy as soon as possible.

As my noble friend Lord O'Shaughnessy said—and I reassure the noble Lord, Lord Patel, that—data sharing is a necessary and crucial aspect of maintaining effective complex reciprocal healthcare arrangements, and the Government are committed to the safe, lawful processing of people's personal data. There are, as the noble Lord said, safeguards in place in respect of processing personal data for the purposes set out under the Bill, for which the Bill makes express provision.

[Baroness Manzoor]
The Bill makes it absolutely clear that it does not authorise the processing of data that contravenes UK data protection legislation.

Data processing will be permitted only for the limited purposes set out in the Bill. Personal data will be processed in accordance with UK data protection law—as the noble Baroness, Lady Thornton, observed—namely, the Data Protection Act 2018 and the general data protection regulation, which will form part of UK domestic law under the European Union (Withdrawal) Act 2018 from exit day.

I assure the noble Lords, Lord Patel and Lord Clement-Jones, and the noble Baroness, Lady Thornton, that the Caldicott principles are an important part of the governance of confidential patient information in the NHS and a guiding mechanism for organisations in how they should handle confidential patient information on a practical level. The NHS is expected to adhere to these principles.

Since 1999, NHS bodies have been mandated to appoint a Caldicott Guardian. These principles are therefore ingrained in the current operation of the NHS and confidential patient data handled by the NHS for purposes in relation to reciprocal healthcare will be subject to these principles. The principles are consistent with the requirements of the GDPR and a breach of the Caldicott principles would most likely amount to a breach of the GDPR and the Data Protection Act 2018. The principles are not intended for statute but are of real practical and operational importance when confidential patient information is processed. This will be the case when confidential patient information needed for reciprocal healthcare arrangements is processed.

It is also worth noting that reciprocal healthcare arrangements will not normally involve the processing of confidential patient information, except in particular circumstances, such as facilitating planned treatment. However, where this information is processed through reciprocal healthcare arrangements under the NHS, it must comply with UK data protection legislation. NHS organisations, as they do now, will be required to adhere to the Caldicott principles. The data ethics framework that the noble Lord, Lord Clement-Jones, mentioned sets out collective standards and ethical frameworks for how data should be used across the whole public sector, as well as the standards for transparency and accountability when building or buying new data technology. Where the framework refers to personal data, it consistently cross-refers to the principles in the GDPR, which is the relevant legislation that policymakers must consider when processing personal data.

Personal data processed for the purposes of reciprocal healthcare arrangements would therefore also take into account the data ethics framework. In addition, from 1 April 2019, the National Data Guardian will be put on a statutory footing and will therefore be able to issue formal guidance and informal advice to organisations and individuals about the processing of health and adult social care data in England. This will provide patients statutory independent oversight of the use of health data, with health bodies being required by law to have regard to the guidance issued by the National Data Guardian. This is another way in which NHS organisations in England which are processing data in respect of reciprocal healthcare will be monitored and personal data can be further protected as necessary.

It is important to note that express reference to these principles in the Bill would not provide any additional protections for personal data or confidential patient information, as the standard of protections required is the same as the existing data protection legislation already provided for in the Bill. I am grateful to the noble Baroness, Lady Thornton, and others for their support in observing this. Furthermore, as I have said, these principles already apply to NHS organisations and will continue to do so in respect of reciprocal healthcare. As a result, it would be inappropriate to put these in the Bill and I am therefore unable to accept the amendment. However, the Government have listened carefully to concerns surrounding the list of persons who can lawfully process data as a part of implementing new reciprocal healthcare arrangements under the Bill and have tabled an amendment on this issue.

Currently, the list of authorised persons under the Bill includes the Secretary of State, Scottish Ministers, Welsh Ministers and a Northern Ireland department, NHS bodies and providers of healthcare. Of course, over time, public bodies change, are reformed and refashioned, and functions are transferred between them in consequence. Clause 4(6)(e) gives the Secretary of State the ability to respond to such changes so that systems can operate efficiently and data can follow in an appropriate and lawful way to enable such operation. We propose, however, subjecting any regulations that add to the list of persons authorised to process data for the purposes of the Bill to the draft affirmative procedure. This would allow Parliament the opportunity to scrutinise authorised persons handling personal data while ensuring that the Government have the ability to guarantee that future agreements are administered in the most efficient way possible.

The Government are firmly committed to the safe, lawful processing of personal data, and to ensuring that patients have enforceable protections under data protection legislation. I hope, given my assurances that any data processing under the Bill would comply with the Caldicott principles and the data ethics framework as appropriate, that the noble Lord will feel able to withdraw the amendment.

The noble Baroness, Lady Thornton, kindly mentioned the factsheet. Of course, if it is useful, we would be very happy to put this in the Library. Officials do a tremendous job and I am very grateful to them. I hope, with the assurance I have given noble Lords, and the fact we are providing greater scrutiny, that the noble Lord feels able to withdraw the amendment.

Lord Clement-Jones: My Lords, that was exactly the kind of robust response from the Minister that I was hoping for. It is very rare that I listen to a government response and nod all the way through, so I thank her for that very careful response, both on the Caldicott principles and the framework for data ethics, and for going into the accountabilities, and the affirmative procedure guarantee at the end—that was a bouquet.

It is not that we on these and other Benches do not understand the value of NHS data and the real importance of that balance. This is not designed as a negative approach to the use of NHS data; it has huge potential benefits, but we have to make sure that it is kept within that ethical framework. The Minister has demonstrated that that kind of culture is ingrained—or is certainly expected to be ingrained—in the NHS and that Caldicott Guardians, post 1 April, will be very much on the case. In those circumstances, with pleasure, I beg leave to withdraw my amendment.

Amendment 14 withdrawn.

Amendment 15

Moved by ***Baroness Manzoor***

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

"Requirement for consultation with devolved authorities

(1) Before making regulations under section 2 that contain provision which is within the legislative competence of a devolved legislature, the Secretary of State must consult the relevant devolved authority on that provision.

(2) In this section—

"devolved authority" means the Scottish Ministers, the Welsh Ministers or a Northern Ireland department;

"devolved legislature" means the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly.

(3) A provision is within the legislative competence of a devolved legislature if—

(a) it would be within the legislative competence of the Scottish Parliament if it were contained in an Act of the Scottish Parliament;

(b) it would be within the legislative competence of the National Assembly for Wales if it were contained in an Act of the Assembly (including any provision that could only be made with the consent of a Minister of the Crown); or

(c) the provision, if it were contained in an Act of the Northern Ireland Assembly—

(i) would be within the legislative competence of the Assembly, and

(ii) would not require the consent of the Secretary of State."

Baroness Manzoor: My Lords, in Committee, the noble Baronesses, Lady Thornton, Lady Jolly, and Lady Humphreys, tabled amendments on devolution and specifically sought to place an obligation on the Government to consult with the devolved Administrations when making regulations under this Bill. We listened very carefully to that debate and were committed to bringing forward a government amendment which set out, on the face of the Bill, a duty to consult the devolved Administrations where regulations under Clause 2 would make provisions that would be within the legislative competence of a devolved legislature. Government Amendment 15 fulfils this commitment.

I am delighted that the Scottish Parliament has granted a legislative consent Motion to the Bill and that the Welsh Government have tabled a consent motion in the Welsh Assembly recommending that the Assembly, which is debating the Motion today, grants consent to the Bill. We have also had positive and productive engagement with colleagues in the Northern Ireland Department of Health and in the Northern Ireland Office. We are grateful for their support and agreement to ensure that this Bill applies and extends to Northern Ireland.

The regulation-making powers in the Bill provide us with a legal mechanism to implement comprehensive international healthcare agreements into domestic law and provide for healthcare outside the UK for the benefit of all UK nationals. It is, however, recognised that these powers may be used in ways which relate to devolved matters, by which I mean domestic healthcare. In light of this, the amendment provides:

"Before making regulations under Section 2 that contain provision which is within the legislative competence of a devolved legislature, the Secretary of State must consult the relevant devolved authority".

5.30 pm

To underpin and facilitate this consultation, we have developed and agreed a memorandum of understanding with the devolved Administrations. This MoU sets out a pragmatic and mutually beneficial working relationship which will ensure that the devolved Administrations will continue to have a vital role to play in delivering reciprocal healthcare for the benefit of all UK nationals. In addition, it will enable devolved Ministers to set out their views at an early stage of reciprocal healthcare policy formation, where their officials will have been involved in helping to develop the proposals. We believe that this agreement, which is both practical and pragmatic, allows us to move forward in a collaborative way with all our colleagues in the devolved Administrations, and we believe that it demonstrates how the UK Government and the DAs can work well together. I hope that noble Lords will be able to give their support to this important amendment.

Baroness Wheeler (Lab): My Lords, I support this important amendment, to which I have added my name on behalf of these Benches, and I thank the Minister for the proposed new clause.

Our original amendment proposing a duty to consult the devolved Administrations before making regulations under Clause 2 highlighted a glaring omission from the original Bill which has now thankfully been remedied by this amendment. Although we were very grateful for the assurances the Government gave that there was active involvement and discussion on the Bill with the devolved Administrations on matters affecting them, the requirement as a statutory duty was crucial, as many noble Lords stressed in Committee. We underlined that a statutory commitment to consult and seek the views of the devolved Administrations on matters affecting them would enable future discussions on reciprocal healthcare arrangements to take place on a collaborative and constructive basis.

I thank the Minister for updating us on Scotland and Northern Ireland, as also happened in Committee. I note too that a supplementary legislative consent Motion with regard to the Welsh Assembly is being discussed today. I was going to ask the Minister for further news, but obviously she has not had any, and I am sure that she will let us know as soon as there is some.

[Baroness Wheeler]

As the Minister also mentioned, in addition to the requirements contained in the amendment, the memorandum of understanding that has been developed between the devolved Administrations and the UK Government to underpin the amendment provides for devolved Administrations to be consulted on: the negotiation of new healthcare agreements; the development and drafting of regulations under the Bill to implement such agreements; and agreements which apply to or have implications for devolved Administrations, and on regulations giving effect to those agreements. We very much welcome that.

Finally, I ask the Minister for a formal response to the question I raised in Committee on the Constitution Committee's report on the Bill in February in respect of the devolved Administrations. Paragraph 15 stressed the need for the Government to set out how they intend to manage the overlapping competencies in relation to the Bill and other policy areas. The committee pointed out that the potential for overlapping competencies will increase as all powers are repatriated from the EU, as does the scope for disagreement about such issues, and this will need to be managed. If the Minister prefers to write to me on this matter, that would be acceptable and much appreciated.

Baroness Humphreys (LD): My Lords, I am grateful to the noble Baroness for introducing the amendment and for the implicit acceptance that the recognition of the powers of the devolved Administrations was a serious omission from the Bill. I must admit that I find the ineptitude—I think that is the right word—of Ministers and officials who produce Bills such as this without "devolution proofing" them deeply frustrating. Surely it would have been possible someone to take a few seconds at the early stages of the Bill's production to ask, "Does this Bill have an impact on the powers of the devolved Administrations?" That would have saved so much time, and prevented my blood pressure skyrocketing.

While I am pleased that the amendment calls on the Secretary of State to consult with devolved Administrations on matters that are within their devolved competence, may I press the Minister to explain the implications—and perhaps the limitations—of the word "consult"? My amendment in Committee called for an assurance that the Bill would not allow the Secretary of State to amend, repeal or revoke Welsh primary legislation—which is rather different from mere consultation. I would therefore be grateful if the Minister could clarify this for me so that we have on record a full recognition of the powers of the devolved Administrations.

Lord Wallace of Tankerness (LD): My Lords, I signed the amendment in the name of the noble Baroness, Lady Thornton, in Committee. Indeed, as I indicated in the speech I made then, when evidence was given to the Scottish Parliament committee that was looking at the legislative consent Motion memorandum issue, there was an expectation that there would be a consent provision in the Bill. The noble Baroness, Lady Blackwood of North Oxford, clearly indicated an intention to do so when she replied to the debate; I put on record an appreciation of the fact that we now have this delivered in letter and in spirit.

Baroness Manzoor: My Lords, I thank the noble Baronesses, Lady Wheeler and Lady Humphreys, for their support for this amendment.

I point out to the noble Baroness, Lady Humphreys, that of course consent means exactly that. We have gone a long way to set out a memorandum of understanding that is mutually beneficial; it will be a beneficial working relationship to ensure that the devolved Administrations will continue to play a vital role in delivering reciprocal healthcare. We will continue to consult and to work closely with them, both at ministerial and official level. I therefore reassure her on that point.

I will write to clarify the issue that the noble Baroness, Lady Wheeler, raised. As I said, the MoU that we have agreed sets out our future working relationship, which will include consideration of where compliances overlap.

This amendment represents our close working relationship; I give an assurance from the Government that we are committed to ensuring that arrangements will be conducive to the development of a reciprocal healthcare system that operates effectively across the whole of the UK in a way that fully respects the devolution settlements. I hope that, with the assurances I have given, noble Lords will feel able to support the amendment.

Amendment 15 agreed.

Amendment 16

Moved by ***Baroness Manzoor***

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

"Report on payments made under this Act

(1) The Secretary of State must, in relation to each relevant period—

(a) prepare a report in accordance with this section, and

(b) lay the report before Parliament as soon as practicable after the end of the period.

(2) Each report must give details of payments made under the powers conferred by or under this Act.

(3) "Relevant period" means—

(a) the period beginning with the day on which this Act is passed and ending with the end of the first financial year to begin after exit day;

(b) each subsequent period of 12 months.

(4) "Financial year" means the period of 12 months beginning with 1 April."

Baroness Manzoor: My Lords, financial reporting in the context of the Bill has already been the subject of debate in Committee. The noble Baroness, Lady Thornton, and my noble friend Lord Dundee, who, sadly, is not here today, tabled an amendment on this matter, and the noble Baronesses, Lady Brinton, Lady Wheeler, Lady Jolly and Lady Finlay, also spoke on this important matter.

While we were unable to support the amendment tabled in Committee, the Government supported its spirit, in line with our ongoing commitment to transparency, particularly when it comes to the use of public money.

We made this clear in our letter to the Delegated Powers and Regulatory Reform Committee earlier this year, and I am pleased now to introduce this government amendment, which provides a statutory duty to publish an annual report. Government Amendment 16 places a duty on the Secretary of State to lay a report before Parliament each year. This report will outline all payments made during the preceding financial year in respect of healthcare arrangements implemented by the Bill. I believe this amendment directly addresses many of the concerns raised by noble Lords in Committee, and the clear request for increased scrutiny of the use of public money.

The nature and implementation of future reciprocal healthcare agreements is, of course, a matter for future negotiations. However, we envisage that, through this reporting mechanism, we would also be able to provide Parliament with further information on the operation of future agreements. For example, we anticipate that this report would include details of both expenditure and income to reflect the reciprocal nature of agreements.

The amendment provides for annual reports, which will be published as soon as is practicable after the end of each financial year. Expenditure by the Department of Health and Social Care relating to EU reciprocal healthcare arrangements is currently published to Parliament in the form of annual resource accounts. Reporting on future reciprocal healthcare arrangements will continue in this way. Indeed, as now, the department's future expenditure on reciprocal healthcare will be subject to the existing government reporting requirements. For example, DHSC income and expenditure accounts, relating to current EU reciprocal healthcare arrangements, are already audited by the Comptroller and Auditor-General and published by the Treasury as part of the annual report presented to Parliament.

However, the Government have heard the need for greater transparency in our administration and implementation of reciprocal healthcare arrangements. Moreover, we understand the importance of presenting this information in a clear and accessible document, which is why we propose to go beyond the current reporting requirements with this amendment. Our intention is that Parliament should have clear and easy-to-access details of the public spending on healthcare arrangements implemented under the Bill.

Noble Lords have also expressed concern over the scope of the powers in the Bill. This proposal works alongside the Government's other amendments in providing clarity. It allows for increased parliamentary scrutiny in respect of costs incurred in relation to future healthcare arrangements.

We remain committed to financial transparency. The amendment ensures that we are able to continue providing Parliament with further opportunities for scrutiny. I hope that your Lordships will be able to offer their support to this amendment. I beg to move.

Amendment 17 (to Amendment 16)

Moved by ***Baroness Thornton***

17: After Clause 4, leave out subsection (2) and insert—

"(2) The annual report laid under subsection (1) must include, but is not limited to—

(a) all payments made by the government of the United Kingdom in respect of healthcare arrangements for healthcare provided outside the United Kingdom to British citizens;

(b) all payments received by the government of the United Kingdom in reimbursement of costs of healthcare provided by the United Kingdom to all non-British citizens;

(c) the number of British citizens treated under healthcare agreements outside the United Kingdom;

(d) the number of non-British citizens treated under healthcare agreements within the United Kingdom;

(e) any and all outstanding payments owed to or by the government of the United Kingdom in respect of the provision of healthcare outside the United Kingdom made before the passing of this Act; and

(f) any and all administrative costs faced by NHS Trusts in respect of implementing healthcare agreements.

(2A) The information required under subsection (2)(a) and (b) must be listed by individual country in every annual report."

Baroness Thornton: My Lords, this is a probing amendment to Amendment 16. I am seeking reassurance about the contents of the annual report. I very much welcome the amendment moved by the noble Baroness, Lady Manzoor, which we shall be supporting.

I realise that lists are a dangerous thing to put in a Bill. In proposing her amendment, the noble Baroness covered some of these points. However, it is very important, given the powers that the Bill contains, that information—for example under Clause 2(2)(a) and (b)—must be listed in every annual report by individual countries. We feel that proposed new paragraphs (a) to (f) in our amendment need to be contained within the annual report.

This amendment seeks reassurance that the contents of this report will be consistent with the powers that the Government are seeking in the Bill.

Baroness Brinton: My Lords, I support the amendment moved by the noble Baroness, Lady Thornton. Without repeating our debates at previous stages of the Bill, it would be helpful to have reassurance from the Minister that the content of the list in the noble Baroness's amendment is exactly the sort of detail we need. It is important to reassure people on exactly how any financial arrangements for healthcare will be made.

Lord Lansley: Further to that point, I think following the list exactly may be the most difficult thing for the Government to do. Amendment 16 sets out to commit to a report on payments. We have healthcare agreements with, for example, Australia and New Zealand where no money changes hands. As I understand the way in which these agreements work, it would be very difficult for numbers of British citizens in Australia or Australian citizens here to be collected to be reported. The noble Baroness, Lady Brinton, asked for the list to contain exactly the sort of information we need. While the list may indicate the sort of information we are looking for, if it is not available, it is not available.

5.45 pm

Baroness Brinton: Under current arrangements, the National Audit Office is able to tell us exactly the costs of the reciprocal arrangements with Europe. I am therefore struggling to understand why we might not be able to do this elsewhere in future.

Lord Lansley: The costs are exactly what the Government are proposing to report on. The Australian agreement, for example, does not involve payments to and fro. So costs do not arise. We have mutual, reciprocal agreements about treating each other's citizens in our domestic healthcare system.

Baroness Brinton: I am sorry to prolong the point but, surely, we would be clocking up those costs in the NHS, even if they were not reclaimed.

Lord Lansley: The Minister may wish to advise on this. I understand that we probably do not—because there is no requirement to recover the money—whereas, under an EU agreement, we collect the data because we are required to charge the Governments who are the competent authorities for those patients.

Baroness Brinton: I am really sorry to prolong this point but, if we are trying to make sure that new reciprocal arrangements are effective, this is exactly the sort of data collection that we should be seeking. Even if it is not used initially, the whole point is that we want to understand the costs of each arrangement.

Lord Lansley: I am making a simpler point: it is no good asking for information that is not collected. There is a good reason why it is not collected. Although, this might happen in future, at the moment I do not think anybody is proposing to switch the Australian and New Zealand agreements to ones where there is reciprocal reimbursement. In this case, I do not think the information is being collected.

Baroness Manzoor: My Lords, I am grateful to the noble Baroness, Lady Thornton, for her amendment and to the noble Baroness, Lady Brinton, and my noble friend Lord Lansley for their contributions. I am not sure I want to go down this route. However, if the noble Baroness, Lady Brinton, wants me to write to her to clarify the point she raised, I will certainly do so. From what I have seen, my noble friend Lord Lansley is correct in saying that we have a reciprocal agreement with the countries he mentioned, where money does not exchange hands.

I can reassure the noble Baronesses, Lady Thornton and Lady Brinton, that—as I indicate—the Government have listened to the need for greater transparency in the administration and implementation of reciprocal healthcare arrangements. I welcome the support around the House for our intentions. We understand the importance of presenting this information in a clear and accessible document, which is why we propose to go beyond the current reporting requirements. Our initial commitment to the DPRRC is contained in the amendment that the Government have tabled on this matter.

As I said, the government amendment directly addresses concerns raised by noble Lords. I hope it reassures noble Lords and demonstrates that we have listened to the clear request for increased scrutiny of the use of public money.

The amendment of the noble Baroness, Lady Thornton, would ensure that specific requirements are reported on. The detailed content of the financial report should—and could only—be determined, once reciprocal healthcare agreements have been made and technical and operational details are known. We do not know what these agreements may be in future. If we accepted the amendment, we would be placing a statutory duty on future Administrations to collect and report on data we have not yet agreed to exchange with other countries. This is not appropriate.

Our amendment is a more feasible way of reporting on future healthcare arrangements that does not pre-empt their nature or how they may be implemented, but still allows for transparency and accountability, which the noble Baroness, Lady Thornton, and other noble Lords seek. It is a baseline, and we intend to go further than just reporting on payments, but we cannot provide a statutory obligation to do so.

The Department for Health and Social Care is currently working to ensure that UK nationals can continue to access healthcare in the EU in the same way they do now, either through an agreement at EU level or through agreements with relevant member states. In either case, we will have to agree how eligibility is evidenced, how—and how frequently—that information is exchanged and the reimbursement mechanisms that will govern those new agreements. Such agreements will have to take into account the operational possibilities and limitations of each contracting party to ensure the smooth operation of reciprocal healthcare arrangements. This should include how NHS trusts in the UK can evidence eligibility for the treatment of non-UK citizens in the most efficient and least burdensome manner.

Once those administrative details are known, the Government will be able to speak confidently to the specific measures that can be reported on for each country. There is an annual reporting mechanism in the government amendment to provide such detail. I acknowledge that the amendment of the noble Baroness, Lady Thornton, is well meaning and agree with its spirit, but the level of detail proposed in it could constrain or create unnecessary burden when administering future healthcare arrangements that have not yet been negotiated.

It is in the interest of neither the Government nor Parliament to force unnecessary administrative burdens on the NHS, which the amendment could inadvertently cause. The level of detail required in the amendment may create new reporting requirements on front-line NHS services.

As always, should the noble Baroness wish, the Minister or others from the department would be very happy to meet her to talk further about the issues, once we have a clear understanding of future negotiations and how they progress. I hope I have reiterated the Government's commitment to accountable financial reporting, and that the noble Baroness and other noble Lords feel reassured on our commitment to ensuring that sufficient and appropriate checks and

balances are in place on reciprocal health agreements. I hope she will agree that her amendment, which places a statutory duty on future Administrations to collect and report on data we have not yet agreed to exchange with other countries, is inappropriate. I hope I have reassured her and other noble Lords and she feels able to withdraw her amendment.

Baroness Thornton: I thank the Minister. I said from the outset that this was a probing amendment and I therefore beg leave to withdraw it.

Amendment 17 (to Amendment 16) withdrawn.

Amendment 16 agreed.

Clause 5: Regulations and directions

Amendment 18

Moved by ***Baroness Blackwood of North Oxford***

18: Clause 5, page 3, line 38, leave out subsection (3)

Baroness Blackwood of North Oxford: My Lords, I now turn directly to the Henry VIII powers of the Bill. As noble Lords know well, the inclusion of the consequential Henry VIII power in the Bill has been the subject of animated debate both inside and outside this Chamber. The Government have been listening closely to these concerns in the Chamber but also in the reports from the DPRRC and the Constitution Committee. In response, we have tabled Amendments 18, 19, 20, 24 and 25, which is a significant step and addresses these concerns directly.

This group of amendments removes Clause 5(3) and amends Clause 5(4). As a result, it will now not be possible to make consequential amendments to primary legislation using regulations made under the Bill.

I want to be clear that the consequential Henry VIII powers were initially included as a future-proofing mechanism. They were never free-standing and we had envisaged using them in only a limited set of circumstances. As negotiations have not yet concluded and the terms of any agreements are not yet settled, there may be situations where it would be appropriate to amend primary legislation. This is why the power was included. We cannot rule out that we may want to amend primary legislation to give effect to a reciprocal healthcare agreement in future, and the lack of such a future-proofing mechanism limits our ability to ensure that the statute book in future is as coherent as it can be.

However, we want to alleviate any fears that we are taking powers which are not absolutely necessary in this Bill. As such we are prepared to take the significant step of removing the entire Henry VIII consequential powers in Clauses 5(3) and (4).

In addition, the Government have listened carefully to the concerns about the list of persons who can lawfully process data as a part of implementing new reciprocal healthcare arrangements under the Bill. To facilitate greater parliamentary scrutiny on this issue, the Government have tabled Amendment 20, which subjects any regulations that add to the list of persons authorised to process data for the purposes of the Bill to the draft affirmative procedure, which we have already debated. This would allow Parliament the opportunity to scrutinise authorised persons handling sensitive patient data, while equally ensuring that the Government can guarantee that future agreements are administered in the most efficient and effective way possible.

I hope that your Lordships will view these amendments, together with the other government amendments, as a genuine and significant effort to reduce the scope of powers in this Bill and respond to the concerns raised by this House concerning the use of Henry VIII powers. On that basis, I commend the amendments to the House.

Lord Judge: My Lords, I have already spoken warmly about the efforts by the noble Baroness, Lady Blackwood, and referred to us having a little touch of Blackwood in this House. Let it continue. I should like what has happened today to be habit-forming.

Lord Hope of Craighead: Perhaps I may add a few words to those of the noble and learned Lord, Lord Judge. I was particularly concerned by Clause 5(3), as the noble Baroness may remember, and am delighted to see it removed because, as worded, it gave rise to a lot of problems. Together with the other amendments proposed, there is considerable improvement and I am most grateful.

Baroness Thornton: I tabled an amendment in this group. First, I join the noble and learned Lords and all noble Lords in saying thank you very much to the Government and the noble Baroness for removing these Henry VIII powers, which cause so much heartache in this House—we really do not like them at all. I tabled Amendment 21 because I should like an explanation. Given that our Constitution Committee and the Delegated Powers Committee have several times said that they find the negative procedure rampant in the Bill, and that the British Medical Association has also voiced its concern about legislation being subject to the negative resolution procedure, in the interests of accountability, I need to ask the Minister to explain to the House the justification for negative procedure throughout the Bill. Should it not be subject to the same level of scrutiny as in the European Union (Withdrawal) Act, for example?

Baroness Blackwood of North Oxford: I thank the noble and learned Lords for their support for our amendments to Clause 5 and the removal of the Henry VIII operation within the Bill. I shall do my best to continue in the way I have started in this House.

I thank the noble Baroness, Lady Thornton, for her Amendments 21 and 23. The Government recognise that appropriate levels of scrutiny are the hallmark of an effective and responsible parliamentary system and that the processes by which we draft, consider and test legislation must be robust. It is necessary that we look

[Baroness Blackwood of North Oxford]
at the nature of the subordinate legislation in the Bill and balance the need for scrutiny against the appropriate use of parliamentary time.

The draft affirmative resolution offers a greater level of parliamentary scrutiny and may be appropriate for particularly significant or sensitive regulations. For example, that is why the Government have agreed that that is appropriate when amending the list of authorised persons able to process data for the purposes of reciprocal healthcare. It is important to understand that, where the UK negotiates a new comprehensive international healthcare agreement, most of the important elements setting out its terms would be included in the agreement itself rather than in the regulations, made under the Bill, that implement it. The regulations giving effect to such an agreement would be much more likely to focus on the procedural, administrative or technical details, such as the types of documents or forms to be used to administer reciprocal healthcare arrangements. Evidence tabled during the course of the Bill's passage from the Academy of Medical Royal Colleges and the British Medical Association demonstrates that the administration for current arrangements works well. The regulations made under this Bill would be likely to simply provide for the effective and efficient administration of these arrangements.

6 pm

We anticipate that, were we to accept this amendment, in future Parliament would likely find itself debating technical updates to operational issues, such as whether forms required to process reciprocal healthcare arrangements should be changed. I do not think that would be an appropriate use of parliamentary time. For that reason, we feel that the negative procedure is appropriate to use for the regulations. With the additional amendments we have tabled today, the Bill allows for effective governance while providing for an improved level of parliamentary oversight. Noble Lords will recognise that it is vital that the Government can make regulations quickly and react to varied possible scenarios arising from the UK's exit from the EU.

The House is also absolutely right to hold the Executive to the highest possible constitutional standards. We understand that ensuring sufficient scrutiny is a legitimate and ongoing concern. That is why we have worked hard in bringing forward a considerable package of government amendments to increase scrutiny and transparency and to alleviate any fears that we are taking powers that are not absolutely necessary. We took a significant step in removing the entire Henry VIII powers for this reason. We have also placed a statutory duty on the Government to publish the annual report, which has just been debated, to give Parliament greater reassurance on how the Bill will be implemented and scrutinised. Finally, we have proposed subjecting any regulations that add to the list of persons authorised to be subject to the affirmative procedure. We think parliamentarians have rightly demonstrated that data protection is a critical issue, and we have decided that it is appropriate that these regulations be subject to the draft affirmative procedure.

Having explained that and gone through our thinking, I hope the noble Baroness, Lady Thornton, will agree that it is not appropriate to impose scrutiny processes on all the regulations made under this Bill, as that could see us in future debating technical changes to administrative systems that implement healthcare regulations. That would not be appropriate. On this basis, I hope she will feel free to withdraw her amendment.

Amendment 18 agreed.

Amendment 19

Moved by ***Baroness Blackwood of North Oxford***

19: Clause 5, page 3, line 43, after "law" insert "that is not primary legislation"

Amendment 19 agreed.

Amendment 20

Moved by ***Baroness Blackwood of North Oxford***

20: Clause 5, page 3, line 45, leave out "this Act which amend, repeal or revoke primary legislation" and insert "section 4(6)"

Baroness Blackwood of North Oxford: I beg to move.

Amendment 21 (to Amendment 20)

Tabled by ***Baroness Thornton***

21: Clause 5, leave out ""this Act which amend, repeal or revoke primary legislation" and insert "section 4(6)"" and insert ""which amend, repeal or revoke primary legislation""

Baroness Thornton: I thank the Minister for her explanation, which of course I accept. I am sorry I did not speak to Amendment 23 in my name, but it is consequential on Amendment 21. I think we probably just have to be watchful, so I will not move these amendments.

Amendment 21 (to Amendment 20) not moved.

Amendment 20 agreed.

Amendments 22 and 23 not moved.

Amendments 24 and 25

Moved by ***Baroness Blackwood of North Oxford***

24: Clause 5, page 4, line 3, leave out "A" and insert "Any other"

25: Clause 5, page 4, line 3, leave out from "Act" to "is" in line 4

Amendments 24 and 25 agreed.

Amendment 26 not moved.

Clause 6: Extent, commencement and short title

Amendment 27

Moved by ***Baroness Thornton***

27: Clause 6, page 4, line 15, leave out "International" and insert "European Economic Area and Switzerland"

Amendment 27 agreed.

In the Title

Amendments 28 and 29

Moved by ***Baroness Thornton***

28: In the Title, line 1, leave out "outside the United Kingdom" and insert "in a European Economic Area country or Switzerland"

29: In the Title, line 2, after "agreements" insert "with such countries"

Amendments 28 and 29 agreed.

Withdrawal Agreement: Attorney General's legal opinion on the Joint Instrument and Unilateral Declaration

Statement

6.05 pm

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, with the leave of the House, I will repeat a Statement made in the other place by my right honourable and learned friend the Attorney-General:

"I would like to make a Statement about my legal opinion on the joint instrument and unilateral declaration concerning the withdrawal agreement published last night.

Last week, I confirmed I would publish my,

"legal opinion on any document that is produced and negotiated with the Union".—[*Official Report*, Commons, 7/3/19; col. 1112.]

This has now been laid before the House. This Statement summarises the instruments and my opinion of their legal effect.

Last night in Strasbourg, the Prime Minister secured legally binding changes that strengthen and improve the withdrawal agreement and the political declaration. The Government laid three new documents reflecting these changes in the House: a joint legally binding instrument on the withdrawal agreement and the protocol on Northern Ireland; a unilateral declaration by the United Kingdom in relation to the operation of the Northern Ireland protocol; and a joint statement to supplement the political declaration. The legal opinion I have provided to the House today focuses on the first two of these documents, which relate to the functioning of the backstop and the efforts of the parties that will be required to supersede it.

Let me first tell you what, in my opinion, these documents are not about. They are not about a situation where, despite the parties using good faith and their best endeavours, they cannot reach an agreement on a future relationship. In my opinion such a scenario is, in any case, highly unlikely to occur. It is in the interests of both the United Kingdom and the European Union to agree a future relationship as quickly as possible. Were such a situation to occur, however, the legal risk, as I set it out in my letter of 13 November, remains unchanged.

Let me now move on to what these documents do achieve. As I set out in my opinion, the joint instrument puts the commitments in the letter from Presidents Tusk and Juncker of 14 January 2019 into a legally binding form and provides, in addition, useful clarifications, amplifications of existing obligations and some new obligations. The joint instrument confirms that the European Union cannot pursue an objective of trying to trap the United Kingdom in the backstop indefinitely. The instrument makes explicit that this would constitute bad faith, which would be the basis of a formal dispute before an arbitrator. This means, ultimately, that the protocol could be suspended if the EU continued to breach its obligations.

The joint instrument also reflects the United Kingdom's and European Union's commitment to work to replace the backstop with alternative arrangements by December 2020, including as set out in the withdrawal agreement. These commitments include establishing,

"immediately following the ratification of the Withdrawal Agreement, a negotiating track for replacing the customs and regulatory alignment in goods elements of the Protocol with alternative arrangements".

If an agreement has not been concluded within one year of the UK's withdrawal, efforts must be redoubled. In my view, the provisions of the joint instrument extend beyond mere interpretation of the withdrawal agreement and represent materially new legal obligations and commitments which enhance its existing terms.

The unilateral declaration records the United Kingdom's position that, if it were not possible to conclude a subsequent agreement to replace the protocol because of a breach by the European Union of its duty of good faith, it would be entitled to take measures to disapply the provisions of the protocol in accordance with the withdrawal agreement's dispute resolution procedures and Article 20, to which I have referred.

There is no doubt, in my view, that the clarifications and amplified obligations contained in the joint statement and the unilateral declaration provide a substantive and binding reinforcement of the legal rights available to the United Kingdom in the event that the European Union were to fail in its duties of good faith and best endeavours.

I have in this Statement and in the letter I published today set out my view of the legal effect of the new instruments the Government have agreed with the European Union. However, the matters of law affecting withdrawal can only inform what is essentially a political decision that each of us must make. This is a question not of the lawfulness of the Government's action but of the prudence, as a matter of policy and political judgment, of entering into an international agreement on the terms proposed. I commend this Statement to the House".

6.10 pm

Lord Goldsmith (Lab): My Lords, I am grateful to the noble and learned Lord for repeating the Statement made by the right honourable Attorney-General in another place. The purpose of the Statement was to provide the Attorney-General's opinion on the implications of the three documents produced following the Prime Minister's dash to Strasbourg yesterday. The purpose was, of course, what the Prime Minister had promised to negotiate, referring to,

"not a further exchange of letters, but a significant and legally binding change to the withdrawal agreement".

According to the *Mail on Sunday*—not a newspaper that I necessarily follow in any respect—the Attorney-General is reported to have said:

"I will not change my opinion unless I'm sure there is no legal risk of us being indefinitely detained in the backstop. I am putting my hand on my heart. I will not change my opinion unless we have a text that shows the risk has been eliminated. I would not put my name to anything less".

Before considering the merits of what the Prime Minister has obtained it is worth considering what has not been achieved. As I predicted in the debate yesterday—was it only yesterday?—there is no change to the withdrawal agreement. Its 597 pages remain unchanged. That is not entirely true, because they have been reduced to a smaller volume. The text, however, is completely unchanged. So too are the 26 pages—I think now 28 pages—of the political declaration.

The result is that the legal risk remains unchanged. As the Attorney-General states in paragraph 19 of his latest opinion:

"The legal risk remains unchanged that if through no such demonstrable failure of either party, but simply because of intractable differences, that situation does arise"—

that is, the situation in which no new agreement is reached—

"the United Kingdom would have, at least while the fundamental circumstances remained the same, no internationally lawful means of exiting the Protocol's arrangements, save by agreement."

I had the opportunity to hear the Attorney-General's Statement in another place this morning, and I understood him to be reconfirming that position in his answers.

It is also worth restating that—despite rumours to the contrary—there are no changes to the arbitration provisions and no new system of arbitration: it will still be lawyers who make this decision. It also follows that the statement in paragraph 16 of the Attorney-General's opinion of 13 November 2018 still stands. That statement was as follows:

"It is difficult to conclude otherwise than that the Protocol is intended to subsist even when negotiations have clearly broken down. The ordinary meaning of the provisions set out above and considered in their context allows no obvious room for the termination of the Protocol, save by the achievement of an agreement fulfilling the same objectives. Therefore, despite statements in the Protocol that it is not intended to be permanent, and the clear intention of the parties that it should be replaced by alternative, permanent arrangements, in international law the Protocol would endure indefinitely until a superseding agreement took its place, in whole or in part, as set out therein".

I understand that still to be the position and invite the noble and learned Lord to confirm it.

In his Statement, the Attorney-General focused particularly on other available remedies in the event that the European Union can be proved guilty of bad faith in not reaching an agreement. He says—this is important, and the noble and learned Lord repeated these words earlier—that the new documents are,

"not about a situation where, despite the parties properly fulfilling the duties of good faith and their best endeavours, they cannot reach an agreement on a future relationship".

Again, therefore, I ask the noble and learned Lord to confirm that the Government accept that if, while acting in good faith, both parties cannot reach an agreement, the backstop would endure with no predetermined end date. I underline the phrase "can be proved to be" acting in bad faith, because that would have to be demonstrated—would it not? —and it would be for the United Kingdom, if it was asserting that position, to prove it. Can the noble and learned Lord confirm that? The burden of proof, as we lawyers say, would be on us.

I also question the likelihood that that could be proved. I have made this point before in the House. It would be a very strong thing—a virtually impossible thing—for this arbitral panel to find on proof that senior statesmen and politicians were acting in bad faith, rather than simply being unable to agree on what are important matters for them—for their constituents, as for ours. As a practising lawyer —at least when he is not fulfilling governmental responsibilities—would the noble and learned Lord agree that the prospects of proving that, when the EU negotiators are saying, "No, we did not regard these proposals as being in the interests of the EU", are vanishingly small? If he were advising a client, he would tell him so now.

In his previous advice, the Attorney-General referred to the difficulties of proof and the egregious nature of the conduct that would be required to establish a breach of those obligations by the EU. These are very strong things to have to prove. I respectfully suggest that, in reaching a view on how much comfort these arrangements give, that must be borne very much in mind.

The Attorney-General says that he believes the risks of an indefinite stay are reduced. He does not—it seems to me—explain in his advice why they are reduced. I understood that, in short, he sees a greater political will to reach an agreement. That is a political judgement. It is of course open to him and to others to take the same or a different view on the political will. I cannot, however, agree that anything in any of the three documents changes the legal reality.

In paragraph 4 of his opinion, the Attorney-General referred to a,

"systematic refusal to take into consideration adverse proposals or interests".

A systematic, contumacious or deliberate refusal even to consider proposals would, I suppose, be evidence of bad faith—but that is as far as it goes. A sincere disagreement about the terms, however, is not bad faith.

As for the third document, the unilateral statement, it is that and nothing more. It is what the United Kingdom says that it thinks, but that does not make it so. I do not, therefore, share the view that there is anything in these legal documents that shifts the legal risk.

I am loath to go back to the codpiece that I referred to yesterday. However, I said then that I did not really understand how that soubriquet had come into being. From what I have read since, it is apparently code for figleaf. I regret to say that despite the energy and good faith of both the Prime Minister and the Attorney-General—which I respect—these are no more than a figleaf, and Members of the other place are left to make their political judgments on the basis of the Prime Minister's deal.

Lord Thomas of Gresford (LD): My Lords, I do not propose to repeat the speech I made yesterday, in which I suggested that it was inappropriate for lawyers to determine an issue as important as whether the backstop had run its course. I am very pleased that in the conclusion to his Statement today, the Attorney-General emphasised that matters of law affecting withdrawal can only inform what is essentially a political decision that each of us must make. As it is a political decision, it is really not right to ask lawyers to determine whether a state is acting in bad faith, as the noble and learned Lord said a moment ago. I commend the Attorney-General for sticking firmly to the opinion that he first gave and not being shifted, despite the enormous pressure I have no doubt he is under.

An aggrieved party under this instrument would have to persuade the arbitrators to prove—as the noble and learned Lord, Lord Goldsmith, said—that the other party had failed the best endeavours test with the objective of applying the backstop indefinitely. Further, he would have to prove that there had been a persistent failure or a systematic refusal to consider the other side's proposals. Only if the arbitrators found in the aggrieved party's favour would they be able to use temporary measures to suspend the backstop—and I emphasise the word "temporary". The other party could cure the problem at will at any time by taking the necessary measures to comply with the ruling.

My first question to the Minister, therefore, is this: what does he envisage to be temporary measures? What does that mean? Clearly, it would not be a permanent unilateral withdrawal from the backstop. What would happen at the Northern Ireland border to the free passage of goods if temporary measures were taken? Would it be a smuggler's free for all or a clamping down?

The Attorney-General originally advised that it would be highly unlikely that the United Kingdom could take advantage of the remedies available to it for a breach of good faith and best endeavours because of the difficulties of proof and the egregious nature of the conduct, which would have to be established. I remind your Lordships that according to the *Oxford English Dictionary*, the word "egregious", which the Attorney-General in typical fashion rolled off his tongue, means "shocking". Is it now then all about timetables? That is all that the instrument appears to lay down. I listened to the Attorney-General talking in the other place about time being of the essence. To every lawyer, that phrase means that if the timetable is not adhered to, the whole agreement is defunct. The United Kingdom negotiators have not shown themselves to be particularly conscious of time over the past two and a half years. Will a breach of the timetable on either side now amount to egregious, shocking conduct, sufficient to trigger the dispute settlement arbitration procedures?

Lord Keen of Elie: My Lords, I am obliged to noble Lords for their contributions. Referring to the observations of the noble and learned Lord, Lord Goldsmith, I will perhaps begin where he finished. If the noble and learned Lord was to revisit his study of early Italian Renaissance sculpture, he might be reminded that the fig leaf can cover some very important bits. Therefore, one must bear in mind that the use of analogies is not always entirely helpful.

In paragraph 19 of his opinion, the Attorney-General set out his view that the legal remains unchanged. But that was not the question that was being addressed. The issue that exercised people was one of an extreme nature, which one would, frankly, never anticipate arising where parties have entered into an international treaty in good faith and intend to discharge their obligations under that treaty in good faith. As I observed in a previous debate, if you simply do not trust the person with whom you are contracting or entering into a treaty, there is little point in doing so—you would not proceed in the belief that they would ever finally discharge their obligations. Here, however, we proceed in the confident belief that their obligations will be addressed and met.

It is therefore important that, in the context of the further agreement, the parties have fixed a date of December 2020 by which to use their best endeavours to arrive at an alternative to the backstop. It is in these circumstances that it is considered appropriate, as the Attorney-General observed in paragraph 7 of his opinion, to note that the provisions now represent materially new legal obligations and commitments which mean that unconscionable behaviour on the part of the EU, and failure to fulfil its obligation to seek suitable and alternative practical means of dealing with the backstop, would have to be properly addressed in the context of the arbitration provisions.

It is in that context that I come to address the questions posed by the noble and learned Lord, which touch upon each other. He began by asking how, if there is bad faith by the European Union, we would prove it. There are circumstances in which it would become apparent that the European Union was intent upon seeking to trap the United Kingdom in the backstop, notwithstanding the provision of alternative arrangements. But let us be clear: one does not anticipate or foresee that that would ever occur.

On that point, I note that the backstop has significant drawbacks for the European Union, just as it has significant drawbacks for the United Kingdom. If it were ever to emerge, the backstop would result in Great Britain enjoying the benefits of a customs union and paying nothing for that. The relevant payment in respect of the customs union would come from trade in Northern Ireland, not in Great Britain. Let us remember that there is very little in this that benefits the European Union, let alone the United Kingdom.

If we were, however, to find ourselves in a situation in which there was shocking or egregious conduct on the part of the European Union, the arbitration measure

[Lord Keen of Elie]
would be available. In finding that there was a breach, the arbitrators would be entitled to grant temporary measures. That would include a temporary suspension of the operation of the relevant backstop provisions with regard to the border.

The noble Lord, Lord Thomas, asked, quite rightly, what would happen at the border. One answer is that we would find ourselves in that situation only where the European Union had not been prepared to engage with coherent, sensible proposals put forward by the United Kingdom to deal with the border and ensure that it could remain entirely open. If a suspension was ordered by the arbitrators, it would then be open to the United Kingdom to implement those proposals unilaterally at the border in order to deal with the issue. If thereafter—in utterly extreme circumstances—the European Union was to persist in refusing to engage with the temporary suspension of the protocol, the arbitrators would eventually come to the conclusion, quite rightly, that the protocol was simply not required; that it was no longer "necessary" because the alternative arrangements during the suspension had clearly worked to the satisfaction of the European Union, which had done nothing in the meantime. Again, I stress that we are talking about the most extreme of circumstances. I do not contemplate that, politically, anyone will go there.

Lord Goldsmith: The noble and learned Lord has given us extreme examples such as unconscionable behaviour and all the rest of it, but does he not agree that the most likely circumstance in which we fail to agree is because we fail to agree? We have seen it over a period of time already, and know that it does not have to be unconscionable or as a result of bad faith. In those circumstances, none of these arguments would avail.

Lord Keen of Elie: I do not accept the noble and learned Lord's suggestion that that is the most likely or probable outcome. We have already seen circumstances in which parties have laid out the suitability of alternative arrangements for the border between Northern Ireland and the Republic of Ireland. Work will go on with regard to that. There is going to be a track of work carried out as soon as the withdrawal agreement is concluded in order to bring that to fruition by December 2020. There is therefore no reason to suppose that such a thing is impossible. If we have a situation in which the EU simply refuses and turns its face away from a workable proposal, then there will be an issue of good faith and best endeavours to be addressed and disposed of. But the political reality is different. This is very much a situation in which we are dealing with an extreme. Equally extreme is the idea that somehow, over a period of almost two years, the parties would not be able to conceive of a means of dealing with the border except by means of the backstop.

6.30 pm

Lord Mackay of Clashfern (Con): My Lords, I have had the opportunity to study the earlier and most recent legal opinions of the Attorney-General. I agree with him that as a matter of law there is a risk. But I was a mathematician before I became a lawyer. One has to find out the size of the risk. Every one of us who crossed the street today to come here had to take a risk, did we not? I came yesterday by aeroplane, which also has a risk. The question is: what is the risk? A good deal of the discussion that has just taken place is about what happens in the event of extremes, but the most important way to annihilate the risk is by reaching an agreement that supersedes the protocol altogether. If we want to see how probable an agreement is, we have only to listen to Mr Johnson, who said: "They are keen to sell us their prosecco". The European Union is as keen to have a free trade agreement with us as we are to have one with it. In fact, its trade is greater towards us than our trade is to the EU. Therefore, the chances are high, to be judged on the facts as they are now, that there will be an agreement to supersede the protocol. That is what one has to measure. So far as I am concerned, the risk is negligible—a very unlikely event. I would feel sorry if the future of our United Kingdom, in this connection, were determined by an appreciation of a so-called risk that is practically negligible.

Lord Davies of Stamford (Lab): Just to deal with "egregious" first, surely the word derives from the Latin "e grege"—

Baroness Goldie (Con): Order. May the Minister respond?

Lord Keen of Elie: I will welcome the noble Lord's comments. His reference to Latin will no doubt enhance this debate. However, for the moment, I entirely concur with the observations of the noble and learned Lord, Lord Mackay of Clashfern. It would be foolish in the extreme to make an important—indeed, significant—political decision on the basis of a risk that can genuinely be regarded as negligible.

Lord Davies of Stamford: My Lords, I apologise for my slip. The word "egregious" derives from the Latin "e grege"—outside the flock; in other words, it means abnormal, out of the ordinary. "Shocking" is the wrong translation.

The elaborate piece of theatre that the Government staged last night in Strasbourg and the opinion of the Attorney-General have been designed to ensure that we do not stay in the customs union. As the Minister himself acknowledged, staying in a customs union would be greatly in the national interest. The Government's policy in this matter is 180 degrees in the wrong direction. Industry and commerce are crying out for the opportunity to stay in the customs union. If we did find that opportunity, I hope we would grasp it. It is much more likely to come to us not from bad faith on the part of the Commission or the Irish but simply because the whole idea of establishing a frontier that is not a frontier proves to be hocus-pocus, as my noble friend Lord Bassam has shown. No such technology is even under study at present. Anyone who knows anything about venture capital knows that the chance of a blue-sky idea becoming viable and generating money is, at best, one in 20.

Lord Keen of Elie: I am obliged to the noble Lord for his address on "egregious", and I do not disagree with the derivation of the term. It would be an abnormal situation to find ourselves in, and that is why I reiterate that it would be exceptional, unusual and unfortunate for us to proceed to make a political decision based on such an abnormality. The point I sought to make on the customs union is that in so far as we remain within it as a consequence of the backstop, if we ever did, it has clear deleterious impacts upon the European Union. We would, in a sense, be getting a free ride on the customs union so far as Great Britain is concerned, but not so far as Northern Ireland is concerned. But I do not anticipate that we are ever going to find ourselves within that backstop and, therefore, within that customs union.

The Archbishop of York: My Lords, I have had the chance to study the Attorney-General's comments and I agree with the noble and learned Lord, Lord Mackay, that the Attorney-General is right. There will always be a legal risk and he would be wrong not to tell us that it remains. But that is the nature of risk. I am told that in Chinese the word "risk" is made up of two pictures—opportunity and danger. We have to look at the opportunities and then the danger, but not always concentrate on the danger.

For the likes of me, the pint is always half-full. For some, it is always half-empty. I thought that the worry about the backstop was that there was no timetable in which this matter might be resolved. December 2020 has been put into the agreement. There was also a worry that the United Kingdom might not be able to unilaterally withdraw from arrangements that did not help the rest of us. That has changed and is now reflected in the protocol. I agree with the noble Lord, Lord Thomas, that it is not lawyers who will resolve this but political will, which is the way in which we should proceed.

Having read the legal opinion, I am of the view that although what has been achieved by the Prime Minister does not take away the legal risk, the issue is more about what will happen in terms of agreements. In the end, do we believe as a nation that we are capable of achieving the best agreement in our interests and those of Europe? We have been good at negotiating protocols that have helped democratic institutions all over the world. This is a time to start believing that we should create a good agreement by 2020 and show good faith. If others do not do so, then the arbitration would come into being.

I want us to take the Chinese view; there is always danger in risk but this is the time for me to say to everybody: let us seize the opportunity and be reconciled on an issue that looks difficult. A time may come, friends, when although lawyers talk and talk—I am one of them—this issue should not be resolved by them but by politicians.

Lord Keen of Elie: I am obliged to the most reverend Primate the Archbishop of York. I agree with his observation that ultimately we are concerned with a political, not legal, decision. We have to remind ourselves that the withdrawal agreement is the means to an end, not the end in itself. Either we leave on 29 March without any deal in place, because the law has already determined that that is our exit date, or we can leave sensibly, with a withdrawal agreement that takes us into the realms of further negotiation for our future relationship. There is no reason to suppose that as a consequence of that further move we are ever going to find ourselves in the backstop, let alone considering how to come out of it.

Lord Kerr of Kinlochard (CB): There are two other options. We could of course change the law and we could take an extension under Article 50. I think there are new elements in the new texts. I do not think they remedy what is, for me, a humiliatingly bad deal, but I see two new elements. First, there is a greater urgency—or an impression of urgency—in the treatment of the search for alternative arrangements to the backstop. The impression created is that the philosopher's stone will be more actively sought. That does not guarantee that the philosopher's stone will be found, and that is the risk that the noble and learned Lord, Lord Mackay of Clashfern, might want to bear in mind as well.

The second point is more legal than political. I see a change in the treatment of the risk of being trapped in the backstop because the European Union breaks the commitment in Article 5 of the withdrawal agreement to exercise good faith. As the Minister said, however, that is a vanishingly small risk. As the noble and learned Lord, Lord Goldsmith, said, the real risk is that the search for a mutually acceptable solution—a workable alternative arrangement—continues for some considerable time to prove fruitless. That is the real risk. Alchemy is like that. Does the Minister agree? Does he also agree with Mr Varadkar that the texts are perfectly acceptable because the withdrawal agreement has not been reopened and the backstop not been undermined?

Lord Keen of Elie: My Lords, I do not agree with the noble Lord, Lord Kerr, on the matter of alchemy. Nevertheless, I agree with much of what he had to say. These further agreements inject a greater element of urgency into the whole process that is to be carried on and underline that this process will be carried on in good faith. That being so, there remains the outlier risk that a solution will not be found by December 2020. We remain confident that it will be. But in the event that it is not, the backstop will continue for a period. Wherein lies the disaster?

Viscount Hailsham (Con): Does my noble and learned friend agree that, if at the end of this week the House of Commons discusses a delay to the Brexit date, a short delay would be entirely useless? Does he agree that what is required is a substantial delay of the kind advocated by the noble Lords, Lord Kerr and Lord Hannay, or the noble Lord, Lord Armstrong yesterday? As existing members of the European Union, we could discuss and negotiate our future relations with the European Union either within or without. Does he agree that that does not necessarily involve Brexit or, necessarily, a further referendum? Indeed, it might involve a Government of national unity to negotiate.

Lord Keen of Elie: My Lords, my views on whether an extension should be short, long or anything in between are of no moment because, at the end of the day, any extension sought will have to be on the basis of consent with the European Union.

Lord Cormack (Con): My Lords, does my noble friend agree that nobody would ever take any medicines if they read the leaflet in the packet in detail? That is the sort of risk we are talking about. Does he further agree that the deal on offer should be accepted tonight in another place and we should then move on?

Lord Keen of Elie: My Lords, I concur with both of my noble friend's observations.

Lord Wallace of Tankerness (LD): My Lords, the noble and learned Lord emphasised the importance in the joint instrument of urgency. Indeed, paragraph 7 of the Attorney-General's opinion today states:

"Therefore, provided the United Kingdom can clearly demonstrate in practice that it is effectively organised and prepared to maintain the urgent pace of negotiations that they imply, the EU could not fail to match it without being at risk of breaching the best endeavours obligation".

As the Minister has emphasised that this is political, perhaps rather more than legal, I ask him a political question. Can he give the House three examples of when, since March 2017, the United Kingdom Government, in dealing with Brexit, have clearly demonstrated in practice that it is effectively organised?

Lord Keen of Elie: Respectfully, it appears to me that we have demonstrated that throughout the process.

Lord Carlile of Berriew (CB): My Lords, can we return to the legal advice, which is the subject of this Statement? Does the noble and learned Lord agree that the legal advice has not changed at all—yes or no?

Further, if we adopt his attractive metaphor about Italianate sculpture, does the Minister agree that if yesterday's breathless Statement from the Prime Minister, anticipated in the House of Commons, is a fig leaf, if we lift that fig leaf, we will find that behind it are no parts whatever? To proceed towards an impossible, extreme scenario, as suggested by the noble and learned Lord himself, is something that a skilled lawyer in private practice, as the noble and learned Lord has been, would say to every client, "You can't do it".

Lord Keen of Elie: My Lords, as regards the legal advice, I refer back to paragraph 7 of the Attorney-General's letter, in which he said that the,

"Joint Instrument extend beyond mere interpretation of the Withdrawal Agreement and represent materially new legal obligations and commitments".

To that extent, we have moved on. But of course, he also made absolutely clear that the legal risk that had been addressed in the context of whether there was a unilateral right to leave the backstop had not changed and that there was no internationally lawful means of exiting the protocol's arrangements except by agreement. But context is everything.

On the second point, there appear ample grounds for supposing that, in taking this forward, we will arrive at a resolution of an issue that troubles lawyers but I suspect does not trouble politicians quite as much: whether or not the backstop is somehow a black or white outcome. It is not an outcome that is anticipated nor one that we believe we will have to address, and if we have to address it, we do not believe it will ever be permanent, and that for political reasons alone.

Lord Campbell of Pittenweem (LD): My Lords, I wanted to ask the noble and learned Lord to name an alchemist who ever succeeded in his determination to turn lead into gold, but perhaps that is for another occasion. Since we are talking about risk, it is important to remember that one risk that featured very strongly in noble Lords' consideration of these matters is the possibility that anything that seemed to have the effect of recreating a border between the north and south of Ireland was a risk we were not willing to take. One reason for that was the fragility, albeit that it is still in existence, of the Belfast agreement. I say with due respect to the noble and learned Lord, Lord Mackay of Clashfern, that when one is considering risk, this is not crossing the road: it is a risk that could have the effect of bringing to an end many years of fragile peace. In those circumstances, it is hardly surprisingly that people want to be pretty certain, before that risk is taken, that to do so is not likely to lead to an adverse outcome.

Lord Keen of Elie: With respect to the noble Lord, Lord Campbell of Pittenweem, I must say that I entirely disagree with his analysis. The whole point of the present withdrawal agreement and the Northern Ireland protocol is to ensure that we adhere not only to the terms but to the spirit of the Belfast agreement. That is why the backstop has been formulated in the manner in which it has. We will leave the backstop only when, or if, there is a need to put in place alternative structures that do not require a hard border between Northern Ireland and the Republic of Ireland. I reiterate my belief that we will never actually enter the backstop in the first place. We have that period up to December 2020 in which to address this issue and it is not beyond the wit of man or alchemist to resolve such an issue.

Lord Hannay of Chiswick (CB): My Lords, the Attorney-General stated:

"A unilateral declaration by one party to a bilateral agreement constitutes an authentic interpretation of the treaty if it is accepted by the other party".

Does he not find that a little odd? It would not then be a unilateral statement at all but a joint statement. On what authority did the Attorney-General say that the EU has agreed to the UK unilateral but it will not object to the UK unilateral statement? I see no trace of that in any of the documents.

Secondly, the use of the arbitration procedure remains shrouded in mystery as a result of the provision in the withdrawal treaty that any dispute involving the interpretation of EU law has to go to the European Court of Justice and not the arbitration panel. It that likely to be the case in most of the disputes?

Lord Keen of Elie: My Lords, with respect to the two points raised, a unilateral declaration by one party can have legal status as an interpretive document in the context of international law. In circumstances where the other party does not object to the unilateral statement, it will be seen to have legal status with regard to that party's interpretation of the relevant treaty. In that context, I therefore see no difficulty with the opinion expressed by the Attorney-General on that point.

On the suggestion that the arbitration will be shrouded in mystery because of the need to refer a point of law to the European Court of Justice, I remind the noble Lord of my response to a question from him some time ago, when I pointed out that the real issue will be of fact, not law. It is therefore difficult to envisage the European Court of Justice having any material role in the context of a dispute over good faith or best endeavours.

Northern Ireland (Regional Rates and Energy) (No. 2) Bill

Second Reading

6.51 pm

Moved by ***Lord Duncan of Springbank***

That the Bill be now read a second time.

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): My Lords, I will speak to both Motions standing in my name on the Order Paper. When I last brought forward a budget Bill for Northern Ireland, I stated that it would be the last time. Events have made a liar of me. I apologise for that.

In the absence of devolved government in Northern Ireland, the UK Government have a responsibility to ensure good governance and to safeguard public services and public finances. I therefore ask your Lordships to give a Second Reading to two pieces of necessary legislation.

The Northern Ireland Budget (Anticipation and Adjustments) (No. 2) Bill will have all its stages in your Lordships' House today. However, following engagement with a number of noble Lords, the regional rates and energy Bill will have only its Second Reading here today. All further stages will take place on 19 March, primarily to allow time for further discussion and reflection.

With your Lordships' permission, I will discuss each Bill in turn, The Northern Ireland Budget (Anticipation and Adjustments) (No. 2) Bill would put Northern Ireland finances for the 2018-19 financial year on a legal footing and enable Northern Ireland's departments to continue to deliver public services into the first half of 2019-20. Your Lordships will recall that the UK Government legislated for the 2018-19 budget for Northern Ireland last year. This legislation was necessary to provide a clear legal basis to Northern Ireland departments, enabling them to manage their resources. The resulting Northern Ireland Budget Act 2018, which passed in July, did not direct any spending but rather allocated funds to departments to be spent by the Permanent Secretaries according to departmental commitments. As we approach the end of the financial year, those spends need to be placed on to a legal footing, as is standard practice in any budgetary process. That is what this Bill does.

In addition, the Bill provides for a vote on account for the first half of next year, which will give legal authority for managing the day-to-day spending in the run-up to the main estimates process. This year, following discussion with the Northern Ireland Civil Service, the Bill provides a higher than normal level of vote on account, some 70%. This is in recognition of the known increased spending pressures and the lack of Ministers in place to react and respond to emerging or escalating pressures. It also recognises the uncertainty of the political situation in Northern Ireland in the coming months. A higher level of vote on account funding is prudent, providing the practical and legal certainties to protect public services in any and all circumstances up until the point that legislation on the Northern Ireland budget for 2019-20 is taken forward.

Your Lordships will recall that my right honourable friend the Secretary of State for Northern Ireland published a draft budget for 2019-20 in February. It is important to recognise that this budget Bill does not legislate for that budget position. Those allocations will require their own legislation later this year. The vote on account in this Bill and the draft Northern Ireland budget position for 2019-20 provide the necessary clarity and certainty to Northern Ireland departments to enable them to plan and take decisions in the coming year.

I will briefly turn to the Bill's contents. In short, it authorises Northern Ireland departments and certain other bodies to incur expenditure and use resources for the financial year ending 31 March 2019. Clause 1 authorises the issue of £16.8 billion out of the Northern Ireland Consolidated Fund. The allocation levels for each Northern Ireland department and the other bodies in receipt of these funds are set out in Schedule 1, which also states the purposes for which these funds are to be used. Clause 2 authorises the use of resources amounting to some £20 billion in the year ending 31 March 2019 by the Northern Ireland departments and other bodies listed in Clause 2(3). Clause 3 sets revised limits on the accruing resources, including both operating and non-operating accruing resources, in the current financial year. Clause 4 sets out the power for the Northern Ireland Civil Service to spend from the Northern Ireland Consolidated Fund some £11.8 billion for the forthcoming financial year. This is the vote on account provision I outlined earlier. It is linked to Clause 6, which does the same in terms of resources. The value is set at around 70% of the sums available in both regards in the previous financial year. Schedules 3 and 4 operate on the same basis, with each departmental allocation simply set at 70% of the previous year. Clause 5 permits certain temporary borrowing powers for cash management purposes.

The Bill would ordinarily have been taken through the Assembly. As such, at Clause 7, there are a series of adaptations that ensure that the Bill will be treated as an Assembly Budget Act once approved by this

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Parliament, enabling Northern Ireland public finances to continue to function notwithstanding the absence of an Executive.

Alongside the Bill is a set of supplementary estimates for the departments and bodies covered by the budget Bill, which was laid as a Command Paper in the Library of the House on 28 February. These estimates, prepared by the Northern Ireland Department of Finance, break down the resource allocation in greater detail. For those who wish to delve in, they are thoroughly set out in the document of which I have a copy here. As your Lordships will recall, this process is different from estimates procedure at Westminster, where the estimates document precedes the formal Budget legislation, and is separately approved. However, this would also be the case were the Assembly in session.

I also ask the House to give a Second Reading to the Northern Ireland (Regional Rates and Energy) (No. 2) Bill. This Bill would deliver two essential measures: it will enable the collection of regional rates in Northern Ireland, and will ensure fair and appropriate tariffs and cost-capping measures are in place for the renewable heat incentive scheme in Northern Ireland. The bills are not without their controversies, as noble Lords will be aware. However, the measures are necessary.

The first clause of the Bill addresses the issue of regional rates. In the absence of an Executive, the UK Government have set this rate for the past two years. My right honourable friend the Secretary of State for Northern Ireland intimated the rate—an increase of 3% plus inflation on the domestic rate and an inflation-only increase on the non-domestic rate—in her budget Statement of 28 February.

The second section of the Bill, specifically Clauses 2 to 5, concerns the administration of Northern Ireland's renewable heat incentive scheme. I need to be clear that this is a devolved matter. We are taking forward legislation at the behest of the Northern Ireland Department for the Economy. Without legislation, there will be no legal basis to maintain the payments to participants in the scheme.

The tariff levels set out in this legislation are based upon analyses of the additional costs and savings of operating a biomass boiler in Northern Ireland following extensive consultation, assessment and analysis undertaken by the devolved Department for the Economy and through detailed discussions with the European Commission. These rates are significantly lower than previous tariffs. The European Commission is clear: the tariff rate cannot deliver a return higher than 12% per annum. For participants with lower usage needs or higher capital costs who have returns below 12%, the Bill introduces a voluntary buy-out scheme.

As I have said, these tariffs, and indeed this scheme, are not without controversy; I appreciate the desire of noble Lords to consider this significant and complex subject in more detail. There will be a Committee stage, on Tuesday of next week, where these proposed RHI measures and the amendments that noble Lords have tabled can be addressed separately. I will ensure in the intervening period that my officials, together with officials from the Northern Ireland Civil Service, are available to engage directly with issues that your Lordships may wish to raise on this matter. In addition, my officials will issue a detailed question-and-answer script addressing commonly asked questions; this note will be distributed to interested Peers shortly.

In conclusion, I hope your Lordships will recognise the necessity of the actions that I have presented today. On that basis, I beg to move.

7 pm

Lord Bruce of Bennachie (LD): My Lords, noble Lords will of course understand why, as he said, the Minister has made a liar of himself and had to come back to the House. It is fair to say that it is not the Minister who has made a liar of himself but the circumstances in which we find ourselves. But to be asked to pass these two Bills—and certainly the budget Bill—at Second Reading, through all their stages, only a week or so after the documentation became available and where the detailed publication, as he says, is very hefty indeed, falls way below what I would regard as any acceptable level of scrutiny. It starts to cause real concern as to who is checking what is going on with respect to the money allocated to Northern Ireland.

Will the Minister consider whether steps could be taken to provide some comfort—and more than that, oversight? For example, the Public Accounts Committee could have a specific role to look at the follow-through from what we have voted. I do not believe that the Select Committee in the Commons has the resources to do that. It was not set up for those purposes; indeed, the second Bill may in any case be the subject of an inquiry being conducted by the House of Commons committee. It will probably have its hands full. I say that to the Minister in all seriousness; many of us are concerned that £20 billion is being voted on for Northern Ireland. We understand that it is necessary, but we have no clear, detailed oversight as to how that will be spent and whether it will be spent properly. Given the problem of the renewable heating scandal, we have every reason to be concerned about scrutiny.

That is my first point. The second concerns more specific questions on issues that do not appear in the budget, which people might have hoped to see: for example, the Hart inquiry into historical institutional abuse, which has cross-party support, and which people had hoped would make progress. I would be grateful if the Minister could say something about that. There is also the issue of pensions for severely disabled victims. The last time this was raised, the Minister said that he had asked for a report from the Victims Commissioner. Can he give us some feedback on whether that report has been received? Let us bear in mind that these are elderly and sick people who, sadly, are dying, and need early action rather than considered delay.

A broader point is that there are issues not in the budget for which there appear to be all-party consensus. Might it be possible in the circumstances to see whether other decisions could be taken? When I raised this matter with officials they said that they could in principle but, before committing to something, one has to identify where the money is coming from or what else is being cut. I raise as an example—as it has been raised with me—the medical school at the McGill campus in Derry, which people had hoped would be

progressing by now. The site and buildings are available, but students are leaving Northern Ireland to go to other universities, mostly in Scotland. As the Minister will know, the problem when students go outside of Northern Ireland for training, is that very often they do not come back. There is a need for places within the Province.

On the rates Bill, we accept that a simple decision has been taken to increase the business rates by inflation and the domestic rates by 3% plus inflation. Most of us recognise that as a fairly understandable formula and I suspect most people will accept it. Regarding the RHI, it is clear that, since the scheme was set up, the tariff has been set on two separate occasions at a value well outside either value for money or state aid criteria. This has led to the situation in which we now find ourselves. I am sure that all Members engaged in this debate will have received similar emails to the ones that I am receiving, from people who fear they will be substantially damaged and, indeed, distressed by the proposed cap. We will debate that in detail next week; I just make the point that it needs to be determined.

The fact nevertheless is that the Minister and officials encouraged people to take up high borrowing. The banks participated in that encouragement, relying on a comfort letter from the Minister and the support of officials. Understandably, people are saying, "We took decisions in good faith on the basis of 20-year guarantees from government Ministers, which are now being reversed". Naturally they feel angry. Having said that, I suspect some people were quite fly at the beginning, saw a good deal coming down the track and took advantage of it. This raises a second question: why were these deals not cross-checked in any way? Why were there not investigations to ensure that they were compliant with both the spirit and the letter of the scheme? That seems a legitimate concern.

I have two final points to raise. The first is one that officials explained to us but it would be helpful if the Minister could do the same: how does the Northern Ireland scheme differ from those on mainland GB? Certainly, all the letters and emails that I have received express concern that people in Northern Ireland feel disadvantaged compared with those in GB. I know there are reasons for it, but it would be good to have them put the record. The second point relates to the buy-out scheme, which the Government are proposing to introduce. On the face of it, it could resolve the problems for some people by enabling them to get a capital sum that could discharge their liabilities. But, given that the circumstances of different contracts are variable, there may well be people for whom that buy-out is not appropriate; I mean people who have acted in good faith and not unreasonably. The question is whether the Government may at some point have to consider some kind of distress help for genuine cases, although I appreciate that how you establish what is a genuine case might be quite difficult.

With these remarks, my message to the Minister is that I understand the reason this has been brought forward and I recognise that services in Northern Ireland have to be maintained, but I hope he will agree that quite a lot of questions need to be answered.

7.08 pm

Lord Browne of Belmont (DUP): My Lords, I start by thanking the Minister for bringing forward these essential Bills today. They ensure that public services continue to be provided in Northern Ireland and give departments some certainty going forward. In the unfortunate continued absence of decision-makers at a local level, I welcome the Government taking these necessary steps but I know that they too will recognise that this is far from an ideal situation. Regrettably, this is the third consecutive occasion that expenditure in Northern Ireland has been considered through an unusual, fast-track process in your Lordships' House, with little scrutiny or knowledge of how allocations to specific departments have been decided. I would much prefer that Bills such as these were being presented in a fully functioning Stormont Assembly by a locally accountable Minister. Equally, I wish that local representatives were able regularly to debate, scrutinise and analyse specific spending, and raise matters relating to their areas. Unfortunately, this is impossible to the same degree right now.

One political party aside, all the other parties want to get back into government and into a functioning Assembly. MLAs were elected to serve the people, but unfortunately they are prevented from doing their jobs. None of us wants to be in this situation, but the people of Northern Ireland must not be punished further because of a political stalemate.

As with any budgetary allocations, challenges are presented—and specifically when allocations are based on historic decisions. When allocations are made by individual departments, we cannot always be certain that the finances will go towards areas that the public might expect to be prioritised. In addition to looking at the amounts being allocated, we must also look closely at how effectively that money is being spent. For example, significant additional money was secured for education as a result of the confidence and supply arrangement. This money was originally meant to go towards front-line services in education. After numerous inquiries, it was eventually revealed that the department allocated this money to finance the Education Authority, which was running a deficit. After further such inquiries to the department relating to spending, a number of my party colleagues met with a series of principals in the education sector. These principals were unanimous in the view that action, in the form of ministerial involvement in the decision-making process, needs to happen soon to rescue their sector from what they describe as an impending crisis.

While the current situation presents considerable challenges, those have been reduced significantly by the welcome additional money obtained for the reform of the health service and for front-line services. On health transformation, the Permanent Secretary to the Department of Health recently made it clear that £100 million was invested in health transformation funding last year, and a further £100 million will be invested this year, as a result of the confidence and supply arrangement. This must be welcomed by all, because it provides an opportunity for the rolling out of multidisciplinary teams and other measures that

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will save money in the long term. These substantial amounts of money are going directly into transforming the health service, and I welcome that.

While always remaining challenging, there is positive news for our schools, with increased spending on front-line services. I trust that key services such as health and schools can also benefit from regular monetary round allocation in year. For homes and businesses struggling with slow—or no—broadband, the ultra-fast broadband project is also moving forward, along with a clear pathway for spending the £150 million secured through the confidence and supply negotiations. I look forward to the tender process starting and the infrastructure being laid. This investment will make a real difference—according to independent estimates, it could be worth over £1 billion for our local economy.

There is also good news for areas of deprivation, with £20 million from the confidence and supply deal being allocated to help some of the most vulnerable communities. This budget reflects the priorities of an Executive of more than three years ago. Indeed, if we look closely at the heads of spending for 2018-19 and 2019-20, we see that they are virtually identical. Very little is new, because of the current situation.

This legislation allows permanent secretaries to take decisions that could redirect spending. Senior civil servants have been tasked with taking the majority of the decisions within departments for over two years. However, in a number of instances key decisions are still not being made. A growing number of key decisions still need to be made on health, education, infrastructure and public services. In many cases, these decisions are about prioritisation—for example, decisions still need to be taken on school places and teaching staff.

Given all available information, it is clear that further action is required in order to deliver good government for Northern Ireland. Can the Minister provide some assurances to the departments that the relevant ministerial direction and involvement in the decision-making process will be provided? The people of Northern Ireland require further assurances, because at the minute, they are only receiving the bare minimum level of governance. We cannot allow the decision-making process to grind to a halt.

My party will continue to work towards a return to locally accountable government. I am of the firm belief that, with political will on all sides, it is possible to see local government back up and running. In its absence, my party will continue to work hard, here and in the other place, as it has done in relation to the confidence and supply arrangements. We will continue to press the Government on all of these matters in the weeks and months ahead.

Turning to the Northern Ireland (Regional Rates and Energy) (No.2) Bill, I have reservations about the level of the domestic rate increase, which is above the rate of inflation. In fact, it is the rate of inflation plus 3%. In some cases, this will cause considerable difficulty for households that do not qualify for housing benefit on their rates but are still in low-paid employment and wish to stay in employment. However, it was initially proposed that the increase would be much higher, and in that regard I am grateful to the Government for listening to the concerns expressed by my colleagues in the other place.

I welcome and appreciate the efforts made by the Government in relation to city deals. These projects could lead to a potential increase in employment and opportunities for local businesses; I hope and trust that the relevant measures will shortly come before the other place and your Lordships' House.

On the renewables scheme, I thank the Minister for arranging briefings on this very complicated matter. The issue is controversial and far-reaching, and its consequences will be felt by a lot of people for a long time. I honestly do not know of anyone who can say that this scheme has in any way been a success. In fact, the way it was set up and ultimately abused by some was disgraceful; fundamental change was required. Why was this not stand-alone legislation?

It is important to say that the scheme was not abused by everyone. As we all know, some certainly did abuse it and their subsidies were rightly cut. However, many people entered into the scheme in genuine good faith and, as a result of the information they were given, ultimately installed more expensive boilers, expecting to get a return at some point in the future.

The historical problems associated with the RHI tariff are the subject of an ongoing public inquiry, so it would be wrong to press those matters in too much detail today. However, the Minister will be aware of our concern that there has been a lack of proper scrutiny of the new proposals. There needs to be further scrutiny, even after this has gone through, so that there can be an opportunity for revision if at any point the figures are proved to be wrong.

While we await the report of the public inquiry, one of the issues on which it makes recommendations may be how we scrutinise measures such as this going forward. We would have hoped that Parliament could set an example on that. Will the Minister address the concern about the timing of this proposal, coming as it does so close to the end of the financial year?

My Lords, I give my support to these Bills.

7.18 pm

Lord Empey (UUP): My Lords, when the business Motion was being discussed last week, I made the point that the method of dealing with Northern Ireland legislation in this place is entirely unsatisfactory. I support the views expressed by the noble Lord, Lord Bruce of Bennachie, to that effect. We know that budgets are annual events and we know that the setting of a regional rate is an annual event. Therefore, there are no surprises, and it is not as though the legislative business that we have had to deal with in the last few weeks has been so pressing that we could not have made time for these Bills to be dealt with in a proper way.

The other significant point made by the noble Lord, Lord Bruce, was on the absence of any meaningful scrutiny. This is concerning, because for years—literally years—now, nobody has been looking at any of these things, other than the examinations conducted from time to time by the Auditor-General in Northern Ireland.

Given that enormous amounts of money are going from this Parliament to Stormont, nobody there is accountable to anybody here, and there is nobody there for them to be accountable to. It is probably a new version of "accountable but not responsible". Therefore, we have developed this limbo land, where the Government trundle on but without the checks and balances that are the hallmarks of a democracy. I appeal to the Minister, as I appealed to the Leader of the House last week, to prevail upon his colleagues that legislation dealing with Northern Ireland should at least be dealt with in a respectable way and at a respectable time, when we can scrutinise it to the best of our abilities, in the hope that it will find its proper place back in the devolved institutions.

The noble Lord, Lord Bruce, spoke about the estimates for the Executive Office for the next financial year. As they have for some considerable time, those estimates contain the phrase,

"actions associated with the preparation and implementation of the Historical Institutional Abuse Inquiry Report and Findings".

That report came out three years ago. I am aware that there has been a consultation, which has now closed. We have had a report and now a consultation, and so it goes on. These people were abused 40 or 50 years ago in some cases, and due to the political limbo that has been created—let us not blame whoever it is—they are being abused all over again, because they are not getting any help at all.

I know that, apart from the state having a responsibility, some of the churches and orders whose members were responsible for some of this abuse also have a responsibility, and their insurers clearly do as well. I appeal to the Minister to ensure that in the financial year about to begin, there is, at the very least, provision in that budget for interim payments to be made. These people are getting on in years and they are suffering again. There is unanimous support in the political parties for this matter to be resolved—not a single elected Member objects to this—yet we are still confronted by the fact that nothing has happened and these people have received nothing. It is inhuman and entirely unsatisfactory, and I appeal to the Minister to ensure that some progress is made in the financial year about to begin.

I agree with the point made by the noble Lord, Lord Browne, about bringing together the rates Bill and the RHI matter. They are two entirely separate matters, and they should not be in the same piece of legislation. I do not know how the Public Bill Office allowed it, and they should be separated; there is no reason for them to be linked.

Another issue in the estimates is that the Permanent Secretary in the Department of Health announced that he was going to start work on the development of a cancer strategy. This is something that Northern Ireland sorely lacks, and I welcome it, but as he said, there is no reason to believe, unless a Minister or somebody else is responsible at the end of the process, that decisions can be taken. I have repeatedly given statistics to this House on waiting lists—they are growing and growing and growing. In every category they are worse each quarter than they were the quarter before. They would not be tolerated in any other region of the United Kingdom. We are now up to 289,000 outpatients waiting for a consultant's appointment. Of those, 95,000 have been waiting for over 12 months. For some procedures that are not life-threatening, people were told last week that they may have to wait 10 years. Where are we going with this? There is nobody there in a position to implement the many reports that have been produced and deal with things as they have been developing.

Another matter the Minister might address is that we are now getting into the habit of turning capital into resource, whereby we are taking money out of the capital budget to put into the revenue budget. The Treasury used to go mad if anybody proposed doing that, but now it seems to be the done thing—it is commonplace. On top of that, we are borrowing through the RRI initiative, and the interest payments in this budget are now up to £51 million a year. That is becoming a burden in itself. Something is radically wrong when we are in the position of having to move money from a capital budget into a revenue budget when we have huge infrastructure issues to resolve, such as our road system and many others. We are also confronted with large sums of money being allocated to the legacy proposals—£150 million is supposed to be ready to support the historical inquiries unit, which is a catastrophe, and that would not cover even half its life. Yet we are short of nurses: this week we are flying people from England into some of our hospitals in Belfast because there are no nurses to look after the wards. Think of the cost of that. We have got our priorities entirely wrong and I hope we can get some accountability and scrutiny into this place.

I appreciate that at least the RHI committee stage will be taking place next week, which will give us an opportunity to go into more detail because it is a complicated subject. It was a catastrophic failure of administration and incompetence, against the background—as the noble Lord, Lord Bruce, said—of people being given guarantees by the Government. I do not quite know how we get out of this. It is a big problem, and it requires scrutiny.

We are dealing with such a complicated matter, with two Bills and all their stages being taken in one evening. I do not know about those who may have looked at it, but it is exceptionally complicated, and not something you can deal with on the hoof. It requires a committee to examine it in detail and resolve it, because there are big issues of principle involved. In all of this, there will be casualties if we do not watch how we handle this. I welcome that we will have a further opportunity to go into this in more detail next week, but I appeal to the Minister to prevail upon his colleagues to treat legislation regarding Northern Ireland with some parliamentary respect, so that at least in the interim, when we are waiting—we hope—for devolution to be resolved, people can feel that somebody is looking after their interests.

7.28 pm

Lord Lexden (Con): My Lords, it is a great pleasure to follow my noble friend Lord Empey, and I will be reiterating some of the points he has made in relation to proper scrutiny.

[LORD LEXDEN]

Our debates on Northern Ireland inevitably evoke feelings of the deepest concern and great sadness in all parts of our House. There is no prospect of a swift resumption of devolution, and politicians of all parties shrink from the prospect of direct rule for reasons that are frequently rehearsed. Over a year has now passed without the slightest glimmer of serious optimism regarding the restoration of devolution, and an end to the political limbo—unprecedented in our modern history—into which our fellow countrymen and countrywomen in Ulster have been cast. Even the principal public services that are the responsibility of local councils elsewhere in our country lie beyond their democratic control. In Northern Ireland, Stormont is the upper tier of local government as well as a devolved legislature—something I have often urged the Government to bear in mind.

It was in February last year that the last serious hope of progress came and went. Yet, astonishingly, the Budget Bill before the House today has been presented to Parliament accompanied by comments that anticipate the imminent return of devolved institutions. The Bill's Explanatory Memorandum, prepared by the Northern Ireland Office, tells us that the Government,

"sought to defer legislation as long as possible to enable the final decisions on the allocations to be made by a restored Executive",

and to avoid,

"distracting from and undermining the work towards talks aimed at restoring an Executive".

What work? What talks?

Fantasists must dwell in the Northern Ireland Office. Only they could believe that a breakthrough on devolution was possible while the Bill was in preparation. The House will surely decline to enter the office's world of make-believe, and accept that, on the ludicrous grounds that it has given, the Bill should now be rushed through Parliament without serious scrutiny, in defiance of our long-standing opposition to unnecessary fast-track procedures, against which our Constitution Committee has so frequently warned.

How have financial allocations to the Northern Ireland departments been determined? How will increased spending affect those public services to which extra resources have been given? Above all, to what extent will this Bill help reverse the current "decay and stagnation" in the public services, of which Mr David Sterling, head of the Northern Ireland Civil Service, has recently spoken. These questions cannot be answered because the necessary information has not been made available to Parliament, and the Northern Ireland Office's unacceptable delay in producing the Bill has prevented its examination in committee. The Explanatory Memorandum states unapologetically:

"Due to the need to implement the Bill urgently, the Commons Northern Ireland Affairs Committee has not scrutinised the Bill in draft".

It is extraordinary that the Secretary of State should have approved such conduct.

The same criticisms apply, perhaps even more forcibly, to the other Bill being rushed through Parliament. It will make drastic changes to the Province's renewable heat scheme, adding still further to the huge controversy with which the scheme has been surrounded since its start. The livelihoods of small businessmen are being placed in jeopardy. Yet this Bill is to be denied full examination by Parliament. However, it is good news that there is to be a separate Committee stage in this House next week. The Government should give an unequivocal pledge today that these are the last major Northern Ireland Bills that they will bring forward without making adequate information and time available to enable both Houses of Parliament to carry out their work of scrutiny and debate, which is all the more essential in the absence of devolved government.

I referred at the outset to the feelings of sadness with which the affairs of Northern Ireland are surrounded. I feel especial personal sadness this month. On 30 March it will be exactly 40 years since Airey Neave was murdered. I had been his political adviser for nearly two years. Those who killed him have never been brought to justice, and the crime has taken its place alongside so many other terrorist atrocities for which no one has been punished. Forty years ago, efforts to restore power-sharing devolution had failed. Thanks to Airey Neave, the Conservative Party had a plan to put the public services vested in Northern Ireland as the upper tier of local government back under the control of elected representatives, pending the return of devolved government. After the 1979 general election, the Northern Ireland Office scotched that plan. It would not necessarily serve as an exact blueprint for Ulster today, but perhaps the initiative that Airey Neave proposed should spur us to contemplate new approaches to the government of a part of our country which meant a great deal to him, and which deserves better government than it possesses today.

7.34 pm

Lord Kilclooney (CB): My Lords, I will speak on the Northern Ireland (Regional Rates and Energy) (No. 2) Bill in particular. I declare an interest, as shown in the register, as the owner of two non-domestic properties in the cities of Armagh and Belfast and the chairman of a company that owns 14 properties in different towns across Northern Ireland. The issue of rates is, therefore, important to me and those who work with me.

The subject of this Bill should, of course, be for the Stormont Assembly, as several noble Lords have already stressed. I am a strong supporter of devolution and was very much involved in the negotiations that led to the Belfast agreement. I believe in shared government at Stormont—a cross-community Government comprising Catholics and Protestants, Unionists and Nationalists. That is the best way forward for Northern Ireland. The imposition of GB rule on Northern Ireland is not a solution, but Sinn Féin makes this devolution unlikely. For at least one year it has stalled the creation of devolution. It does not want responsibility for unpopular decisions at Stormont as it prepares for the southern Irish general election, which could be within the next year. The campaign for equality of Irish with English is only an excuse for delaying the restoration of the Executive at Stormont, as only 1% of the people of Northern Ireland speak Irish daily—much less than those who speak Chinese, Polish and Portuguese. It

was wrong to link rates and the renewable heat incentive scheme together in the Bill. The RHI scheme is a major and controversial subject in itself and I am glad that the Minister—I hope that he still is a Minister because I have just heard that the Government were heavily defeated by 149 votes in the House of Commons—has decided that the Committee stage of the Bill will be next Tuesday and not rushed through tonight. That is appreciated.

I welcome the decision to keep rates on non-domestic properties to zero plus inflation, as some retailers in Ulster towns—like elsewhere in the United Kingdom—are suffering from online competition and closing down. In contrast, life is buoyant in border cities such as Newry and Armagh, as the Irish cross the border in their thousands each day to do their shopping. The reason for that is, of course, the change in exchange rates following the Brexit referendum. Last year, Irish shoppers spent £415 million in Northern Ireland. It is expected that this year they will spend a further £500 million on daily shopping in Northern Ireland.

Has the reorganisation of local government, from 26 councils down to 11 super-councils, resulted in savings, as was suggested at the time? There seems to be a growing democratic deficit in local government in Northern Ireland. People no longer know who their local councillors are; it used to be that they were known individually. Some of the new super-councils are making major decisions in committee, where even the media are often excluded. Approval of the committee's decisions is at monthly council meetings by a nod of the head, without proper public debate. There needs to be greater transparency in the affairs of some of the 11 new super-councils in Northern Ireland.

The RHI scheme is a problem area, due to a decision of the European Union. Here I quote the Secretary of State, Mrs Bradley, in the other place:

"As I said, this situation has resulted from a decision of the European Commission on state aid rules, and failure to do this"—

to pass the Bill—

"will mean no subsidies being paid to anybody".—[*Official Report*, Commons, 6/3/19; col. 1012.]

The European Commission, therefore, is very much a problem when we discuss the whole of the RHI scheme. As the decision on the scheme must be made by 1 April 2019, as we have been told, but we are leaving the European Union in advance of that on 29 March 2019, will the Minister say whether the EU rules on state aid still apply after 29 March 2019?

Finally, the problem with the RHI is that almost 2,000 businesses feel that they were badly misled by decisions made by both the DUP and Sinn Féin at Stormont. Both were involved, not just one. The problem appears worse, as people in the rest of the United Kingdom will be getting £20,000 per year for a biomass incinerator, whereas their equivalents in Northern Ireland will be getting only £2,000 per year. Likewise, the scheme in the Republic of Ireland will be more favourable than that in Northern Ireland.

People in Northern Ireland who got involved in this scheme on the recommendation of politicians now feel very aggrieved at this unfair treatment. These RHI proposals are very complicated and we will debate them at greater length in Committee next week. However, many feel that they were misled. A number might be forced into bankruptcy—it is as serious as that. The form in which the changes in the RHI scheme are presented, almost as an afterthought to announcing the annual rates, is mischievous, to say the least.

I oppose this Bill, and should either Her Majesty's Opposition, who are not particularly present this evening, or the Liberal Democrats, who also are not noticeable by their presence—there must be something going on in the other place—propose amendments next Tuesday, I will probably vote with them.

7.42 pm

Lord Alderdice (LD): My Lords, like other noble Lords, I am grateful to the Minister for his presentation of these Bills. He commands considerable respect and affection in this House because he is assiduous in his work, he is committed to the business and he is a man of integrity. He clearly demonstrates that by what he says. At the start of the debate, he admitted that the commitment that he had made last year was not one that he was in a position to deliver. We all have some sympathy with him. However, I associate myself with comments made by the noble Lord, Lord Cormack, when we last discussed some of these matters just a week or so ago. He said that he would be persistent in raising the same question and the same issue in respect of Northern Ireland until the Government addressed it.

The truth is that there is nothing at all surprising about the tragic state of affairs in which we find ourselves in the politics of Northern Ireland, because most of us here have been predicting it time after time, debate after debate, for almost two years now. The noble Lord, Lord Kilclooney, pointed out that there is not a huge array of people on all the various Benches, but this is not a question of this House. Not only noble Lords and other representatives here from Northern Ireland but the people of Northern Ireland need to understand that the lack of presence is a representation of how people on this side of the water feel about things. I see on the other side of the road hundreds of EU flags, lots of union flags, and flags of Scotland, Wales and lots of other places. In the last few weeks, however, I have not seen a single flag of Northern Ireland, and it is not because we are short of them in Northern Ireland.

Lord Rogan (UUP): On a point of information, I have seen two Northern Ireland flags recently.

Lord Alderdice: The noble Lord must have brought them with him himself, because certainly nobody over here would even have known what they were, never mind be displaying them. The truth is that the interests of the people on this side of the water have moved on for a whole series of reasons, and we have to take this extremely seriously, because when people are frustrated, disadvantaged and do not have the opportunity of making a difference—and many people over here feel they have no chance of making a difference to the

[Lord Alderdice]
difficulties in Northern Ireland—then they move on in their minds and in their feelings. This is a very real danger in Northern Ireland.

We have no devolution and we understand the reasons for that. It would be perfectly possible, however—as the noble Lords, Lord Trimble and Lord Empey, and I have pointed out repeatedly in this place—for the Government to permit the Assembly to sit and debate these issues, and that would inform the conversations that we have on this side of the water in two ways. First, it would mean that there was some holding to public account, if not to legal account, of the Northern Ireland Civil Service. When I was growing up, I had a relatively implicit trust in both the competence and the integrity of the Northern Ireland Civil Service. That has been shattered and blown apart repeatedly over the last number of years, as a combination of incompetence and a lack of integrity has been demonstrated over and over again. If there were Northern Ireland politicians from right across the parties demonstrating in debate their concern for these issues, that would hold Northern Ireland civil servants to account in a way that has not been the case for a long time.

Secondly, if Northern Ireland representatives in Belfast were having to hold the discussion and the arguments in public, even if they were not able to make decisions, people from Northern Ireland would start holding them to account for the fact that many of these adverse decisions were made by those very representatives. When they are not meeting and there is no debate, it is far too easy to pass it across the water to somebody else. I do not, for the life of me, see why the Government are not prepared to allow that degree of accountability, even though it does not have legal force. It would also say to many people in Northern Ireland that those who are being paid to be Members of the Legislative Assembly should be doing not just constituency business in their offices but constituents' business on the Hill.

Lord Empey: Is the noble Lord aware that there was no greater opportunity than to use the MLAs in the run-up to this budget? Instead, there were two or three very brief and perfunctory meetings, of little import, between the civil servants and representatives of the parties. Surely it would have been a golden opportunity to let them go through the process, even if it were for guidance, if for no other reason.

Lord Alderdice: The noble Lord knows that I agree entirely with him. I simply cannot see that there is any sound reason at all for the Government to hold back on this. My noble friend Lord Bruce of Bennachie has insisted, quite rightly, that there is now deep concern that large amounts of money are being allocated and spent in Northern Ireland without proper accountability and with increasing concerns that they are not being properly dealt with, spent and accounted for. It is not possible for us in this place, in the absence of direct rule, to hold to account, and even if we had direct rule, it would not be a satisfactory holding to account. Why? It is because neither in this place nor in the other place is there a representation of the nationalist community.

Now, one might well say that some of that is the nationalist community's own choice; that is not the point. The point is that there is not satisfactory representation and therefore the degree of accountability is not one that is going to be acceptable to large proportions of the population. Many of the arguments will not be satisfactorily adverted and adduced. I do not want to see direct rule, but I also do not want to see a continued drift and I have to say that, not just on this issue but on the issue that has just been debated and voted down at the other end of this building, the Government have shown an absolutely clear habit of kicking the can down the road and not making the decisions, even when it is manifestly clear that it is long past the time when the decisions should be made.

So we come to these Bills. Why do they go through some kind of emergency procedure? Was it some great shock or surprise that these Bills were going to have to be brought forward? Of course it was not, but it looks like every piece of Northern Ireland legislation is now going through an emergency process, even when it is known six months in advance that the matter must be dealt with in this place. This is not an acceptable way of going about things. Why do we have democratic processes? We have them because it is the way that we find to disagree with each other, as much as to agree, but to do so democratically and without violence. If people are left with no way of affecting process inside the democratic process then they will be encouraged to look beyond it, and that is not something that we should preside over.

It is not enough for Governments to suggest that strand 1 of the Good Friday agreement is the key strand and is not being implemented because of political disagreements in Northern Ireland. Strand 3 of the Good Friday agreement, the British-Irish Intergovernmental Conference, did not meet at a top level for 10 years and neither of the Governments asked the other, or insisted on having it. So when people talk about the Good Friday agreement not being implemented, it is not being implemented by the two Governments who are still in operation, in some fashion or other, and that has led to a deterioration in their relationship and in the whole process that we were supposed to be trying to make work. I say it not to the noble Lord, because I suspect he has some sympathy, coming as he does from north of the border himself, but it is really important to be clear to the Government: they are not governing in a satisfactory way, neither in this place, nor in terms of insisting on devolution, nor in the relationship between the British and Irish Governments.

I ask the Minister one specific thing in respect of RHI: I ask not that we have a debate next week and put material through, but will we have a serious debate in this place when the report of the RHI inquiry comes out, when we will have a serious piece of business to address which will make public, in this place and elsewise, the kind of exceptional inefficiency and perhaps even corruption that has gone on in Northern Ireland? Will he undertake that we will have that debate and that we will not be told that it is a devolved matter and not something that we should be debating in this place?

7.53 pm

Lord Morrow (DUP): My Lords, it is with some regret that I speak on this issue today. Indeed, I feel that this is the sort of debate that we should not have to have. I find myself in general agreement with everyone who has spoken and with some of the things that have been said, if not all of them. However, I think the Minister knows and understands clearly where we are coming from, those of us who reside and come from Northern Ireland, when we see this type of debate. This debate should be taking place either not at all or in the Northern Ireland Assembly, but regrettably that is not the case. I recognise that the Minister has to do what he has to do. I am not sure that he has to do it at the 11th hour, but it has to be done nevertheless. He may be the one in the firing line—if that is a bad choice of words, I apologise—and has to take the flak here today, but it can come as no surprise to him or to this House that we find ourselves debating this issue this evening.

I could commence by saying, "Here we go again". We have been here on other rushed pieces of legislation at the 11th hour, which is something I do not understand. I cannot understand why it is that way. We accept, of course, the reason for this Bill because we do not have a functioning Executive and Assembly. That is most regrettable. I was interested to hear the noble Lord, Lord Alderdice, say that he is not a fan of direct rule. Neither am I, but it would be infinitely better than what we are getting at the moment, because, basically, we are not getting rule. My first choice would be to have a devolved Administration in Northern Ireland with a functioning Executive. I suspect that even those who have yet to speak would say that that would be their first choice too.

We were told quite expressly that the Belfast agreement was a great compromise, that it was how Northern Ireland would be governed in future and that all future decisions would be made around the table, either in an Executive or in the Northern Ireland Assembly. Everyone signed up to it, some perhaps more reluctantly than others, but nevertheless we were told that this was as good as it was going to get. Hence, we had devolution for upwards of 20 years. Was it perfect? Not at all. Were there aspects of it that I did not like? There were many aspects I did not like. Indeed, it was the most convoluted and complicated piece of work that I ever witnessed in my political life, but we do not have an Executive today, we do not have a Northern Ireland Assembly, and I make it very clear to this House that I tire of people saying, "Oh, they are all to blame—they could never agree on anything over there". I make it very clear that we have no Assembly today because Sinn Féin walked out of the Assembly and brought it crashing down. It was a calculated and deliberate piece of work. Surely there have been greater crises that have to be got over, but you do not bring government crashing to the ground to stress your point. You sit down, you debate it and you get on with it.

What have we been asked to do here this evening? The noble Lord, Lord Bruce, it was who put his finger right on it. He said that we are being asked to wave through £60 billion of budget with no scrutiny and virtually no questions asked. We are supposed to suck it up and get on with it. Would this happen in any other region of the United Kingdom? Would it be tolerated in any other part of the United Kingdom? I suspect it would not. Why does it have to be tolerated in Northern Ireland? Do we not deserve better?

Northern Ireland has gone through turbulent times, 30 or 40 years of horrendous times, and there was then a breath of fresh and a sigh of relief that maybe we were going into better times. Should we not be allowed to get on with that? If we cannot have devolution, let us have the second best, which is direct rule. I am not a fan of it any more than is the noble Lord, Lord Alderdice, so let us have it on a temporary basis, until we get the restoration of devolution. Surely the Minister can tell us today; the previous time he was here, he said that it would be the last. I am not saying this to embarrass him—I know he said it in good faith—but I noticed he did not say that this time will be the last; he has learned his lesson. Someone has to take the initiative and inject some urgency into the whole situation and debate in Northern Ireland.

The noble Lord, Lord Lexden, is correct when he says that prospects of a swift return to the Northern Ireland Assembly do not look promising. That might not be what we want to hear, but it is very factual. The Government need to move with some degree of urgency and say, "Enough is enough; we can't continue like this, we have to deal with the particular problem here". That problem lies in the Belfast agreement: it allows a single party to pull down the whole edifice of government at a whim. That has to change; if we do not get that change, we will go in perpetuity into this uncertainty.

8.01 pm

Lord Maginnis of Drumglass (Ind UU): My Lords, very much along the lines of the previous speakers who have addressed this issue, I will start with a word or two about rates. The inequity is that domestic rates have yet again risen by 4.8%, whereas commercial rates have risen by 1.8%. While we continue to pay Members of the Northern Ireland Assembly for being idle as far as their public impact is concerned, the ordinary ratepayers—not least those on minimum wage—are being exploited by our so-called streamlined local government. We reduced 26 local councils to 11 in order to save money but, as my colleagues have already pointed out, local councillors are barely known; they are detached, and their decisions are made in enclosed committees and are merely accepted as faits accomplis in full council meetings.

When I was a councillor during direct rule, things were different. We had Secretaries of State—experienced politicians, such as the late Jim Prior, Peter Mandelson and Tom King, to name but three—who knew their councillors and worked through them, and who, bluntly, took no nonsense. I thought I was in a minority, but I am relieved to find that I am not, when I say: let us stop this current pandering to Sinn Féin and let us reintroduce active direct rule with the likes of those three I have just mentioned—there were others—for periods of 12 months, with an obligation on Assembly Members to give four months' indication if and when they are prepared to assume the responsibilities for

[Lord Maginnis of Drumglass]
which they sought election. That means that if, on 1 June, we decided to have direct rule—the noble Lord, Lord Duncan, knows I have some ideas as to how Members of this House could assist the Secretary of State in the interim period—things would begin to turn around. Common sense might dawn on some of the people who are playing a very dangerous game.

A second point that has not been made tonight is on the issue of accountability, concern and caring about our nation—that, sadly, has been missing, at least in that part of our nation to which I belong and from where I come. Why have I not yet received straight answers to my Written Parliamentary Questions of June, September and December 2017 about the scandalous proxy voting scandal that saw the number of applications for proxy votes rise from just over 2,000 in 2010 to almost 12,000 in 2017—a 555% increase? It was a ploy that succeeded in Sinn Féin unseating all the SDLP sitting Members—Durkan, McDonald and Ritchie—with respective proxy vote increases of 806%, 677% and 434%, and in Ulster Unionist Member Tom Elliott losing in Fermanagh and South Tyrone.

Bluntly, it is fairly obvious—I do not include the noble Lord, Lord Duncan, in this—that, in general, the Government did not give a tinker's curse. They dismissed the outcome to some vague and never followed-up exclusive responsibility that was passed to the Chief Electoral Officer and the PSNI, without, as far as I am aware—no one has ever bothered to update me on this—a single successful prosecution; that is, if any even occurred. How could they when few were pursued and those whose votes were violated were informed that they—elderly ladies—would be obliged to appear in court to give evidence against Sinn Féin? Most would still see that in historical terms as the Provisional IRA camp. No doubt, the noble Lord, Lord Duncan, will endeavour to enlighten our Chamber—if not today, by next week.

Of course, the most hurtful element within the debate this evening is that of the renewable heat initiative. That brings me to the infamous RHI con game being played against bona fide farmers who were induced to invest huge sums of mainly borrowed money. I will not enlarge on what my colleagues, the noble Lords, Lord Empey and Lord Kilclooney, and others have so graphically explained, except to point out that I was shocked to find Northern Ireland Members in the other place being so utterly mealy-mouthed in their acquiescence to this proposed legislation a week ago.

I will, however, put on record the letter written to the banks by the Minister of Enterprise, Trade and Investment, when she encouraged and endorsed the very scheme that the current Secretary of State for Northern Ireland is blithely dismantling. I will also acquaint your Lordships with one brief letter of the dozens I have received from despairing farmers who literally fear for their and their family's futures.

First, the Minister wrote to the banks in these terms and I think it is important that this goes on the record so that next week we will know exactly what promises were made—promises now being broken. The Minister of Enterprise, Trade and Investment wrote:

"I would also like to draw your attention to the Renewable Heat Incentive (RHI) which my Department launched in November 2012. This scheme supports the installation of renewable heat technologies in businesses throughout Northern Ireland. Under the RHI, eligible and accredited technologies can expect to receive quarterly payments for the lifetime of the technology (to a maximum of 20 years). The level of payment will be dependent on the heat output of the installation and the eligible tariff for the specific technology. The tariffs have been calculated to cover the cost difference between traditional fossil fuel heating systems and a renewable heat alternative. The tariffs account for the variances in both capital and operating costs, as well as seeking to address non-financial 'hassle' costs. In addition, a rate of return is also included on the net capital expenditure to ensure the renewable energy technology is attractive to investors. The rate of return has been set at 12% for all technologies incentivised under the NI RHI (barring solar thermal which has a rate of return of 6%). These rates of return reflect, amongst other things, the potential financing costs of the investment. Tariffs are '*grandfathered',* providing certainty for investors by setting a guaranteed support level for projects for their lifetime in a scheme, regardless of future reviews. However they will be amended on a yearly basis, for existing installers and new schemes, to reflect the rate of inflation. DETI believes that the RHI is a real opportunity for consumers and investors to install new renewable heating systems and enjoy lower energy costs and ongoing incentive payments. Traditionally the operating costs of renewable systems have been less than conventional oil systems however the capital costs have been somewhat prohibitive. The RHI aims to bridge that gap and provide a return on investment.

It is intended that the NIRO and the RHI will help to incentivise the market to achieve the ambitious renewable targets mentioned above. However, I am aware that in many cases the uptake of the schemes is dependent on potential installations being able to access the appropriate finance to cover the initial capital outlay. I am therefore writing to encourage you to look favourably on approaches from businesses that are seeking finance to install renewable technologies. The government support, on offer through the incentive schemes, is reliable, long term and offers a good return on investment. If you would find it useful, DETI officials would be happy to arrange a seminar for financial institutions, to explain further the current and proposed financial mechanisms.

Your support in working towards a more secure and sustainable energy future would be much appreciated".

That was signed by the Minister.

In contrast to that, I will conclude by mentioning one letter that I received from a farmer who I know and trust—a middle-aged man with a young son who hopes to succeed him on the farm. He wrote:

"It was this time last year I emailed you regarding last year's cuts. I know you did your best to try and stop it. I believe the latest bill is going before the House of Lords on Tuesday. This one must be stopped. It will be nothing but mental cruelty to hundreds of participants and their families. I haven't had a full night's sleep since the first cuts in 2017. I also have had to get the help of Rural Support. My costs (bank repayments, servicing and extra electricity) not including wood pellets are approx. £65,000 per year, and now I will receive approx £8,000"—

he has four burners. He continues:

"Could you please lobby other members of the House of Lords on our behalf as I am not great at using the computer".

He borrowed £205,000 over a five-year period. Noble Lords can work it out; he is paying about £47,000 or £48,000 per year to repay that. He has been hoodwinked.

I will stop there but will add only that as a Parliament, we cannot do other than meet our moral obligations to RHI investors.

8.16 pm

Lord Cormack (Con): My Lords, unlike most of the speakers in this debate, I do not come from Northern Ireland. It is a part of our United Kingdom that I got to know and love when I was chairing the Northern Ireland Affairs Committee in the other place. The people are marvellous; the countryside is beautiful and I fell in love with it.

I shall always have two particular memories, because 2005-10 was a very interesting, formative time. One was in 2008, when Ian Paisley—the late Lord Bannside—retired. I was at Hillsborough. Perhaps some of your Lordships were as well. It was a remarkable occasion. The Prime Minister, Gordon Brown, was there to pay tribute. The Taoiseach was there. The most moving and amazing part of that evening was the wonderful address, delivered to his friend and mentor, by Martin McGuinness. We have come a long way since then—and not in the right direction.

There is another event I shall always remember and which is printed on my mind. There was a particularly brutal murder of a young man called Paul Quinn. His parents came to see me and some members of the committee and we were invited to Crossmaglen. I was informed that I was the first British politician from this part of the United Kingdom to address a meeting in Crossmaglen since 1901. The warmth of the people, suffused on that occasion by very considerable anger, was palpable.

I feel very sad indeed that neither the Executive that was created nor the Assembly that met regularly exists for the moment. I do not go along with the desire for direct rule. I believe this would be a terribly unfortunate development. I do, however, associate myself with those who have talked about the way in which we are dealing with Northern Ireland legislation in this place and in another place. It is nothing less than an insult to the people of Northern Ireland for us to fast-track the two Bills that are before your Lordships' House tonight. Frankly, there is no need for it. I am delighted and grateful that we have another day next week on the second of these Bills. I will endeavour to be present and to take part in the debate. I am sure that your Lordships who are here will all do likewise.

It is not good enough. Billions of pounds are effectively being nodded through. There is nothing approaching scrutiny or detailed examination. If we are to have another year like this—and I suspect that we are—this must not be allowed to happen again. There must be proper, adequate scrutiny, even if it has to take place not on the Floor of your Lordships' House but in the Moses Room, in Grand Committee. We must engage. The people of Northern Ireland are as deserving as the people of Lincoln—where I now live—or of my former constituency of South Staffordshire. They are not getting the government they deserve. They are being short changed. Unless and until the Assembly and the Executive are restored, we have to shoulder—and willingly—the burden of government. This does not mean an early imposition of direct rule.

In his speech, the noble Lord, Lord Alderdice, took up a cry that we have made separately and jointly on many occasions. Why, oh why is the Assembly not meeting? He and I accept that it would not have legal, executive authority. Time and again, I have asked my noble friend why the Assembly cannot meet. I attach no blame whatever to him. My noble friend is an exemplary public servant. He conducts himself with great dignity and is exceptionally well-briefed. When I said it to him again last week, he was kind enough to say that he would try to give some sort of definitive answer this evening. I wait with real interest because it is very important indeed.

I want to touch on a couple of issues, one of which—this renewable heat incentive—has been touched on many times. I am not going to read anything into the record, because that has been done. I have received, as have many of your Lordships, a number of pleas—cris de coeurs—from people in Northern Ireland who believe that they have been badly let down and misled, encouraged to do things they would not otherwise have done and placed themselves in penury as a result. One of them was cited by a noble Lord a moment or two ago. We have all had those letters and I dare say that we will be referring to them again.

The noble Lord, Lord Hain, was unable to be here this evening because of a long-standing previous engagement, but he talked me beforehand because I was one of a group of former Secretaries of State and others who went to see the Secretary of State some weeks ago. I also had a private meeting with the victims' commissioner, who was over here. We were particularly concerned about the plight of those who, through no fault of their own, had their lives shattered—effectively destroyed—as a result of injury during the Troubles. Most of them are in their 60s or 70s. Many, alas, have already died. We have been told that there is a desire to give them pensions, but as my grandmother used to say, fine words butter no parsnips. These are people who are often living in the most straitened circumstances: their bodies pulverised, their futures destroyed decades ago. They deserve help, and I very much hope that when next we have a Bill before us, it will be a very short one that we can indeed fast-track, and which will enable those people to be recognised.

I finish where I began. It is very wrong that this legislation should be fast-tracked in this way. There is no excuse for it, there is no need for it and the people of Northern Ireland deserve better.

8.36 pm

Lord Bew (CB): My Lords, I support the two Bills and thank the Minister for arranging the briefing from his officials in the Northern Ireland Office yesterday. During that discussion, I was struck by a point already raised by the noble Lord, Lord Bruce, this evening: the possibility of a University of Ulster medical school in Magee. The cost mentioned in yesterday's meeting was £30 million. I asked officials about the cost of the current inquiry into the Scappaticci affair, which according to press reports has cleared £35 million, but no one knew the answer.

I am here making a point made by the noble Lord, Lord Empey, which is that the expense of these legacy inquiries really mounts up. In principle, at least, obvious social goods for the future of Northern Ireland might be obtained if money was not going in that direction on the dramatic scale it has in the past. The Bloody

[Lord Bew]
Sunday inquiry, for which I was proud to be an historical adviser, has cost £200 million and is still going on. At the time of the Bloody Sunday inquiry, I did not believe that we would still be having these inquiries, and there are many more to come unless, somehow or other, we get a grip on this. Otherwise, there will not be a medical school in Magee or many other social benefits in Northern Ireland in future.

I have one more point to make to the noble Lord the Minister. I think he is perfectly aware that Northern Ireland housing associations are restricted in their operation by a definition from the Office for National Statistics. This issue was raised in the other place when the legislation was debated, and on 6 March the Secretary of State seemed to hold out the prospect of legislation, although the situation was not made completely clear. I am pressing the noble Lord on the issue of timing. Can we have action before the summer? I understand that he may need to write to me. This is a way to expand social housing, affordable housing, in Northern Ireland without putting any pressure on the block grant. It would therefore be very helpful if progress could be made in that area.

8.29 pm

Lord Hay of Ballyore (DUP): My Lords, there has been a wide range of speeches on the Bills here this evening, all very much with a similar theme: the lack of transparency, scrutiny and certainly accountability. We might get a few hours in this House to debate a budget for Northern Ireland—a very unsatisfactory situation for all the people of Northern Ireland—with no real scrutiny or knowledge of how the allocations to departments have been reached. As the noble Lord, Lord Browne, said, this is the third year that expenditure in Northern Ireland has been debated through this House. Surely the people of Northern Ireland deserve better; they are in a very difficult position. We were told that the Bill has been fast-tracked because there was hope that an Executive, an Assembly, would have been restored to make these provisions. Over the past number of months, was there any real prospect of an Assembly being restored to go through the process of setting a budget? I think not.

While I believe that we have the mechanisms here within Parliament to scrutinise such Bills, I just do not know why those procedures are not used. We will all have known over the last several months that this Bill was coming. We also know that the Assembly would not be meeting to process such Bills. I think this is something the Northern Ireland Office needs to answer, because this is not the way to do business. It is just not possible. Yes, I understand that in the absence of a working devolved Government in Northern Ireland, the United Kingdom Government have a responsibility to safeguard public services and public finances in Northern Ireland. I know that the Bill is putting spending on a statutory footing; that has already taken place. Of course, this is more or less a spending Bill giving departments in Northern Ireland the ability to continue to spend money with a higher than normal level vote on account of 70%. The tragedy of this process is that the Secretary of State cannot direct the spending with these departments or what programmes they can spend money on, so there is no real control over how our Civil Service in Northern Ireland spends money.

Of course I welcome the £140 million of new funding that will go to the health service, education and other projects in Northern Ireland. I place on the record my gratitude to the Minister, the Secretary of State and the Treasury for finding that extra £140 million. Education especially is in dire straits at the moment in Northern Ireland. The various principals of all our schools will tell you the seriousness of the education situation right across Northern Ireland. Our health service in Northern Ireland, which has been mentioned continually in this House, continues to suffer, and our waiting lists get longer and longer. Why? Because we have no Minister in place to lead and to decide policy. It is a total and absolute tragedy. Of course, the £140 million is on top of the £330 million of funding that comes from the Government's confidence and supply agreement with the party.

I will move on quickly, because the evening is getting on, and raise the issue of a city deal, which has already been raised by the noble Lord, Lord Browne. I specifically raise the city deal that is very much ongoing in my own city of Londonderry and the region. The Minister will know that I have raised this with him on several occasions. My understanding is that there may be an announcement within the spring estimates. I am not too sure; I do not want to pre-empt that decision. He will know that it will certainly regenerate the region and create employment, economic development and inward investment. A city deal for the region has all of that connotation. Certainly, on two or three occasions someone has mentioned a medical school for the city, which is very much part of the wider city deal. It is something that the Minister knows about and that I have spoken to him about.

I also want to quickly raise the issue of RHI, which comes under the rates and energy Bill for Northern Ireland. The Bill deals mainly with the RHI scheme. We have all received emails and letters from individuals who feel aggrieved by the proposals in the Bill—and rightly so. They went into the scheme very much in good faith and now feel that they are being unfairly treated. I agree with them, and I will not stand here and defend the scheme: it was flawed from day one. We need to be honest enough to say that.

The Minister will be well aware of our concerns about the lack of proper scrutiny for these proposals, which will change the tariff to 12%. The Minister knows that MPs have challenged the figures that the civil servants have come up with. These, of course, are the same civil servants who got the scheme wrong from the start. They are now telling us that the figures are right. I am glad that the Northern Ireland Affairs Committee has decided to launch an inquiry into the figures and has called for representations; I hope that we can move forward that way. It is, however, a tragedy, and there will be a number of people out of pocket from all this.

The rest of the United Kingdom set a rate of return from the scheme of between 8% and 22%. Here we are told that because of the whole issue of legal aid and the European Commission, Northern Ireland can have

only the 12% tariff. There are a number of questions about this. I hope that the ongoing Select Committee inquiry will tease out all these issues, because I and others are concerned that the figures presented to us are not correct and need to be challenged.

In finishing, I mention the issue that the noble Lords, Lord Alderdice and Lord Cormack, and others raised about why the Assembly is not meeting. There is some suggestion that the Assembly should meet in shadow mode. If all the parties could agree, we would be there in the morning, because at least that would be a start towards getting the Assembly to function as a fully devolved Government in Northern Ireland.

The answer to dealing with these issues is devolved government in Northern Ireland, and I hope that this is the last time that we deal with such important business—budget-related business in particular—for Northern Ireland. We should not give up hope of Stormont being brought back, perhaps sooner rather than later. Direct rule—and I know that at some point we may have to go to direct rule—has not been good for Northern Ireland. We had direct rule Ministers flying in and out of Northern Ireland with no accountability, making decisions that affected the lives of people in Northern Ireland with no responsibility to them. That cannot happen again. We need to get the Assembly and a workable Executive up and running, because direct rule Ministers, as good as they are, make decisions that affect the lives of all the people in Northern Ireland with no accountability. For me, therefore, it is devolution back at Stormont, and I hope that we redouble our efforts to get the Executive and the Assembly up and running.

I place on record my appreciation for the meetings, short as they may have been, that the Secretary of State and the Minister held to discuss these Bills. He and his officials took time out of a busy schedule to brief us as best they could; I thank him and the Secretary of State.

8.40 pm

Lord Rogan: My Lords, I will speak briefly with what is, I hope, a simple message, one which has been expressed many times but needs to be repeated. The Explanatory Notes for the legislation before us this evening begin with the following statement:

> "The Bill deals with matters arising from the continued absence of a Northern Ireland Executive, and the consequent inability of the Northern Ireland Assembly to pass legislation to provide the authority for departmental expenditure following the Assembly election on 2 March 2017".

It is clearly important that we support the legislation because, in its absence, government departments and public bodies in Northern Ireland will be unfunded; no one in your Lordships' House would want that. However, the people of Northern Ireland should not be placed in this invidious position, with no prospect of the establishment of an accountable, devolved Administration anywhere in sight.

Last Saturday, I attended the Ulster Unionist Party's annual general meeting in Belfast. It was standing room only, although I am happy to say that my noble friend Lord Empey and I were given seats. The mood was vibrant as candidates and supporters listened to an excellent speech from our party leader, Robin Swann, in advance of the council elections in May. There is real enthusiasm for the democratic process in Northern Ireland, and the absence of a Stormont Assembly and the ability to engage with locally elected Ministers is causing ever-increasing frustration, anger and dismay. As an aside, if we had devolution and the noble Lord, Lord Duncan, was Minister, I have every confidence that a bloody good job would be done.

I reiterate the comments of the noble Lords, Lord Bruce of Bennachie and Lord Hay of Ballyore, on the proposed medical school in Londonderry. In Northern Ireland, we are short of both doctors and nurses. Can special arrangements be put in place to at least allow this facility to become operational? On a personal note, last Friday I had an examination by a specialist for a minor ailment. Minor though it was, nevertheless an operation is required. It is expected that I will have that operation in two years' time.

This morning it was announced that four viable parcel bombs targeting London and Glasgow over recent days were sent by a group calling itself the IRA. The perpetrators are thought to be so-called dissident republicans. I remind your Lordships that it was dissident republicans who were responsible for the 1998 Omagh bomb attack, which took the lives of 29 people, including a pregnant mother with twins. As the noble Lord, Lord Alderdice, said, such evil terrorists exploit political vacuums for their own murderous ends, and always will do so.

I have a simple message for the Minister. I will support the Bill, but the current democratic deficit in Northern Ireland must be closed without any delay, and before the men of violence—according to their own sick mindset—get "lucky".

8.43 pm

Lord Murphy of Torfaen (Lab): My Lords, I very much agree with the noble Lord, Lord Rogan. Where there is an absence of democratic government, particularly in Northern Ireland, that gap will be filled by the men of violence. That is an interesting point on which to start this final but one speech in your Lordships' House.

There has been a theme throughout this evening's short debate concerning the way in which we scrutinise legislation, particularly of this sort, in Parliament. It was a theme in the other place as well. I hope the Minister will take back to his boss that constantly relying on emergency legislation for Northern Ireland, when we know the timetable in front of us, really is not good enough. When we consider that the meetings that apparently were held with the political parties in Belfast were rather perfunctory, that adds to the difficulties we face.

Northern Ireland is now the least democratic part of the United Kingdom—possibly the least democratic part of the European Union. The local authorities will be elected in a few months' time but they have very minor powers in comparison with their British counterparts. All other decisions regarding education, health, planning and the rest are now taken by a bureaucracy. I suspect that there is nowhere else in Europe where such huge decisions, involving billions of pounds, are taken by unelected administrators and

[Lord Murphy of Torfaen]
civil servants. I do not envy them because whatever they do will be criticised. But it is not their job. In a democracy, such decisions should be taken by elected politicians, which has not been the case in Northern Ireland.

A number of your Lordships mentioned the possibility of the Assembly being used for deliberative purposes. Brexit would have been an ideal subject for the Assembly to discuss, as the budget would certainly have been. I might have mentioned before in your Lordships' House that when I was Minister of Finance in Northern Ireland before an Executive was set up, I took the budget to the new Assembly that had only just been elected. All Members of that Assembly were able to question me about that budget. Such an arrangement would not have legal standing, other than the fact that the Members have been elected legally, but the Assembly would have a deliberative function. I am sure that two of its former Speakers who are here, the noble Lords, Lord Alderdice and Lord Hay, would agree that the opportunity would be enormous and that the people of Northern Ireland would regard it as a first step, particularly given that Members of the Assembly are still being paid. It is a proposal worth considering.

The Opposition will not oppose these Bills. As regards the budget, a number of your Lordships have raised different issues. I echo the point made by the noble Lord, Lord Cormack, about the interest of the noble Lord, Lord Hain—we are all interested in this issue—in pensions for the victims of the Troubles, and the fact that a lot of those people are now old. Indeed, some have died. Around 500 would qualify. A tiny handful would be people about whom there may be controversy. We must not allow that vast majority to be affected by issues of definition of victim; rather, we must address the mental and physical problems that those people face.

The proposal regarding the rates is fair. It is on a level with those affecting my local authority in Wales. There is nothing outrageous about the amount but the point has been made by some Members here that we should consider those who still cannot afford the rates. Although non-domestic rates are smaller, in Northern Ireland, as in the rest of the United Kingdom, there are small towns in difficulty and where business rates are a burden. I ask the Minister whether the new small towns initiative will apply to Northern Ireland, by way of the Barnett formula.

A lot of Members rightly raised the RHI, and it is good that next week we will have an opportunity to look at it in detail. We await the results of the inquiry. There might be a judicial review of the issue, which the Northern Ireland Select Committee will deal with next week. Although some people benefited a lot from the RHI, everyone who applied did so in good faith. A lot of farmers and small business people in Northern Ireland will be affected adversely by the results of this legislation. It has to go through, otherwise nothing would come to them at all; but we should scrutinise this issue in greater detail. It was a scandal and I hope that we will be able to rescue some of the people who have been caught up in it. However, I still come back to the fact that none of this should be happening. There should be an Assembly, an Executive, north-south bodies and indeed the British-Irish Intergovernmental Conference. The east-west aspect of the Good Friday agreement should be operating.

We are 312 hours from the first deadline for legislation—which this House approved, by the way, not long ago. I very much doubt that we shall achieve what we want by that time. The involvement of both Prime Ministers has been peripheral. The Government —to put it diplomatically—were less than energetic in this matter. I cannot see a plan ahead of us. There should be a plan for talks about talks, if nothing else, and there is none. There is no hope of it. We have had over two years without an Assembly or an Executive.

A few hours ago, the Government were defeated by 149 votes on an issue about Northern Ireland, effectively. The proper argument put in the other place was that the Good Friday agreement must not be affected by a hard border. The hard border would adversely affect everything that was agreed 20 years ago. Of course that is right. But here we are today in this Chamber discussing Northern Ireland and the restoration of the Assembly and Executive, and in reality this issue is as great a threat to the Good Friday agreement as that of the existence of a hard border, which has just resulted in a vast government defeat. The two are linked. Had an Assembly and Executive been functioning, a resolution of the backstop issue between both the nationalist and unionist communities in Northern Ireland might well have been possible. These abject failures in negotiations, in both Brussels and Belfast, have had tragic consequences not just for Northern Ireland but for the whole of our country. The crisis we are currently in is partly about Northern Ireland and, frankly, the Government should do something about it.

8.51 pm

Lord Duncan of Springbank: My Lords, no matter how much homework I do before I come here, I am always confronted by new questions, so I will try as best I can to do justice to all of the questions that have been presented this evening. I also stress that the opportunity next week to examine in greater detail the renewable heat incentive will give us a further opportunity to discuss that issue.

I start on a positive note and I will try to weave my way through all of the other questions. A number of noble Lords mentioned the medical centre in Derry. Derry/Londonderry will secure significant funding through the city deal initiative. Noble Lords will be aware that the Belfast city deal has been set at around £350 million. There will be substantial funds going into Derry/ Londonderry and into the medical centre. If it is able to secure the correct construction of its bid, that is exactly the sort of thing that the city deal should be able to move forward. I am not across the details, but I will be, and I will report back when I have more to say. It is a useful initiative to take forward.

The common theme from noble Lords this evening was to ask why we always seem to do this at the last moment and at short notice. It is important to place this in context. The Bills before us are, in a sense, a reconciliation of the moneys broadly spent in the financial year soon to close. The budget for that was set before and we are now reconciling it. It is happening

now because we had to wait until the figures were available, and that happened only within the last month. That is why we are doing this today.

On the question of the rates, again, noble Lords were right to flag up that this could have been examined at a different time, but the two issues have been put together in this package. The heating initiative concept also falls into this debate because we face a time limit of the deadline by which we must introduce an adjustment to the scheme because of the grandfather clause that will bring it to an end.

The point noble Lords are making is different: if this is how we are doing things, why are there not more opportunities for further scrutiny by different parts of this House and others, either through committees or elsewhere? I am going to take that away from the discussion this evening because I agree. We should be looking at how to move that forward in a fashion that does not rely on the methods we have used thus far. I do not think they are adequate. When we are spending such sums of money, there should be thorough, careful and detailed scrutiny—not in one evening, not even spread over the two opportunities we have—to ensure that those who are tasked with examining these things are capable of doing so.

I will try to move forward on several of these smaller but important questions. I have had several meetings with the noble Lord, Lord Hain, about pensions. I recognise how important this is and that we need to move forward for the very reasons that a number of noble Lords have struck upon this evening, not least the noble Lord, Lord Murphy. These people are ageing and dying off. We are awaiting the information from the Victims Commissioner. We believe that it will come very soon and hope that we will be able to move forward on this initiative once we receive that. I will come back when I have more details and am in a better position to do so.

The noble Lord, Lord Bruce of Bennachie, raised the wider question of the Hart inquiry. I wanted to get the exact wording, so forgive me if I read it out. My right honourable friend the Secretary of State for Northern Ireland has made it clear that, in the absence of an Executive, she will consider the next stages when she receives advice from the Northern Ireland Executive. We need to move this forward—I recognise how urgent and important it is—and we will do so when we have received that information. Even if there is no Executive, we will not let this settle. We need to make progress now.

I will touch on one of the other, bigger issues, the role of an Assembly, not necessarily as a generator of legislation but as a place where debate and discussion can take place. There is no impediment to the Assembly meeting. It would have to select and elect its own Speaker and its own Presiding Officer, but it could do so. One noble Lord flagged up one of the difficulties: to be an appropriate place for this discussion to take place, it would need to bring together all of those parties. I am aware of the challenge that that may represent. Perhaps noble Lords here gathered can do something to help. On a cross-party basis, they could write to each of the MLAs and ask if they would be willing to sit and meet in such an Assembly now.

There is no doubt that the noble Lord, Lord Murphy, has flagged up an important point. Just along the corridor in the other place, an extraordinary event has unfolded. It has centred on Northern Ireland, yet the voices of Northern Ireland have been remarkably quiet in this process. It is not just about flags outside but voices in here. Any small progress will be a step in the right direction.

Lord Alderdice: I am very grateful to the Minister, but it feels as if he is giving a veto to one party. When Lord Prior was Secretary of State, an Assembly was able to meet for some years without any nationalist representation at all. We are not talking about that in this situation. I understand what he is saying very well. The Government would be very ill advised to hand out a veto in that kind of way.

Lord Duncan of Springbank: The noble Lord is absolutely correct. That is why I am trying to be very careful in putting this forward.

Lord Cormack: I am most grateful. I would like to follow up: I think we see this as one. I appreciate the suggestion that we might take part in some way. However, I would ask that the Secretary of State herself writes to every single elected Member, saying that there will be a meeting on a particular day and inviting them to come. It would be wrong to allow any single segment or group to veto that initiative. It has to be taken at the highest level, by the Prime Minister or Secretary of State.

Lord Duncan of Springbank: I accept the words of my venerable and noble friend. I am trying to find a way of moving this forward as best I can. I wonder whether there might be an opportunity for us to meet collectively in a different forum to discuss that very thing. I do not think I will be able to resolve it on my feet. I do not doubt that in a few moments or so I will be getting little notes from my assistants in the Box.

Lord Hay of Ballyore: To follow the remarks of the noble Lords, Lord Alderdice and Lord Cormack, has there been any discussion on the idea of a shadow Assembly within the talks at any time? Has it been put by the Secretary of State to the parties? What has their reaction been, if any at all?

Lord Duncan of Springbank: The noble Lord raises a question to which I do not have the answer, I am afraid; I do not have it to hand. That is why if we are in a position at a date soon hereafter to sit down and explore some of these issues in an effort to move them forward as best we can, that would not be a bad initiative. Let us revisit that. I am not trying to park it in any way.

I hope noble Lords will forgive me for being a little disorganised: I seem to have an awful lot of papers spread in front of me. I will try to take the points raised by each noble Lord in turn. The noble Lord, Lord Bruce, asked about the RHI situation and how it compares with other parts of the United Kingdom. We are broadly agreed that the scheme in Northern Ireland was not well constructed; we can probably all

[LORD DUNCAN OF SPRINGBANK]
accept that. The unfolding inquiry into that will set out clearly exactly what has gone on. In response to the question from the noble Lord, Lord Alderdice, yes, we can have that debate should your Lordships desire to have one at the stage when a report emerges; I am happy to say that.

The scheme set out a 12% return; that was at the heart of what was meant to be achieved by the initiative. It is indeed 12% in Great Britain itself; the scheme that we anticipate in the Republic would be 8%. One of the reasons that we end up with different figures is that there are different ingredients going in. For example, the scheme in Great Britain is a 20-year scheme, whereas that anticipated in Northern Ireland is a 15-year scheme. Some of the capital costs involved in the scheme depend on when the emergent technology became more cheaply available. The scheme in Northern Ireland that commenced in earnest in 2015—although it opened earlier—contrasts quite clearly with the scheme which opened in Great Britain in 2012, during which there were significant cost reductions.

The scheme construction also differs significantly between Great Britain and Northern Ireland, not least the element of "tiering" which exists in British schemes but not in Northern Ireland and the digressive component. I will not go into greater detail on that; we will have an opportunity to do so next Tuesday evening. In the intervening period, I recommend that any of your Lordships who are minded to find further details meet my officials so that those who have serious concerns can have them addressed.

To put this into context, the 12% return that we talk of is the needful part within the state aid rules. The scheme in Northern Ireland as it initially emerged had a return rate of 55%—noble Lords will see the contrast between 55% and 12%. It is not difficult to see how those individuals, who, through clear guidance, accepted a scheme with its various component parts and invested on that basis, now find themselves in the invidious position of all their calculations being blatantly wrong, based as they were on incorrect information. It is important for me to stress that those who were responsible for the wrongness of that scheme, I do not doubt, will emerge from Patrick Coghlin's report; we will have an opportunity to discuss that further.

I stress that those within the Northern Ireland Civil Service undertaking the work on the current proposals are not the same people. This has been conducted in a very different fashion, based on significant investment in looking at the actual data rather than forecast data. Rather than trying to anticipate what the figures will be, the report itself and the consultants who examined it looked at the actual data. Again, it might be worth getting into the detail of that at an opportunity that will be provided by my officials and by others, because noble Lords will be surprised how quickly this moves from a high-level discussion into extraordinary technicalities.

I have written at the top of this page: "still a Minister". I think that must reflect on what was going on down the Corridor. I will check when I leave, obviously.

A noble Lord: It is only 9.05 pm.

Lord Duncan of Springbank: The night is still young, exactly.

Returning to the remarks of the noble Lord, Lord Empey. In stressing the notion of the cancer strategy, he placed his finger on one of the more important questions: in the previous Act we set out our ability to offer guidance to civil servants in Northern Ireland but at what point does a civil servant in receipt of information feel he is comfortable to implement it or not? There is no doubt in my mind that there is a strong difference between a civil servant who feels so empowered and a Minister who wishes to move things forward, and there is no point pretending that one is the same as the other. I recognise that a cancer strategy is only as valuable as it is implemented in all its manifest forms, and I also recognise how important that will be.

The noble Lord asked about turning capital funding into resource funding. In the current arrangements there will be £130 million of that, and he is absolutely right that the Treasury has in the past not been overly fond of this approach. This particular approach is one method of trying to balance out that budget, but I recognise that there will be other challenges. He rightly points out that there are enough capital projects in Northern Ireland to keep Northern Ireland busy for some time, which is again why there will be £200 million from the confidence and supply arrangements, focused primarily upon infrastructure. That should in some sense help to recognise how we can balance out these particular aspects.

My noble friend Lord Lexden was very critical, and I accept his criticisms in the spirit in which they were given. We deserve some criticism in this area. We should be doing better, so I will take that on board. Again, he flags up the vital role undertaken by the Northern Ireland Affairs Committee, which should have a stronger role in all the things which we are discussing. There is no point in having a Northern Ireland Affairs Committee if the only thing it does not discuss is what you are up to in Northern Ireland in this context, so I shall take that on board. He was right also to remind us of the role of Airey Neave, and the tragic circumstances in which he died. There is much to learn from that period about how we can move things forward.

The noble Lord, Lord Kilclooney, asked several questions. The first one, which he has touched upon previously, was: has the reform of the council structure had any benefit? I do not have an answer to that but I am going to find one and report it to him directly. He also asked what the role of state aid will be after the point at which we depart. The reality is that the state aid approach will be adopted broadly by a UK-based entity called the Competition and Markets Authority, which will apply common rules. I will write to him with more detail so that I can set out at greater length the information which I am here slightly gliding over the top of.

I hope I have answered the questions raised by the noble Lord, Lord Alderdice, so I will glide over the top of those and move on.

The noble Lord, Lord Morrow, like many others, raised the very serious point of scrutiny. I hope we can find a way of doing this differently. This time last year, I somewhat foolishly made a bold promise, which I will not be doing it again, as I have discovered that Northern Ireland is not the place to make bold promises—certainly not as far as I am concerned. However, I believe we need to find a different way of scrutinising. It is right and necessary that the people of Northern Ireland have faith and confidence in the way that their money is being administered, and that is going to be done only if they have genuine confidence. The notion of using expedited or emergency powers creates this sense of emergency, which in itself is self-defeating, so we want to move away from that as best we can.

The noble Lord, Lord Maginnis, asked certain questions on proxy voting. I will chase up the responses tomorrow and ensure that the noble Lord gets them. He read into the record one of the letters from the responsible devolved Minister, reminding us again that all those individuals who have written to each of us about the RHI scheme did so on the basis of very clear, simple, straightforward guidance. They did the right thing, and so it is important that is on the record and part of the wider discussions that, I do not doubt, will follow on from the report which will be published. That echoes the points raised by my noble friend Lord Cormack, and I am pleased he was able to raise the issue of pensions on behalf of the noble Lord, Lord Hain, which we should be able to move forward on, once we are receipt of that information from the victims' commissioner.

The noble Lord, Lord Bew, asked about how much the Scappaticci affair cost. I do not know, but I will find out and report back to him. I hope I was able to give him some comfort on the Derry medical school.

Lord Bew: I am also interested in whose budget it comes from.

Lord Duncan of Springbank: I will make sure the letter covers that point as well. On the housing association aspect, I have assurances from my right honourable friend the Secretary of State for Northern Ireland that we will find time, and this will move forward as quickly as we can. Whether it will be by the summer will slightly depend upon events, but there will be an ambition to move forward quickly. The longer we delay in moving this aspect forward, the greater the cost to the Exchequer, as the noble Lord will know. If we do not make progress by the end of the financial year, it will have cost us £45 million, which is money we could better spend on a thousand different areas.

The noble Lord, Lord Rogan, reminds us of the challenges we face if we are not able to deliver, and he is right to point out the challenges of a vacuum, and who will fill it. It is a stark reminder, and we are living through that reality now. We need to make sure we can make some progress, because it is too important an issue for it to fall into that particular abyss, from which it will be harder and harder to extricate ourselves.

The noble Lord, Lord Murphy, as ever, brought forward a useful summary, and trenchant criticism, which lands upon us as the Government. It is important that we recognise the issues we have tried to take forward, and how we can improve the way we do business. He asked a specific question about the small towns initiative, to which I do not have an answer, but I will get an answer and I will write to him, lodging my answer in the Library for those who wish to have that information at their disposal.

The noble Lord, Lord Bruce, posed a question on scrutiny, and the noble Lord, Lord Empey, touched on this. The actual spend is scrutinised by the Northern Ireland Audit Office, but there is a difference between scrutinising post facto spend and the other way around. I take that on board, as I hope he will understand. The noble Lord, Lord Bruce, also asked why the flaws in the RHI scheme were not caught earlier. It is a good question, and there have been attempts throughout the process to ameliorate what has become a significant problem. When the scheme was set up, the figures being discussed were in the £20 million range, but when we look at the simple costs now for this scheme, were it to have run the full distance, we would already be at £500 million, which is a significant overshoot. The reason why the judicial review, which is going to appeal and will report soon, found that there should be reform of this is because we need to balance the commitments we make to individual participants in this scheme, and the wider sense of common good and public finances, which are challenging in this regard.

The noble Lord, Lord Maginnis, also raised proxy voting. It is important that we get clarity on this, and I will write to him and will share that information with others.

I think I have answered all the questions I can. If I have not answered particular questions, noble Lords should grab a hold of me, and I will answer them. If I cannot do that, we will arrange a meeting where I can answer properly.

Bill read a second time.

Northern Ireland Budget (Anticipation and Adjustments) (No. 2) Bill

Second Reading (and remaining stages)

9.14 pm

Bill read a second time. Committee negatived. Standing Order 46 having been dispensed with, the Bill was read a third time and passed.

Children Act 1989 (Amendment) (Female Genital Mutilation) Bill [HL]

Returned from the Commons

The Bill was returned from the Commons agreed to.

House adjourned at 9.15 pm.

Grand Committee

Tuesday 12 March 2019

Arrangement of Business

Announcement

3.30 pm

The Deputy Chairman of Committees (Baroness Pitkeathley) (Lab): My Lords, I remind your Lordships that, if there is a Division in the Chamber, the Committee will adjourn for 10 minutes.

Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019

Considered in Grand Committee

3.30 pm

Moved by ***Baroness Sugg***

That the Grand Committee do consider the Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019.

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Sugg) (Con): My Lords, this draft instrument will be made using powers in the European Union (Withdrawal) Act 2018 and will be needed if the UK leaves the European Union in March without a deal.

The draft instrument corrects five principal EU regulations related to aviation safety, together with a number of Commission implementing regulations made under them. The draft instrument also makes some corrections to domestic legislation which establishes offences and penalties relating to the EU legislation. The most important of these is EU Regulation 2018/1139 —more commonly known as the EASA basic regulation —which establishes a comprehensive regulatory framework for aviation safety in the EU. In particular, it provides for the continued establishment of the European Aviation Safety Agency and the adoption by the European Commission of implementing regulations on aviation safety. These implementing regulations also ensure the EU member states can meet their obligations under the Convention on International Civil Aviation—the Chicago convention.

The implementing regulations each deal with a specific aspect of aviation safety regulation, including: the design, construction, maintenance and operation of aircraft; the licensing of flight crew, maintenance engineers and air traffic controllers; the provision of air traffic management and air navigation services; the design and operation of aerodromes. The other principal regulations are: Regulation 3922/91, on technical harmonisation, which has largely been replaced by the EASA basic regulation—but provisions on flight and duty time limitations still apply to the crews of aeroplanes undertaking air taxi, emergency medical service and single pilot commercial air transport operations; Regulation 2111/2005, which establishes the list of air operators banned from operating to the EU on safety grounds; Regulation 996/2010, which sets requirements for the investigation of air accidents and incidents; and, finally, Regulation 376/2014, which establishes requirements for civil aviation occurrence reporting.

Many of the corrections we are considering today are to clarify that the retained legislation only applies to the UK. For example, references to "the territory to which the treaties apply" are replaced with "the UK", and references to "the competent authority" are replaced with references to "the CAA". Other amendments relate to the relationship between member states. For example, requirements on the mutual recognition of licences are deleted, as are requirements on co-operation and the sharing of information.

The draft instrument also reassigns functions that currently fall to EU bodies. The majority of regulatory functions required under the EU regulations are currently undertaken by the competent authorities of member states. These include: licensing pilots, air traffic controllers and maintenance engineers; and certifying the airworthiness of individual aircraft. However, EASA is responsible for a number of functions, including: preparing proposals for new technical requirements and for amendments to existing technical requirements; approving organisations that design aircraft and aircraft engines as well as certifying the design of aircraft and engines types. The CAA will take on these functions, with the exception of those related to management of the EU safety regulatory system, which will be corrected so as to no longer apply. While design certification has formally sat with EASA since 2008, it is not a capability that the CAA has totally relinquished, and we are confident that the CAA will be able both to meet the needs of industry and to fulfil the UK's international obligation as the "state of design". The CAA is implementing contingency plans to ensure that it will be able to undertake the new functions effectively from exit day in the event of no deal.

The European Commission also has a number of functions under the EU regulations. Most notably, it has the power to adopt regulations, to adopt or amend technical requirements, to impose operating bans on airlines which do not meet international safety standards and make limited specified amendments to the principal EU regulations. All of these legislative functions will be assigned to the Secretary of State.

The powers to amend the retained principal EU regulations are very limited and are designed to ensure that the regulatory system can adapt to technical developments and changes to the international standards adopted by the International Civil Aviation Organisation—ICAO. Most notably, the Secretary of State may amend the annexes to the retained principal EU regulations, particularly the ones to the EASA basic regulation. The annexes contain the high-level safety objectives which are implemented through the technical requirements. This power is exercised through regulations subject to the negative resolution procedure.

In addition, the draft instrument also revokes four implementing regulations that set out internal procedures for EASA and which will become redundant after exit day. None of the amendments in this instrument changes any of the technical requirements established by the retained EU regulations. All valid certificates, licences and approvals issued by EASA or by EU/EEA states prior to exit day will remain valid in the UK by virtue of the withdrawal Act. The draft instrument provides that such certificates shall be treated as if they were

[Baroness Sugg]
issued by the CAA. The instrument limits the validity of most such certificates to two years after exit day, after which time CAA-issued certificates will be required. However, certificates related to aircraft design will remain valid indefinitely. The CAA needs to issue the safety certificates to have full oversight of aviation safety in the UK in accordance with the UK's obligations under the Chicago convention.

The best outcome is for the UK to leave the EU with a deal, and delivering a deal negotiated with the EU remains the Government's top priority. However, we must make all reasonable plans to prepare for a no-deal scenario. This draft instrument ensures that, in the event of a no-deal exit, legislation on aviation safety continues to work effectively and that the aviation industry has clarity about the regulatory framework in which it would operate in a no-deal scenario. I beg to move.

Lord Berkeley (Lab): My Lords, I am grateful to the noble Baroness for introducing these regulations. It would be good if she could say something further as a result of the Boeing accident a couple of days ago, which brings aviation safety into focus.

I have a couple of questions, and I will use the Explanatory Memorandum as a reference because it is easier. My first question is on paragraph 7.2, "Corrections to domestic subordinate legislation". She said that most aircraft types are subject to EU technical requirements and that will be changed from "EASA aircraft" and "non-EASA" aircraft to "Part-21" and "non-Part-21". What is the point of this, and has anybody seriously tried to get associate membership of EASA? I know "European" is in the name, which probably means that it is anathema to some members of the Government, but it would be a lot easier. I will probably bring this up when we debate railways as well. EU technical requirements are well known and well respected. We will have CAA technical requirements if this SI goes through. What happens when they diverge? Is there any mechanism for our side to talk to the European side? It is pretty stupid to have technical requirements for aircraft in this country that will be different—even to a small degree—from those in the European Union. Of course, the same applies vice versa. We tend to think only about the problems in this country, but for our planes to be able to fly on the continent, presumably somebody has to confirm with EASA or the Commission that the technical requirements of our planes fit in with their specifications.

My second question relates to paragraph 7.5 of the Explanatory Memorandum concerning banned operators. Quite a few rather unpleasant cases over the years come to mind. The paragraph refers to the,

"list of aircraft subject to an operating ban in the Community".

That means that there is a list, which is great, but what process will there be for the UK and the European Union to share that list? It would be pretty stupid to have two lists, and I hope that the Minister can give us some comfort that there will be a mechanism for sharing, as this is a very important issue.

My last question relates to paragraph 7.8, which refers to,

"powers provided for in Single European Sky".

That is an ambition that has not quite been achieved, although it is some of the way there. Do I understand that it will now be dumped, that there will be a single European sky that does not include the UK and that we will have our own little sky? I look forward to the Minister's responses.

Baroness Randerson (LD): My Lords, I thank the Minister for her opening statement. The Ethiopian Airlines crash has been a salutary reminder of the fundamental importance of aviation safety. Sometimes we take it for granted, but it relies on a complex interlocking of the highest standards for design, manufacture and maintenance, stringent standards for the training of flight crew and air traffic controllers, and exacting standards for the design and operation of airports. As aircraft have become more complex—the crash two days ago illustrates this point extremely well—and the skies become more crowded, the importance of international co-operation on the specification and maintenance of these standards has never been greater.

Yet this SI is intended to withdraw us from EASA and hence from access, as of right, to much of that international co-operation. I was very pleased that the Minister confirmed yesterday that the Government want to remain a member of EASA. I have no doubt that the Minister wishes to do so, but it was good to have the reassurance that that was the Government's position. However, in the present political chaos, we cannot rely on this SI being simply a paper exercise.

Last November, the Second Legislation Scrutiny Committee drew our attention to this SI. It drew attention to the impact on CAA resources and to whether the EU will reciprocate in the recognition of licences, certificates and approvals. The UK will continue to have the same technical requirements and standards on exit day but, as the noble Lord, Lord Berkeley, has just said, there are real questions over future changes and over whether and how we will keep in step with the EU. Next week, we will be looking at maritime SIs, and we are way behind in keeping up with the flow of maritime legislation. I have real concerns that in the aviation sector, where technology moves on really fast, we will not be on the ball in changing our standards as fast as the EU.

3.45 pm

EASA has set the highest standards, and we have been a very important member of it. Given the importance of our contribution, it is sad that we are considering this situation today. The CAA has a well-deserved reputation for efficiency and expertise. However, in future it will have to operate within the framework set by the Secretary of State, and not that set by the European Commission. The difference is this: as I pointed out last week, when we were discussing railways, there is an issue about the transparency of the process and the availability of the information for public scrutiny. I was concerned to read in Paragraph 7.4 of the Explanatory Memorandum that:

"Delegated powers in the Basic Regulation are transferred … to the Secretary of State, who will be able to make regulations to adopt new technical requirements or to amend the technical requirements".

There is no procedure laid down here for consultation and no formal role for the CAA as advisers; and, worse, it is by negative procedure. I have very serious concerns about this, because there may be no public discussion and no public rationale provided by the Secretary of State as to why standards are changing.

I am concerned, too, about the implications of paragraph 7.3(b) in the Explanatory Memorandum, on the recognition of certificates. In future, individuals will need UK certificates if they are to fly or maintain UK-registered aircraft. This again has important resource implications, and I would be pleased if the Minister could give us details of the resource impact on the CAA in providing those certificates.

Paragraph 12.2 of the Explanatory Memorandum refers to additional staff for the CAA. It would be good to know how many additional staff will be needed and what their cost will be. If the Minister has not got that information today, could she write to us?

Paragraph 7.5 says that the UK safety list of banned operators will no longer be laid down in legislation but merely published on the CAA website. There have been serious incidents involving operators and banning, but I am concerned about this change of approach. Why will it not be laid down in legislation in future? Why is it just a notification on a website? Would there be a legal implication if there were to be infringements of a ban, for instance? Again, simply having this on a website lacks transparency and public accountability.

Moving on to the thorny issue of consultation, we have the same formula of words that we have had before—that there has been "regular engagement" with the industry and "long-established stakeholder forums", and so on. This is absolutely not the same as consultation. It is much less transparent, and we are all aware that there have been issues with the ability of those who have been consulted in these forums—specifically, the limits that have been put on them in terms of what they could say publicly about their views on that consultation, the Government having limited their rights to do this. That is the opposite of a public consultation. If a public consultation had taken place, we would have a report on how many people were opposed to something, how many people supported it and so on, and if that report was not made public, we would have the right to ask for that information. There is no public trail of accountability here.

Moving on to the impact, individuals will need new CAA licences after two years. The committee's report specified that the CAA will need 59 additional staff, 38 of whom were in post in November. Are they all in post now? What will the annual cost of this system be? Pilot licences issued by the EU must be validated by the CAA before being used outside the UK on a UK-registered aircraft. I note that there will be no charge for this, but last November the Department for Transport was unable to tell the committee how many people would be affected by the requirement for these new licences. Does the Minister now have that information?

As CAA licences will not be recognised in the EU, pilots will need to transfer their licence to another EU state if they wish to operate aircraft registered under the IATA system. Any cost to them will depend on which member state is involved.

I understand the reason for this statutory instrument, and I greatly regret the reason for it, but the system that is being put in place is less transparent, the standards will be less guaranteed and there are significant impacts on individuals working in the aviation industry. I am concerned that there has not been sufficient publicity about this aspect.

Lord Tunnicliffe (Lab): My Lords, I make my usual statement that I deeply regret being here. I think the idea of leaving the European Union without an agreement is absurd. In many ways, this SI and the many SIs I have worked through illustrate just how bad a situation it will be, but assuming that we are leaving, or have to be ready to leave, the EU without an agreement, I have looked at this SI. Its thickness deterred me from reading it, so my comments are based on the Explanatory Memorandum. Having been in the industry, I look forward to the seminar that the Minister is no doubt about to give us on ICAO. She will no doubt explain how this statutory instrument answers many of the questions that have been asked. I am sympathetic to many of them.

I shall restrict myself to two issues. The first is the powers of the Secretary of State. I have dealt with an awful lot of these SIs, and they have the same general characteristic: the stuff that is handled by EU regulators gets handed to UK regulators, and the stuff that is handled by the Commission is transferred to the Treasury. As I understand it, the Treasury is a body in its own right that can make decisions as a body in its own right. In a sense, one would expect the Treasury to be equipped to make those sorts of decisions. Here, paragraph 7.4 of the Explanatory Memorandum states:

"Delegated powers in the Basic Regulation are transferred from the Commission";

and it ends by introducing a role for Parliament:

"Regulations made by the Secretary of State would be subject to negative resolution procedure".

Unfortunately, as you read the document, it implies that decisions will be made by the Secretary of State himself, as the natural person. Given recent history, I am not sure that Parliament should be that comfortable with the idea of giving decisions to this Secretary of State, as the natural person. I assume it will not work like that. I assume the department and the Secretary of State will set up systems to advise the Secretary of State to analyse the issue and make sure that when we come to examine the regulations—if we choose to, under the negative procedure—the decisions would be backed up by a proper decision-making system, which the Minister will be happy to present to us. I hope we have reassurance on that point. To some extent, that covers one of the points made earlier in this debate.

Reading through the Explanatory Memorandum, I also stumbled across paragraph 7.6, which says:

"Corrections made include … removing provisions dealing with the relationship with and cooperation between EU Member States".

I know we have had two tragic events recently, but the tremendous improvements made over recent decades in civil aviation safety absolutely depend on worldwide, international co-operation. Therefore, I hope that that

[Lord Tunnicliffe]
paragraph is a technicality and that it will not change the attitude of the British Government to continuing to pursue this strong co-operation through the international bodies. I ask the Minister: what procedures will be put in place and what agreements will be sought to continue to optimise safety through international co-operation?

Baroness Sugg: My Lords, I thank noble Lords for their consideration of this draft instrument. Before I move on to the SI, I am very happy to give noble Lords an update following the tragic accident in Ethiopia. The UK CAA has been closely monitoring the situation, as has the department. It made an announcement just after lunchtime today that it does not currently have sufficient information from the flight data recorder, so as a precautionary measure, it has issued instructions to stop any commercial passenger flights with that aircraft for any operator arriving, departing or overflying UK airspace. The safety directive will be in place until further notice, and of course the CAA remains in close contact with EASA and industry regulators globally.

It might be helpful to start by reiterating our position on EASA. We seek continued UK participation in EASA. This will help to ensure high levels of safety, as well as facilitating trade between the UK and the EU. We have the second largest aerospace sector in the world and the largest aviation sector in Europe, so it is not in any of our interests not to participate. It is a critical industry and, of course, safety is critical. This SI is not intended to remove us from EASA; that is a consequence of a no-deal Brexit. We want to see continued participation, but it is not just up to us to decide that. We very much hope that the EU will want us to continue participating in EASA. As the noble Baroness said, we have been deeply involved throughout its history. We very much hope that the EU will agree to our continued participation. However, we need this SI to be in place to ensure that we have a contingency plan; that is what this SI gives us. We very much hope that we will agree a deal and see continued participation in EASA. If we are in a no-deal situation, we expect to move into conversations about our future air transport agreement very quickly, which will also cover safety issues.

In response to the noble Baroness, Lady Randerson, who highlighted our response to the SLSC back in December, the mirror image of these regulations is the EU safety regulation. The EU is in the process of adopting the regulation on aviation safety. It will be voted on in the European Parliament tomorrow and at the Council next week. It has already been agreed at the Committee of Permanent Representatives and we expect no issues with its adoption. That EU regulation is ultimately designed to prevent disruption to the EU industry, but it will be beneficial to us as well. It has three strands. First, it will extend the validity of certificates issued by EASA to UK-based design organisations. That extension is initially set at nine months, but the Commission is empowered to extend it if it proves necessary. Secondly, it provides for the continued validity of authorised release certificates for products, parts and appliances, certificates of release to a service issued on completion of maintenance, and airworthiness review certificates issued prior to exit day by organisations approved by the CAA. Finally, it provides that examinations taken at CAA-approved training organisations prior to the entry into force of the regulation will remain valid. We think that the EU's regulation, as ours, is a sensible contingency measure to have in place for a no-deal exit. It is not a permanent solution, and we very much hope that we agree a deal, and, if we do not, that we are able to negotiate further on safety regulations.

The noble Lord, Lord Berkeley, raised the issue of the banned airlines list. I agree that this is a very important list to have. On exit day, the UK list will be established and it will mirror the current EU banned list. The list will be published on the CAA's website, and it will be updated to reflect the imposition of operating bans. Operating bans are imposed by the refusal or revocation on safety grounds of permission for an airline to operate to the UK or by the refusal or revocation of a third-country operator authorisation. As the noble Baroness, Lady Randerson, pointed out, unlike the EU list, the UK list is not contained in legislation because it does not itself impose the bans, but reflects bans that have been imposed by the exercise of statutory powers. We will, of course, aim to keep the UK list consistent with the EU list as far as possible, and the decision on any operating bans will always be based on advice from the CAA.

4.01 pm

Sitting suspended for a Division in the House.

4.11 pm

Baroness Sugg: My Lords, before the vote we were discussing the banned airlines list. As I said, we will aim to keep the UK list consistent with the EU list, as far as possible. Those decisions on operating bans will be based on advice from the CAA. The method of enforcing that ban will be the same as it is today: the withdrawal of a permit or operating licence. There may be instances where the UK lists will need to deviate: if we have evidence that an airline does not meet international standards, we may want to prohibit it flying to the UK and add it to the UK list, even if the airline is still permitted to fly to the EU. We are working closely on implementing that list. There may be some resource implications, but we expect to be able to use existing resources within the CAA. As with all these things, we very much hope that we will be able to maintain close co-operation with the EU and maintain the same list.

The noble Lord, Lord Berkeley, raised the issue of the single European sky. We have already discussed the statutory instrument on air traffic management, and we absolutely recognise the need for our air traffic arrangements to remain in line with the rest of Europe. Safe and efficient air traffic management is a priority for us, and we will continue to work with European partners on it.

The new delegated powers were raised by all noble Lords. As I said, the draft instrument gives us delegated powers to make regulations, subject to negative resolution parliamentary procedures. The powers relate to the amendment or adoption of detailed technical requirements, which need to be updated regularly to reflect technical developments, changes to international

standards, recommendations arising from accident investigations and so on. As the noble Baroness, Lady Randerson, pointed out, these changes come thick and fast. This reflects existing UK practice, where the technical requirements for aviation safety are contained in secondary legislation made using the negative resolution procedure and the fact that the EU requirements were adopted under Commission implementing regulations.

The draft instrument contains a power for the Secretary of State to amend the essential requirements contained in the annexes to the EASA basic regulation by making regulations subject to the negative power. These very limited powers are designed to ensure that the regulatory system can adapt to technical developments and changes to international standards adopted by the International Civil Aviation Organization to ensure a continued high level of safety. I understand the noble Baroness's concern about consultation involving the CAA. We will of course always base these decisions on advice from the CAA, but the powers are very limited and relate only to adopting international standards, which we will continue to follow.

4.15 pm

On CAA resourcing, the CAA is already responsible for many of the responsibilities, including licensing and oversight of a significant proportion of the UK aviation sector. However, the CAA will be taking on some work from EASA, which requires additional resources. It currently estimates that it will need 53 additional people, which has come down from 59, and 50 of those people are in place. The CAA is content that it is ready, should we leave without a deal. In line with the "user pays" principle, these costs will be funded through charges on industry. New charges arising from the transferred functions will mainly affect UK manufacturers and organisations based in third countries, including EU member states. The CAA will endeavour to keep those charges as low as possible. The CAA estimates that the cost of taking on new functions and responsibilities will be around £3 million for 2019-20 and £3.6 million in 2020-21. As I said, these costs will be recovered by charges to the organisations concerned, whether they are based overseas or in the UK.

On pilot licences, all pilot licences issued by EASA or EU or EEA states prior to exit day will remain valid if they were valid immediately before exit day. The instrument provides that such licences are to be treated as if they were issued by the CAA. However, in order to meet our obligations under the Chicago convention, pilots holding such licences who want to fly UK-registered aircraft will need to obtain the licence validation mentioned by the noble Baroness, Lady Randerson. This will be available free of charge, and the draft instrument limits the validity of licences to a maximum of two years after exit day, after which a CAA-issued licence will be required. A general validation will be issued by the CAA immediately after the SI enters into force. It will be downloadable from the website. I am afraid we still do not know how many people will be affected, as non-UK EASA licence holders are not currently required to notify the CAA when flying UK-registered aircraft. We have set this out in technical notices and we are working very closely with industry to make sure that this information is being given to pilots. We are trying to make the system for getting this licence validation as free and quick as possible.

The other part about licences regards holders of UK licences who need to transfer their licences to EASA in order to operate EU-registered aircraft. The CAA is working on that. We opened applications in January. As of 11 March, we have received over 4,500 applications. All applications which were put in at the right time will be completed before exit day.

On consultation and industry engagement, as the noble Baroness pointed out, the Explanatory Memorandum says that we have regular engagement with industry stakeholders. We also work with union representatives; those from BALPA were included in this engagement. The CAA was closely involved in identifying the corrections to EU legislation contained in this instrument. Stakeholders are very supportive of this draft instrument. It would provide continuity through maintaining the current technical standards and requirements. We published a technical notice in September to inform the industry and the public of the actions we are taking, and the CAA website has a microsite dedicated to EU exit, which provides information and advice. The EU and EASA have also published regular updates on the implications of a no-deal Brexit and guidance for those affected.

Lord Berkeley: On consultation, can the Minister assure me that there will no more use of non-disclosure agreements for this ongoing consultation? That is happening at the moment for whatever reason, but it does not need to be a precedent that carries on after Brexit.

Baroness Sugg: I agree with the noble Lord. We have used NDAs when commercial issues are at hand, for example on our US agreement. The aviation industry is not silent about Brexit. It has been very clear about its position. It is supportive of this draft instrument, but it is not supportive of no deal or leaving EASA; it is making that very clear and has done for quite some time. I genuinely do not feel that the industry has in any way been restricted by talking about its views on Brexit; it has been very vociferous on that point, and we are very aware of its views, which have influenced our position on EASA membership.

The noble Lord, Lord Tunnicliffe, asked about the removal of provisions dealing with the relationship with and co-operation between member states. As I said previously, our future relationship with EASA is going to be a matter for negotiation. We have been clear on our position. We very much hope that the EU will welcome that. It has been quite frustrating because the CAA has not yet been able to have conversations with EASA because of the position we are in with the negotiations. We stand ready, but we have not been able to do that because a deal has not yet been agreed. We will continue to participate in ECAC and ICAO, as participation in both organisations does not depend on being an EU state. Even in a no-deal scenario, we recognise the importance of co-operation and collaboration with our European and international partners and will continue to do that.

I think I have answered all the questions—

Baroness Randerson: Can I take us back to the CAA's 59 new employees? I am delighted to hear that progress has been made. However, it occurs to me—going back to what the noble Baroness said at the beginning of her response—that this SI is for a no-deal scenario, but the CAA has had to recruit for a no-deal scenario that might not happen. I am sure most of us very much hope that it will not happen. What will happen to these staff if there is a deal and good transition arrangements that allow us to continue as members of EASA and dovetailing in? I am not trying to have it both ways; I am not trying to say that they should not have been employed because they might not be needed. It just occurred to me that this is nugatory expenditure, but it might also have an impact on the permanence of people's employment.

Baroness Sugg: The noble Baroness makes a very good point. These are difficult decisions. We need to make sure that we have contingency plans and the right people in the right place. On the cost of those people, the DfT gave the CAA £2.7 million from the Treasury to build up contingency. These costs have yet to be transferred to industry, at least. She is quite right that people are being affected. I cannot speak for the CAA and its human resources plan, but it is an excellent employer and I am sure that it will have a good plan. Regardless of whether we get a negotiated agreement, many other aspects will need to be discussed, such as our future relationship following the end of an implementation period. I very much hope that those people will be used and used well. However, I will take up that point with the CAA next time I speak to it.

As I said, we are working towards a negotiated agreement that is supported by Parliament, and we very much hope that that will happen. However, we need to ensure that we are prepared in the event of no deal, and this draft instrument is a key part of the preparations. Aviation safety is a priority for us and, as the noble Baroness said, that has been highlighted by the tragic events over the weekend.

Both the UK and the EU have set out their intentions on safety regulations to ensure that we have the plans we need in place and to ensure that we continue to have a high-level—a world-leading level—of aviation safety, irrespective of the outcome of the negotiations. I beg to move.

Motion agreed.

Aviation Noise (Amendment) (EU Exit) Regulations 2019

Considered in Grand Committee

4.24 pm

Moved by ***Baroness Sugg***

That the Grand Committee do consider the Aviation Noise (Amendment) (EU Exit) Regulations 2019.

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Sugg) (Con): My Lords, the draft regulations will be made under the powers conferred by the European Union (Withdrawal) Act 2018 and will be needed if the UK leaves the European Union in March without a deal.

The regulations make amendments to domestic legislation and a directly applicable EU regulation that relate to aviation noise certification and the process for when operating restrictions are considered at airports. The first of those is the Aeroplane Noise Regulations 1999, which were made to implement in UK law EU obligations relating to noise certification requirements in relation to propeller-driven and civil subsonic jet aeroplanes. The noise regulations prohibit certain aircraft taking off or landing in the United Kingdom without an in-force noise certificate issued by the UK, or a competent authority of the state of registry recognised by the UK.

The Air Navigation (Environmental Standards for Non-EASA Aircraft) Order 2008, also known as the environmental standards order, would also be amended by this SI. It sets out the environmental standards relating to noise and emissions of specific UK-registered aircraft that are not subject to the basic EASA regulation—Regulation EU 2018/1139—and regulation by the European Aviation Safety Agency. These regulations apply largely to light and microlight aircraft.

Thirdly, the regulations would amend Regulation 598/2014, commonly known as Regulation 598, which establishes the rules and procedures with regard to the introduction of operating restrictions at certain airports based on a balanced approach to noise management—an agreed International Civil Aviation Organisation principle since 2001.

Finally, the regulations would also amend the Airports (Noise-related Operating Restrictions) (England and Wales) Regulations 2018, otherwise known as the operating restrictions regulations, which appointed competent authorities for England and Wales for the purposes of Regulation 598. The withdrawal Act will retain Regulation 598 in its entirety in the event of no deal.

The draft instrument also makes the necessary changes to the noise regulations, the environmental standards order and the operating restrictions regulations to ensure that the legislative framework continues to function correctly after exit day. The noise regulations are being amended so that in the UK, the same noise certification requirements apply to aeroplanes registered in an EEA state as apply to other foreign-registered aeroplanes. In effect, this will end the automatic recognition of noise certificates granted in the EU and the EEA, ensuring that the same rules apply in relation to the recognition of noise certificates for all aircraft registered outside the UK. The requirements relating to certification of UK-registered aeroplanes are also being amended so that they apply only to use in the UK rather than in the EU and the EEA. The regulations apply to propeller-driven and civil subsonic jet aeroplanes, including light aircraft and commercial passenger aircraft.

The changes to the environmental standards order amend the terminology in that order so that it is aligned with changes made to aviation safety legislation on EU exit. For example, the instrument removes references to EASA. The amendments to Regulation 598 provide for functions conferred on member states

under the regulation to be conferred instead directly on the Secretary of State and, where appropriate, on the Northern Ireland Department for Infrastructure or Scottish Ministers. This includes an obligation on competent authorities to inform the Commission and other member states when operating restrictions are planned to be imposed, and instead provide for a UK-based "relevant authority" to be notified in place of the Commission. It also places an obligation on the relevant authority, instead of the member state, to ensure a right of appeal.

The Commission's power to adopt delegated acts providing for technical updates to the regulations to take account of changes to international rules is conferred instead as a power for the Secretary of State to make regulations subject to the negative resolution procedure.

The amendments to the operating restrictions regulations reflect an amendment to the title to Regulation 598 made by this instrument.

The best outcome is for the UK to leave the EU with a deal, but this instrument ensures that, in the event of no deal, there will be continuity of aircraft noise standards and certification. It ensures that the regulatory regime in place after exit continues to regulate properly noise certification standards for aircraft and that the framework for consideration of operating restrictions at UK airports operates effectively. I beg to move.

4.30 pm

Lord Berkeley (Lab): My Lords, I am grateful to the Minister for that introduction. I have two questions. The first relates to the noise regulations and the assessment of the aircraft. It is difficult to see how we can have two different bodies coming up with different solutions, so I suspect that it will not be easy to reach agreement on how much noise an aircraft makes in certain circumstances.

My biggest worry is over the appointment of what is called a "competent authority" in paragraph 7.6 of the Explanatory Memorandum. It seems to me that the word "independent" could be added to "competent". If we look at issues on operating restrictions, in the debates over Heathrow Airport and its third or fourth runway—or whatever it is called today—for whatever reason the Government have come out very strongly in favour of it and there are now, I think, several judicial reviews to challenge them. I cannot see how the Government acting as a competent authority, however competent they might be, can be seen to be independent of their policy, particularly in relation to Heathrow, saying they want this and are going to bulldoze it through under whatever circumstances. There are serious issues here about independence. When it was the European authorities, there was clearly independence. Now there is not, and given the particular status of Heathrow—in my view, it should be changed, but that is a completely different issue—I cannot see how this can satisfy members of the public, especially those who live under the flight path, that the Government can set operating restrictions and at the same time demonstrate that they are completely independent of their views on developing an extended airport for London. I will be pleased to hear how the Minister thinks the Government can wriggle out of those two conflicting requirements.

Baroness Randerson (LD): My Lords, this SI concerns one of the most controversial and divisive aspects of aviation. I assure noble Lords that I have not been copying the homework of the noble Lord, Lord Berkeley, but I shall make much the same point. Heathrow protestors will be looking at this SI very carefully and with great concern. It relates to the mutual recognition of noise certificates across the EU and the end of that system as it applies to the UK. From exit day, aviation safety legislation in the UK will be independent of EASA. EU Regulation 598 requires member states to appoint a "competent authority" to ensure rules are followed. That includes a balanced approach to noise management, and noise problems are supposedly to be addressed in a cost-effective way.

The balanced approach to noise management includes reduction of noise at source, the use of land use planning and management, noise abatement and operational procedures and operating restrictions. In future, who applies these rather vague and subjective principles, which are counterbalanced by cost effectiveness? It will be the Secretary of State. I had imagined the same scenario as the noble Lord. Promises have been made on noise abatement in relation to Heathrow that many experts believe will be very difficult—indeed, impossible—to achieve. The Secretary of State is the champion of the scheme and in any decision is bound to come under pressure to agree that the rules have been applied effectively, because it is a subjective judgment. There will be no back-up from international standards applied across the EU. There will be no international case law on an EU basis. There will be no EU comparisons to be made. I predict that the Secretary of State would be likely to buckle under pressure to agree the scheme for Heathrow no matter what the objections on noise grounds might be, but whatever happens it will be a highly controversial and highly political decision as opposed to one that would, under EU rules and processes, be taken slightly more objectively.

This SI once again preserves existing standards, but there are no guarantees in it that more stringent standards will be applied as aviation technology and quieter planes develop. I am very concerned that there are no guarantees that we will keep up with EU improvements, because this Government's record on the environment is, quite frankly, abysmal. This SI opens the door for heavily political decision-making and for stalling environmental standards.

On consultation, we once again have the magic words that "specific meetings and workshops" have been held and that "long-established stakeholder forums" have been consulted. There has been no public consultation on this, so there has been no opportunity for the community groups established around most airports—most airports try to work with their local communities—to be aware that this SI was being put forward and to look at the its disadvantages. It is not just community groups; I wonder how many local authorities that have an aviation noise issue in their midst are aware that this SI is coming forward. I doubt that they are.

I very much hope we will have some agreement with the EU that makes it possible to have a more transparent and more far-sighted approach to aviation noise in future, but as it stands I find this a really retrograde step.

Lord Tunnicliffe (Lab): My Lords, I will not repeat at length the points made by my noble friend Lord Berkeley and the noble Baroness, Lady Randerson. I broadly agree with them and will certainly be listening with care to the Minister's response. I do, though, come back to the issue of the Secretary of State exercising his powers. We got a clear answer on the previous SI that, in exercising his powers under that statutory instrument, he would consult the CAA. We need something a good deal more complex for this issue because noise is quite different in character from safety. Realistically, a member of the public does not have a useful or valid opinion about airline safety issues, but on noise a member of the public is exactly who it is all about. The issue is about communities around airports.

There are two areas that I would like the Minister to expand on. First, from what parts of government will the Secretary of State receive advice in exercising his powers? Secondly, I would like an assurance on matter of consultation. As far as I can tell, the statutory instrument seeks as far as possible in this nightmare scenario to maintain the status quo, but any changes to these regulations that the Secretary of State makes—using, once again, the negative procedure—will affect the general public in all the communities around airports, and of course there are also the additional issues of practicality, cost and so on. This is a difficult and complex political subject, so we need assurances that at any time in the future when the Secretary of State uses his powers under this instrument, he will conduct a full consultation to get all proper inputs to the decision-making.

Baroness Sugg: I thank noble Lords for their consideration of this statutory instrument. The regulations do not set noise policy; noise standards for aircraft are set by ICAO and we will continue to follow them.

On the point about the competent authority, last year we laid regulations that appointed competent authorities in England and Wales. The implementation provides for the local planning authority to be the competent authority when an application for any change is brought under the Town and Country Planning Act, but it also allows the Secretary of State for English airports or Welsh Ministers for Welsh airports to be the competent authority for called-in applications. Therefore, that matter is slightly separate from this SI.

The noble Baroness mentioned the balanced approach. Regulation 598 requires the competent authorities to take account of the balanced approach, and that requirement is kept by this SI. It will ensure that the balanced approach consists of identifying noise problems at specific airports and giving consideration to various measures that might be available to reduce noise. That is being carried over in its entirety.

Expansion at Heathrow is conditional on a package of mitigations. The NPS makes clear that noise mitigation measures should be put in place to ensure that the impact is limited. Again, that is going through the planning process following the judicial review process. We of course recognise that aviation noise is a key concern for communities living near airports. I regularly meet community groups and MPs to discuss this. We have played a leading role at an international level in relation to noise standards, and we will continue to promote further improvements in this area.

This SI does not change noise policy; it is concerned only with corrections as a result of EU exit. It does not impose restrictions; it is just a framework. We are consulting more widely on our noise policy, which we set at a national level through the aviation Green Paper consultation which we published in December. In that, we set out a number of policies designed to reduce noise and its impact, and that is how we will set our noise policy in future.

On consultation, in 2017 we consulted on proposals for appointing competent authorities, and the Scottish Government conducted a consultation on their proposals earlier this year. However, we have not consulted communities on this. The changes in Regulation 598 will not have a direct impact on overflown communities. They will ensure that the correct procedure is followed when operating restrictions are considered or it is proposed that they be imposed, but they will not change things for communities per se. As I said, that is being dealt with through the aviation strategy consultation.

There is a delegated power which provides for the Secretary of State to make secondary legislation under the negative procedure. It is about providing technical updates to the regulations, but again that power is limited to such updates to the noise certification standards and methodology indicators relating to the assessment of noise impact at an airport. Again, those updates are limited within the regulations to account for changes to relevant international rules.

As with the previous SI that we discussed, we will continue to follow the international rules. We have been leading the way with our noise policy and are suggesting further measures to improve it through the consultation. We will publish our final aviation strategy later this year, which we hope will address the understandable concerns of communities around the airport. However, that noise policy is not directly relevant to the SI we are discussing, which simply ensures that in the event of a no-deal exit from the EU there will be continuity of aircraft noise standards and certification and of the process when operating restrictions are considered at airports.

Lord Berkeley: Perhaps I may press the Minister a little further on the competent authority. I think she said that the competent authority for Heathrow would be the Secretary of State, but I recall that over the past 30, 40 or 50 years, Ministers of different persuasions have had a major influence on what happens at Heathrow. It does not matter which party has been in power; a Minister either likes it or does not like it. There is a perception that these Ministers have encouraged studies, shall we say, or other independent work to support their particular opinion. I suppose that is part of the political process for Heathrow, but nobody will have any confidence if a Secretary of State is promoting very hard an expansion of Heathrow while being the competent authority in deciding whether the noise is too great or too little, or whatever. I appreciate that this SI—

4.46 pm

Sitting suspended for a Division in the House.

4.56 pm

Lord Berkeley: I was just concluding. I wanted to note that, as we all know, this SI will come into force only if there is a hard Brexit. However, it would be good to have the Minister's assurance that, depending on the type of Brexit we have—if there is no Brexit, it will not matter, but it will matter if there is some type of Brexit—if and when she brings these regulations back again she will take into account the question raised by several noble Lords about the competent authority and independence when it comes to Heathrow and perhaps other airports as well.

Baroness Sugg: I understand the noble Lord's point, but competent authorities will not be appointed by this SI. That was done last year following extensive consultation. As I said, that role was to follow the balanced approach of ICAO. Article 3 of Regulation 598/2014 requires competent authorities to be independent.

Of course, the Government and the Secretary of State are allowed a position on airport expansion. They are very clear on the benefits that expansion at Heathrow will bring. That will have an impact, which is why we set out lots of requirements in the national policy statement. The Secretary of State is not deciding on the planning process; that is being done through the independent planning process, as is right.

Under Regulation 598, the appeal route is broadly aligned with the planning process, so there may be scope to challenge any local planning authority's decision related to operating restrictions. That is the appeal process under the Town and Country Planning Act 1990. For all other cases, including where the Secretary of State was the decision-maker, judicial review would be the appropriate route for challenging that decision. There is independence there on the granting of planning permission and the appeal route.

As I said, I very much understand the impact aviation noise can have on communities. As Aviation Minister, I am alive to it, which is why we suggested many new noise policies in our consultation on the aviation strategy. This SI is purely about the regulatory framework and will ensure the continuity of aircraft noise standards and certification and the process for considering operating restrictions at airports in the event of no deal. Noise policy is covered extensively elsewhere.

Baroness Randerson: Will the Minister address the issue of the nature of the consultation? Did any of the meetings, workshops and long-established stakeholder forums include local authority representatives or representatives of community groups established across the country by airports?

Baroness Sugg: For this SI, they did not because the communities are not going to be affected by it. We consulted when we were appointing competent authorities because that will affect them. That was properly consulted on in 2017 ahead of those regulations coming into force. We did not consult on this SI because we do not believe that it is going to affect communities. It is purely about transferring the regulatory framework and not about the noise or competent authority policies. We are having a full consultation now on our aviation strategy after setting out some policy positions. We will certainly meet community groups; we are meeting community groups and will continue to meet them as the consultation evolves and the strategy develops.

Lord Berkeley: My Lords, the Minister is right that there is no change in policy but, as I understand it, there is a change of the organisation or person who is the competent authority. It is now the Secretary of State and before it was somebody from one of the European organisations. There is a change and that introduces a conflict of interest.

Baroness Sugg: There is a change, but to the relevant authority not the competent authority. The competent authority is staying the same. Competent authorities were consulted on and set in the previous regulations. Under current EU law, they have an obligation to report operating restrictions to the Commission. Instead, under this SI they will have an obligation to report operating restrictions to the relevant authority. In some cases, that will be the Secretary of State, in others, it will be the Scottish Government. I do not believe there is a conflict of interests because the competent authority remains the same; it is purely who it reports to that will change. There are the same reporting obligations but just to a different person.

Motion agreed.

Aviation Statistics (Amendment etc.) (EU Exit) Regulations 2019

Considered in Grand Committee

5.02 pm

Moved by ***Baroness Sugg***

That the Grand Committee do consider the Aviation Statistics (Amendment etc.) (EU Exit) Regulations 2019.

Relevant document: 18th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B)

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Sugg) (Con): My Lords, these draft regulations will be made under the powers conferred by the European Union (Withdrawal) Act 2018 and the European Communities Act 1972. Unlike our two previous SIs, some provisions in this instrument will be needed if we leave without a deal, but specific provisions relating to an enforcement power are needed regardless of the outcome of EU exit negotiations.

The regulations amend EU Regulations 437/2003 and 1358/2003 and seek to maintain the status quo with regard to the provision of data by operators of airports served by commercial flights. This is achieved by making technical changes to ensure that retained legislation continues to function, including amending redundant references to the UK being a member state.

[Baroness Sugg]
A further part of this instrument, made under the European Communities Act 1972, also creates a mechanism to enforce the obligation on airports to provide data, because there is currently no penalty if an airport does not comply.

This SI was proposed as a negative instrument, but we have accepted the Secondary Legislation Scrutiny Committee's recommendations to re-lay it using the affirmative procedure, acknowledging its concerns around the potential impact of these changes on commercial airport operators. I thank that committee for its consideration of this SI.

This draft instrument amends two pieces of EU legislation. The first of those is EU Regulation 437/2003, referred to as the statistical returns regulation, which requires operators of airports served by commercial flights to provide their member state with specified statistical data. In its existing form, the regulation specifies information that must be compiled by the member state—a function completed by the Civil Aviation Authority. It also requires that the same information must be provided to the European Commission's statistical office, Eurostat. It further sets in place standards that must be met during the compilation and submission process. Secondly, it amends EU Regulation 1358/2003, referred to as the implementing regulation, which requires that the process set out in the statistical returns regulation is applied to a set list of airports and updates the list of statistical information that said airports must supply. The list of airports is effectively comprised of all airports that see commercial air traffic. This list included 46 airports across the UK at the point of its last update by the EU.

The withdrawal Act will retain both these regulations in their entirety. The draft instrument we are considering makes the changes necessary so that they continue to function correctly. That is essential to ensure that the regulatory regime in place continues to allow statistics on the total volumes of passengers and freight using UK airports to be compiled. The gathering of such data and the publication of derived figures are activities that are important for the Government, the public and the sector itself to be able to monitor performance.

This draft instrument amends the statistical returns regulation to remove the duty on the UK to continue to transmit this data to Eurostat. The power to collect statistical data and the obligation on respondents to provide that data are to be retained, with responsibilities for these functions given to the CAA.

This instrument amends the implementing regulation to remove the specific list of airports covered. This list is in fact superfluous, as the existing implementing regulation also contains a mechanism that sets the burden of data collection at different levels dependent on the volume of traffic seen by an individual airport. The mechanism will remain in the retained EU regulations, so that what is expected of airports will stay the same as it is now. The data collection power provided is an important tool for accessing data due to the competitive and commercially sensitive nature of the sector. As such, it is important that this legislation continues to operate after the UK has left the EU.

During the preparation of this instrument, a review of the statistical returns regulation highlighted the requirement for an enforcement mechanism in this instrument to meet the UK's responsibility as a member state. This is why the SLSC recommended this instrument be upgraded. This instrument therefore provides a mechanism whereby the CAA can enforce the obligation on airports to provide the data specified. In determining the penalty, enforcement mechanisms in similar pieces of legislation were considered so as to not go beyond prior precedent. Consequently, the department decided to match the enforcement powers that exist within the Airport Charges Regulations 2011, with a civil penalty of up to £5,000. This part of these regulations is required regardless of final decisions on the UK's future relationship with the EU. As I say, it is there to meet our responsibility as a member state.

The best outcome for the UK is to leave the EU with a negotiated agreement, but this instrument ensures that, in the event of a no-deal exit from the EU, statistics on the total volumes of passengers and freight using UK airports can continue to be compiled and published. I beg to move.

Lord Berkeley (Lab): My Lords, I shall be quick. I note that in paragraph 7.2 of the Explanatory Memorandum, the Government think that,

"The gathering of such data … of derived figures are activities that are crucial for Government, the public and the sector itself to be able to monitor performance".

However, paragraph 7.7 suggests it is no longer appropriate for any of these statistics to be given—they can be given to the Secretary of State, if he so directs—to anybody else in Europe. Why is that? Would we not want data from there? Would it not be helpful for our ongoing air services between the whole of the European Union and the UK if we exchanged this statistical data? Or will we put a ring around ourselves and pretend that Europe does not exist? Surely it would be useful—and the Government say it is useful. Why is no mention made of the CAA being able to share this information with the relevant European body?

Baroness Randerson (LD): My Lords, airport operators currently provide their statistics to the CAA, which passes them on to Eurostat. This is to be replaced, according to this SI, with a system whereby airport operators give the information to the CAA, which then provides that data to the Secretary of State if directed—not by legal obligation but if directed.

There are four problems with the SI. First, statistics collected on a national basis are much less useful and meaningful than international statistics. As the noble Lord said, there is no guarantee that this information will be shared internationally.

Secondly, there is no obligation on the Secretary of State to even want to see the statistics. What will he do with them? There is no obligation on the Secretary of State to publish them. Therefore, one has obvious concerns about transparency. Statistics should be important for the Government; they are certainly important for the public and the industry itself to monitor performance. The CAA already collects this data, but it will be of much less use for comparative purposes as matters stand in the SI.

The third problem is the impact of changing rules on exactly how the data is expressed and collected. This is the kind of internal thing that happens in any organisation. If you change the order of the questions or one or two words in the questions, you impact the results. It does not matter that much if you are looking across the piece and everyone is obeying the same rules, but we will be collecting our data on a different basis. I more or less guarantee that, within a year or two, we will be told that our data is no longer comparable because of differences in collection procedure.

Finally, there is the new power of the CAA referred to in the SI to impose a £5,000 fine if an airport does not provide data. I am not entirely clear about this, and I would be grateful if the Minister could clarify. I believe that this is a new power; I am not sure that the CAA has it at the moment. If it does, what is the fine, because £5,000 seems derisory as a fine on a large organisation for failing to provide data? It would cost Heathrow Airport or Gatwick Airport a great deal more than £5,000 to collect the data, so there would be an incentive not to bother. Where does £5,000 come from? Has it been thought through as a penalty that should be paid by a large commercial organisation? It does not seem worth it.

Lord Tunnicliffe (Lab): My Lords, the points made by my noble friend Lord Berkeley and the noble Baroness, Lady Randerson, are exactly right. I look to the Minister to answer them. I can see why we would want to avoid an obligation, but I cannot for the life of me see why we would not want voluntarily to co-operate with Eurostat. This obviously is a wider question for government as a whole, but in an open society we have to believe that sharing information is a good thing, not a bad thing.

I formally object to the £5,000. It clearly is not within the spirit of the withdrawal Act and therefore the Minister has not prayed that Act in aid but has prayed in aid the draconian European Communities Act 1972. I was not here in 1972 and I have not recently brushed up on the detail, but that Act was created to implement European law. This is not creating European law; it is smuggling in a little correction. I am not going to cause a constitutional crisis by objecting to it, but the Government should not have done it.

5.15 pm

Baroness Sugg: I thank noble Lords for their consideration of these draft regulations.

On the gathering of statistics, Eurostat oversees the European statistical system, which is comprised of EU member states and selected other countries which are not member states. Work is ongoing to determine our future relationship with the European statistical system; that is being led by the UK Statistics Authority and is subject to ongoing negotiations. Of course, sharing information brings many benefits. We will continue to participate in other statistical work in aviation through ICAO and, specifically, its aviation data programme. Although Eurostat publishes statistics based on the aviation data currently collected, this was always in duplication of the figures published by the CAA. We will continue to publish the statistics arising from the data collected and they will continue to be in the public domain. We expect to have a future relationship with Europe on data collection.

Air transport data collection is only one part of the transport data currently compiled. As I said, the Office for National Statistics has been carrying out a cross-government review on all of this. While other statistical collections were assessed as being able to continue on an existing basis, in the event of no deal we needed to bring forward the SI on this matter.

I understand the noble Baroness's point about changing the categories and the way we collect this data. Of course, in order to make it as useful as possible, having as much consistency as possible with Europe and countries across the world is important. We do not plan to change any of the categories. We are carrying over into law what is there at the moment. Should things change in the future, whether at an international or a European level, it would of course make sense to ensure that we have continuity.

On the enforcement mechanism, the noble Lord, Lord Tunnicliffe, was not here in 1972—and I was not born in 1972—but the European Communities Act 1972 gives us the power to implement EU obligations. This is the kind of thing that the ECA provision is intended for. It is a civil penalty rather than a fine, and the Airport Charges Regulations 2011, on which the enforcement scheme and the £5,000 amount were based, are made under Section 2 of the ECA to implement a directive. It was an oversight that we did not already have a mechanism to ensure that airports reported this data; other member states do. It is an obligation on us under these regulations and there are precedents around it. There is a penalty of up to £5,000 for airport users who do not notify airport operators of their forecasts in a timely manner, for example.

I take the noble Baroness's point that this is not an excessive amount for airports. Historically, airports have provided this data in a timely manner. It is in their own interests as well as everybody else's. There has never been a serious case of non-response, and we do not expect there to be if we leave the European Union without a deal. It is an important tool for accessing data from across airports, so we are confident that airports will continue to comply. However, we now have the enforcement mechanism that we need on the obligations from EU law. That is why, in the event of an agreed deal, this part of the regulation will remain. Following the UK's departure from the EU, we will need to maintain that enforcement mechanism.

In the event of no deal, this SI will also ensure that the UK's legal framework for the collection of statistical data will continue to be fully functional and enforceable. The regulations ensure that the collection of this important data has a sound legal basis to continue, while removing the requirement on the UK to provide this data to the European Union, as we will no longer be a member state. However, as I said, we fully expect to work very closely with our European partners in the future, regardless of the outcome of the negotiations. I beg to move.

Motion agreed.

Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019

Considered in Grand Committee

5.19 pm

Moved by ***Baroness Williams of Trafford***

That the Grand Committee do consider the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019.

Relevant document: 17th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee A)

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, the Committee will be aware that the Government are preparing for all scenarios relating to the UK's withdrawal from the EU, including the scenario in which the UK leaves the EU without a deal at the end of this month. As part of these preparations, the Government are bringing forward a programme of secondary legislation intended to ensure that there is an effectively functioning statute book on exit day. The instrument forms part of that programme of secondary legislation. It addresses deficiencies in our domestic statute book that would arise if we leave the EU without a deal, focusing in particular on deficiencies in security, law enforcement, criminal justice and some security-related regulatory systems.

By way of context, the UK currently participates in a number of EU tools and measures that support security, law enforcement and judicial co-operation in criminal matters—some of which, like the European arrest warrant or Europol, will be familiar. We also participate in a number of security-related EU regulatory regimes relating to firearms, drug precursors and explosive precursors. Should the UK leave the EU without an agreement at the end of the month—the no-deal scenario—the UK's access to those tools and measures would cease.

At the same time, the UK would cease to be bound by those security-related EU regulatory systems. This decoupling would occur as a result of the UK having withdrawn from the European Union after the Article 50 notification not as a result of the provisions found in this instrument. It is important to be clear that the regulations play no part in bringing about the UK's withdrawal from the EU; rather, the purpose of the instrument is to make amendments to the UK's domestic statute book, including retained EU legislation, to reflect a new situation. The changes we are making in the instrument are the ones we cannot, or should not, avoid in the event of no deal. The regulations do not contain significant policy choices.

Against this backdrop, the regulations will do three main things. First, they will revoke or amend retained, directly applicable EU legislation and domestic legislation in the areas of security, law enforcement, criminal justice and some security-related regulatory systems. This will ensure that the statute book continues to function effectively in a no-deal scenario. It is important to emphasise that where the regulations revoke retained EU law or connected domestic law, this is not expected to have a practical real-world effect because the underlying EU instruments would cease to be available to the UK upon withdrawal from the EU in any event. For example, in a no-deal scenario, our membership of Europol will end on 29 March by virtue of the UK ceasing to be an EU member state rather than as a result of the retained Europol regulation being revoked by this instrument.

Secondly, where necessary, the instrument includes transitional or saving provisions to address live or in-flight cases—that is, provisions confirming how cases live on exit day should be dealt with or how data received before exit day should be treated. This will provide certainty for operational partners, such as the police and prosecutors, who currently operate the EU tools and measures and need to be clear on what activity can continue and on what terms at the point of exit. Thirdly, in the case of extradition, the instrument will ensure that the UK has the correct legal underpinning to operate the no-deal contingency arrangement for extradition—the Council of Europe Convention on Extradition 1957—with EU member states.

For the most part, the regulations make the same sort of changes over and over again in a series of related areas: revoking in whole or in part legislation on our domestic statute book that would be redundant in the event of a no-deal exit; fixing deficiencies, such as making sure that definitions in our domestic law reflect our new status outside the EU; and making sure that there is clarity over what happens to cases and requests that were live or in train at the point of exit.

Overall, the making of this instrument will provide legal and operational certainty for the public sector, including our law enforcement and criminal justice partners across the UK, such as the National Crime Agency, our police and our prosecution services. While it remains the Government's position that exiting with a deal is in the UK's best interests, this instrument makes important changes to ensure readiness on exit day in a no-deal scenario.

Having provided an overview of what the instrument does, I should also be clear on what it does not set out to do. For the most part, this instrument is not a vehicle for implementing the Government's policy response to a no-deal exit. Our contingency arrangements for co-operation with EU partners on security, law enforcement and criminal justice involve making more use of Interpol, Council of Europe conventions and bilateral channels. These existing, alternative channels outside the EU are already in use between the UK and many other non-EU countries. Accordingly, they do not require domestic legislation to set them up, which is why those contingency arrangements are largely outside the scope of what these regulations set out to do. Even the Council of Europe convention on extradition, which this instrument links into our contingency arrangements, is already in place and in day-to-day use by the UK with non-EU countries. The instrument re-categorises EU member states for the purposes of our own domestic law, in the form of the Extradition Act 2003, so that we can administer requests from EU member states under Part 2 of that Act rather than under Part 1, as at present.

Finally, I should make it clear to the Committee that the instrument comes into force on exit day, as defined in the European Union (Withdrawal) Act 2018. Should we enter an implementation period the entry

into force of these regulations, along with most other EU exit instruments, will be deferred to the end of that implementation period. I commend the regulations to the Committee and I beg to move.

Baroness Hamwee (LD): My Lords, I have to give the Committee apologies from my noble friend Lord Paddick, who is unwell. I am afraid that your Lordships have me whinging over this instead.

I was a member of the Secondary Legislation Scrutiny Committee for some time and its staff always amazed and impressed me with their ability to grasp detail while not losing a grip of the bigger picture. Reading the committee's report on this instrument, it seemed to be the verbal equivalent of throwing one's hands up in despair. It drew it to the special attention of the House,

"on the ground that the explanatory material … provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation".

When I got the draft instrument out on Sunday, to look at it in a rather casual way, I thought it was just me but apparently it is not.

The committee also has within its terms of reference reporting to the House when an instrument fails to fulfil its policy objective. It has made it quite clear that it has some difficulty in assessing that. Its report says that it found the impact assessment,

"to be of little practical use",

and that,

"for the most part the impact is categorised as … 'there could be some practical impacts arising if legislative deficiencies are not addressed through these Regulations'. No information is given about the frequency with which the provision is currently used, whether an alternative route to the information is available at a different cost, or what effect the loss of this intelligence or information will be. Neither the financial nor the societal cost is quantified".

The committee went on:

"We … expect an EM to include some contextual explanation, preferably with estimated numbers or an indication of the degree of usage, illustrating how the system will operate differently after the legislative change has happened".

The Minister may say that she has told us that there really will not be a change, but I think that the committee is commenting on getting from A to B. It continued:

"Without such information we cannot assess the significance of a policy change and, therefore, advise the House accordingly".

If I caught it correctly, the Minister said that for the most part there is no policy change. She is nodding at that, and I suggest to the Committee that that rather makes my point for me.

Scrutiny is not a rubber-stamping exercise. Analysis is at its heart. We have already heard the term "real-world effects", and on that point the committee said that statements made by the Government,

"raise concerns that cannot be assessed properly without appropriate information on the current scale of usage and how that might change as a result".

5.30 pm

The draft instrument covers, inter alia, law enforcement and judicial co-operation in criminal matters and investigatory powers. A comment on the situation seems to have come more from outside the House and the Government. The Metropolitan Police Commissioner commented just before the new year on a no-deal Brexit potentially meaning loss of access to intelligence databases and throwing up barriers to arresting and extraditing suspects. She said:

"We will have to replace them as effectively as we can. That will be more costly undoubtedly, slower undoubtedly and potentially put the public at risk. No doubt about that".

That is the practitioner's assessment of the impact. I know that my noble friend Lady Ludford will be able to give a much more precise critique of this instrument than I can.

The Minister responding to the Secondary Legislation Scrutiny Committee—not our Minister—wrote that the Government considered that the portmanteau approach would assist scrutiny and assist eventual users of the legislation. The committee was, of course, not persuaded by that.

We now have a 16-page Explanatory Memorandum replacing the 78-page memorandum. Certainly this guide is more easily handled, provided you can find it. The hard copy, which I collected at the end of last week, has the old memorandum attached to it. I am not persuaded that it enables scrutiny at the level and of the standard for which our House is known. I do not think that most of us will feel that we have really done the job as well as we should have done. There is a complexity and a scale to this, and bringing this draft instrument to the Committee so close to the wire—as may be the case—does not make the best use of the dedication and application that Members of our House show in scrutinising such instruments. There simply has not been the capacity to do so. It gives me no pleasure to say that, nor any pleasure to say that when the instrument goes to the Floor of the House, Liberal Democrats will oppose the instrument unless the Minister can satisfy noble Lords, although it is not her fault that we are in this situation.

Baroness Ludford (LD): My Lords, just what we will lose by not being part of all these EU measures emerges less from the fairly dry Explanatory Memorandum to the measure and more from the Government's document of last November, *Assessment of the Security Partnership*. The introduction in paragraph 2 of the Explanatory Memorandum cites a lot of the issues, but the document of last November talked about how,

"the UK would rely on the 1957 Council of Europe Convention on Extradition. Without a surrender agreement as proposed in the Political Declaration"—

which itself begs the question of what such a surrender agreement would consist of—

"requests would be subject to a longer and more complex process, and extraditions would be more difficult".

Although I have not seen any examples recently, we saw that difficulty in the extradition of a convicted person from Georgia. I do not know whether the Minister has any updates on how long that process will take, but it clearly takes a lot longer to extradite under the 1957 convention. To make the case for the UK's need to stay in the European arrest warrant, or something very similar, the document of last November also cited how,

"ten years elapsed between the request to extradite Rachid Ramda, an individual accused of terrorism in France, and his eventual surrender in 2005".

[Baroness Ludford]

We could be talking about such extraditions taking anywhere between several months and a decade.

Indeed, one commentary raised the issue that,

"Extraditions under the Convention are not automatic and the state of bilateral relations can influence decisions. It takes 18 months on average to extradite a suspect under the Convention"—

in contrast to a few weeks under the European arrest warrant. Clearly, even just looking at extradition, the consequences of not having something similar to the European arrest warrant are severe.

It struck an odd note with me that the commentary in paragraph 2.7 of the Explanatory Memorandum says that is necessary,

"to revoke the relevant retained EU law to ensure that the domestic statute book operates effectively following the UK's withdrawal".

As my noble friend Lady Hamwee said, we know from senior police officers, including the Metropolitan Police Commissioner, that if we are not in the European Union, it is impossible for our systems to operate as effectively in terms of security and law enforcement co-operation across Europe. That includes all scenarios, not just no deal, although it applies particularly to a no-deal exit. It is odd to say that we need to do this so that our statute book operates effectively. I understand what that means, technically, but it is not the same as saying that our law enforcement system would operate effectively. We need to measure the impact of this decision. We need to know its effect on our effectiveness in fighting crime and bringing people to justice, and on our court systems and police—indeed, on our civil servants. Unlike the European arrest warrant, if you fall back on the 1957 convention civil servants and Ministers are involved.

On extradition, the aim is that the UK will have the correct legal underpinning to operate the 1957 convention. I think that is referred to somewhere as the housekeeping between Part 1 and Part 2 of the Extradition Act. I think that was in paragraph 12.5. At the briefing meeting that the Minister kindly put on a week or so ago, I tried to ask whether we have any knowledge of what our partners would need to do in terms of similar housekeeping and whether they are prepared to do it. Even if they still have the 1957 convention on their statute books—which they may well have for non-EU Council of Europe countries—they might have to make some domestic legislative changes, similar to ours under the Extradition Act, to make that work.

Then there is the fact that it is much more difficult to extradite under the 1957 convention, which is precisely why the EAW was brought in. Some countries, such as Germany, have constitutional bars on the extradition of their own nationals, which the EAW solved. Does the Minister have any information on whether Germany is prepared to extradite its nationals to the UK in the scope of the 1957 convention? Some countries operate political exemptions, which were abolished by the European arrest warrant for a common list of crimes. That makes extradition more difficult.

Then you have the legal uncertainty under human rights law. I do not want to get totally into the subject of human rights and our worries about the Government's intentions in that respect, but they have said that they continue to keep in their sights what they call reform of human rights law. A state of legal uncertainty surrounds the continuity of human rights protection in this country—if the Human Rights Act were to be abolished, for instance, let alone if we withdrew from the European Convention on Human Rights. What impact will that have on the confidence of partners to extradite to us?

If one looks at the Norway and Iceland treaty with the EU—the aim of which is to have procedures similar to the European arrest warrant but with some differences—that took 13 years to negotiate and there have been problems amending the national laws of some EU countries and Iceland. As of last June, Ireland and Italy had still not ratified that treaty. It gives you an idea of the problems if you drop out of the European arrest warrant and rely on the 1957 convention. The Government are failing to give us any information about what they understand to be the willingness of partner countries to extradite to us.

I have a couple of other points. The Government say that we will retain some data protection rules under which data was originally received, such as SIS data. Are they sure that there is no contradiction between those rules and the Data Protection Act? The aim is to have no gap, but have the Government done a filter to check that there is not a contradiction in any case between the rules under which the data was received from EU partner countries and the Data Protection Act?

5.45 pm

I agree with and will supplement slightly what was said by my noble friend Lady Hamwee about the impact assessment and the Secondary Legislation Scrutiny Committee deploring the information on loss of capacity. We have an odd situation in the impact assessment; it expects the cost per extradition to rise compared to the EAW, but then says:

"Costs have not been monetised".

Why are those costs not monetised? How can you assert that the costs are going to increase when you do not monetise those costs?

It has also been reported in the press that the National Crime Agency and the National Police Chiefs' Council have between them received about £6 million for no-deal preparations. Why is that not in the impact assessment? How can that be reported in the press but not be in an impact assessment? What is that money for? Is there similar money for the courts and for other bits of the justice system, including the MoJ, to cope with the administration of extradition requests—both outgoing and incoming—under the convention? All this is presumably available somewhere, but strangely not in the impact assessment.

Finally, the great joy of the European arrest warrant is that government Ministers can say, "Nothing to do with us, guv. It is all down to the courts". Once you have to fall back on the Council of Europe convention, just as with extradition to the United States, there is a potential for the politicisation of extradition. You can certainly put a political, if not a financial, cost on it, which Ministers might have to think about.

Lord Kennedy of Southwark (Lab Co-op): My Lords, I agree with the comments of the noble Baroness, Lady Hamwee, about the report of Sub-Committee A of the Secondary Legislation Scrutiny Committee. If I were the Minister, sitting here reading this report and having to address Members, I would be pretty unhappy that the Government put forward these regulations in such a way that the sub-committee's report was so damning. Normally in these reports, one or two little lines are highlighted in black with a few concerns, but in this case they are all over the place.

The sub-committee's comments highlight its concern about how this issue is presented to Members. The first says:

"These draft Regulations are drawn to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation".

It goes on:

"We were not persuaded that so wideranging an instrument, covering policy areas that are individually of significant concern to the House, can be justified. Effective scrutiny is inhibited by the wide range of issues included".

Looking at the document, these issues are huge. I do not think that this is the way to present them to either House. I accept that the Government are up against it in terms of time—perhaps that is of their own making. However, we in this place and the other House have not exactly been busy; on many days, we have gone home quite early. On Thursdays now, we seem to be going home at 2 pm; we often used to sit until 7 pm. There has been plenty of time to discuss these things in more detail.

The list of concerns is unacceptable. The sub-committee, quite rightly, criticised the Government when they brought forward the regulations. I endorse its actions in pointing that out. It is not acceptable to bring them forward in this way. However, I accept that if we end up with no deal and crash out—I do not want to get into that situation—we must have functioning procedures in place. So, if the regulations are voted for on the Floor of the House, we will not oppose them.

We participate in several EU measures to enhance our security, law enforcement and judicial co-operation. They are vital in keeping us safe from people who do harm and commit criminal offences. We all support that. The Minister reminded us that the regulations seek to revoke or amend EU retained law that is directly applicable to our current domestic legislation. She said that the regulations would deal with live cases—as I think she referred to them—at the point of exit, and extradition.

Other noble Lords referred to the 1957 Council of Europe Convention on Extradition, which, according to the Explanatory Memorandum, would be used in lieu of the European arrest warrant. That is regrettable. The measures in the convention are far more limited than the European arrest warrant. Yes, the UK and the EU would allow extradition requests from other member states in lieu of the European arrest warrant, but Article 2(3) of the convention states:

"Any Contracting Party whose law does not allow extradition for certain of the offences referred to in paragraph 1 of this article may, in so far as it is concerned, exclude such offences from the application of this Convention".

It is clear that the situation will be worse. The only people who will benefit are criminals; nobody else will. This is the criminal's friend. It is a ridiculous situation and it is not the right thing to do, so we need further comments from the Minister on it.

The Government have made the case for the importance of the European arrest warrant. They have explained that more than 1,400 individuals have been arrested on European arrest warrants issued by the other 27 member states and that, in the same period, EU member states have arrested 183 individuals and brought them to the UK. The warrant is an important tool and it is regrettable that we will end up less safe as a consequence of these actions.

The Minister spoke about the loss of access to databases. We will lose access to a number of databases as a consequence of this measure, so it would be useful to have some comments on that. We are told that the impact of a no-deal exit on security, law enforcement and criminal justice co-operation with member states is not in the scope of the regulations, but the Government need to set out their plans. People are concerned about where we are and the consequences; if they are concerned about anything to do with leaving the European Union, it is matters of security. We need to understand fully what is at risk. We will be outside the Schengen information system and Prüm. Again, that is very regrettable, so it would be useful if the Minister could comment on it. We must have effective systems in place to deal with these matters.

I would also welcome the Minister's comments on Europol and Eurojust. I hope that she will not say, "We're still working on that". If I get that response, I will remind her that it has been nearly three years since the referendum and we need to know where we will be on these important matters.

We do not oppose the regulations. I accept that they are narrow, but they have not been presented to this House and the other House well. The Government need to do much more to reassure us that, whatever happens, we will keep people safe. I believe that some of the measures here will make them less safe going forward.

Baroness Williams of Trafford: My Lords, I shall start with the final point from the noble Lord, Lord Kennedy, which concerns one of our first considerations as we leave the European Union: keeping our people here safe. He hits the nail on the head. For that reason, I hope that down the other end they are voting for the Prime Minister's deal.

We need to be clear about these instruments. Should the UK leave the EU without an agreement at the end of the month—the no-deal scenario—the UK's access to these tools and measures would cease. We are absolutely clear about that. At the same time, the UK would cease to be bound by the security-related EU regulatory systems. This would occur as a result of the UK's withdrawal from the EU through the Article 50 notification, but not as a result of the provisions found in these instruments—I stress this yet again. It is important to be absolutely clear that the regulations play no part in bringing about the UK's withdrawal from the EU. Rather the purpose

[Baroness Williams of Trafford]
of the instrument is to make amendments to the UK's domestic statute book, including retained EU legislation, to reflect the new situation.

Baroness Ludford: Surely the difference that should be measured is between crashing out with no deal and the Government's hopes for a security partnership, which are rather ambitious or, some might say, overambitious? The Government want something as similar as possible to what we have at the moment. That contrasts a great deal with simply cutting all our existing measures and systems.

Baroness Williams of Trafford: The noble Baroness makes a good argument, but it is not the basis of this statutory instrument. That is why I thought I would outline it. I do not disagree with her. I agree that we need to make sure that this country is kept as safe and secure as possible, as the noble Lord, Lord Kennedy, says. However, that is not the argument we are having today; I need to make that clear upfront. We are at one on this. There is no way that we want to undermine safety.

The noble Baroness, Lady Hamwee, and the noble Lord, Lord Kennedy, talked about the Secondary Legislation Scrutiny Committee. As they said, it highlighted the sheer range of subjects included in these regulations. The Government responded, setting out the reasoning behind our approach. The changes made by the regulations are in linked policy areas and cover three subject areas—this should start to make it clear why we have linked them all. The three areas are: security, law enforcement and judicial co-operation in criminal matters currently underpinned by EU legislation; security-related EU regulatory systems for which the Home Office is responsible; and domestic legislation affecting the police and the investigatory powers made deficient by EU exit.

In regard to security, law enforcement and judicial co-operation in criminal matters, the regulations address deficiencies in connection with EU measures with a justice and home affairs, or JHA, legal base. Reflecting their shared underlying legal base, these measures all relate in some way to law enforcement and security in their subject matter, and in many cases interact at an operational level. For example, as the noble Lord, Lord Kennedy, mentioned, SIS II circulates European arrest warrant alerts. The regulatory regimes, while not having a JHA legal base, have a similar underlying purpose to prevent, detect and prosecute criminal activity and to maintain security. Given that these are linked policy areas and that the changes made are very similar across most parts of the instrument—we are making the same sorts of amendments over and over again—we considered that combining them in a single instrument would assist scrutiny by providing as complete a picture as possible in one place. We expect it to assist the eventual users of the legislation, which will include law enforcement partners and prosecutors around the UK and who will often be using combinations of the EU tools covered by these regulations.

6 pm

Lord Kennedy of Southwark: The Minister made the point that these measures have been put together to assist scrutiny. No doubt she believes that but the scrutiny people do not; they think the opposite. This is not the first time that we have had reports like this—although this may be one of the worst ones. When will the Government realise that Parliament does not like the way they are laying instruments in front of us, and that they should do it a different way? Some of the instruments I have seen coming forward are like encyclopaedias. There should be a policy decision because they are not being received very well. If the Government want to have proper scrutiny. we need to do it a different way.

Baroness Williams of Trafford: I do not dispute what the noble Lord says. I am purely trying to explain the logic behind the way that it has been laid out.

The Government then published a second Explanatory Memorandum because of the Secondary Legislation Scrutiny Committee writing to the Home Office, commenting on the sheer length of the original Explanatory Memorandum. As the Policing Minister outlined in his response to that committee, the detailed information in the original Explanatory Memorandum was supplied in good faith—the committee recognised this in its report—to provide the committee and other users of the Explanatory Memorandum with a thorough explanation of each provision in the instrument. One can conclude that we could not do right for doing wrong. Some people thought that there was too much information, others not enough. In the event, we provided a more concise Explanatory Memorandum on 11 February.

Lord Kennedy of Southwark: I thank the Minister—that is very helpful. I do not know what goes on in departments. Do I take it that Ministers sit round the table and say: "We got that one wrong. Both Houses are clearly very cross. When we have the next set of stuff, maybe we should try and do it a different way"? Does that ever take place? Can the Minister enlighten us?

Baroness Williams of Trafford: I think the noble Lord would probably accept that in this instance the Secondary Legislation Scrutiny Committee coming to us saying it was far too long and complex, then us trying to do a more concise version was a learning point for us. We accepted the committee's point. In that sense, we try to learn as we go along. I certainly do not want to come to Committee too many times and having to take the rap for Explanatory Memorandums that are too long, too short or incomplete.

Lord Kennedy of Southwark: I have one final point. I will then leave it and move on. If we are to have more regulations, in the next few days or whenever, I hope the Government will take on point the concerns raised here and in the other place.

Baroness Hamwee: My Lords, it seems to me that there a number of stages to this. There is scrutiny and then, as the Minister says, making the final regulations accessible to practitioners. Those are not necessarily the same things and what one may also take away from this experience is the need—following the scrutiny to whatever extent it is successful—to produce final versions in each of the subject areas that can easily be used, without having to go through the awful trail that we are all familiar with.

Baroness Williams of Trafford: That is a very good point, because if Parliament does not understand what the regulations mean then practitioners will be at a distinct disadvantage. I totally take the noble Baroness's point.

As the noble Lord, Lord Kennedy, said, the Home Affairs Select Committee and the House of Lords' EU Home Affairs Sub-Committee have been particularly active in publishing reports in March, July and December last year. There was the EU Home Affairs Sub-Committee's report on a UK-EU security treaty on 16 January, as well as its oral evidence session on security arrangements in the event of no deal on 27 February. I am pleased that both Houses of Parliament are looking at an issue that has been under-debated in both Houses. For me it is one of the most important aspects, as the noble Baroness, Lady Ludford, said, as we leave the European Union.

The noble Baroness, Lady Hamwee, talked about the impact assessment being insufficient because it does not outline the impact of no deal. The impact assessment assesses the impact of legislating, as proposed in the regulations, compared with not doing so in a no-deal scenario. For the purposes of the impact assessment, the no-deal scenario is treated as a given since that is the scenario the regulations prepare for. We are not getting mixed up, but I think we are conflating no deal generally with the regulations.

Baroness Hamwee: I understand what the Minister is saying. Is that the explanation for us not being given the cost to the public purse, which, frankly, must be considerable, to which my noble friend Lady Ludford referred?

Baroness Williams of Trafford: That is pretty much so, but I will get on to that later. The impacts of no deal as a whole are completely outside the scope of the regulations.

The noble Baroness, Lady Hamwee, said that the regulations are indigestible. That is pretty much what the noble Lord, Lord Kennedy, said too, but we cannot avoid them in the event of no deal, given the importance of this area. As I said in my opening speech, most of the changes being made by the regulations are very similar—indeed, one might say repetitive—in most parts of the instrument.

The noble Baroness, Lady Hamwee, made a very serious point about the Liberal Democrats intending to vote against the regulations. Obviously, it would be deeply regrettable, particularly in this area, to take that course of action. The noble Lord, Lord Kennedy, pointed that out. These regulations will provide legal and operational certainty for operational partners. Clearly, it is vital that they uphold the rule of law and protect the public. We should be doing everything we can to support their work and to manage the transition to a no-deal scenario. I hope that does not happen, but if it does that is exactly what the instrument will do. I must say to the noble Baroness that if the changes in these regulations in the extradition space are not made, it is not clear that new incoming extradition requests from EU member states could be lawfully processed, with potentially serious consequences for our extradition arrangements with EU partners.

The noble Baroness asked how many EU member states need to make legislative changes to operate the Council of Europe's European Convention on Extradition with the UK. All EU member states operate the European Convention on Extradition with Council of Europe countries that are not EU member states. I will not speak on behalf of other member states as to their particular systems, but we anticipate operating the European Convention on Extradition with all EU member states. I think that answers the question asked by the noble Baroness, Lady Ludford.

The noble Baronesses, Lady Hamwee and Lady Ludford, and the noble Lord, Lord Kennedy, talked about extradition. The noble Baroness, Lady Hamwee, asked me about "almost" no policy changes; here there is a tiny tweak which I will now explain. In the case of extradition, the regulations help to support the implementation of the no-deal contingency arrangement. The regulations will ensure that we have the correct legal underpinning, as I have already said, to operate the no-deal contingency arrangement with EU member states. However, the legal underpinning for our contingency arrangements for March 2019—the end of this month—largely exists outside these regulations. To be clear, the convention is already in place, and it is in use by the UK with other countries. These regulations will recategorise EU member states for the purposes of the Extradition Act 2003 so that we can administer requests from them under Part 2 of the Act rather than under Part 1 as at present. That is the tweak. I hope the noble Baroness will agree that it is a small tweak.

The noble Baroness, Lady Ludford, asked how much longer a Council of Europe case will take compared to a European arrest warrant case. We have absolutely accepted that, in the event of no deal and having to revert to Council of Europe conventions, it will take longer and cost more. The noble Baroness also made the point that it will not be as effective in the case of a no deal—she does not want Brexit at all, but that is by the by. The purpose of the regulations is to ensure that the statute book functions correctly and reflects the new situation should a no-deal scenario materialise. She very rightly asked about human rights. As the White Paper and the political declaration make clear, the UK is committed to membership of the ECHR, and we will remain party to it after we have left the EU. I also add that this country has some of the strongest human rights legislation in the whole world, and I remain confident that we will be world leaders in that.

The noble Baroness, Lady Ludford, and the noble Lord, Lord Kennedy, very sensibly asked about data protection. The default position on data protection is that in a no-deal scenario we can continue to process data received from other member states before exit day, subject to compliance with the Data Protection Act 2018. One of the principles in that Act is that there should be compliance with the conditions under which personal data was first accessed, which in this case would imply the conditions—including those found in the measures themselves—under which the UK accessed the data while still a member state. However, to put the legal position beyond doubt and to reduce the risk of legal challenge, the approach taken in

[Baroness Williams of Trafford]
relevant areas of the regulations is to save the specific data protection measures. Saving those provisions helps to create legal certainty, including for operational partners.

The noble Baroness, Lady Ludford, also talked about the cost per extradition going up, and asked why that is not in these regulations. We have gone over that ground—this is not about no deal generally, but about putting things on the statue book. We are absolutely not denying that the cost will go up and that the time will be longer. I hope that answers all noble Lords' points.

Baroness Ludford: I do not deny that I have been somewhat distracted by events going on elsewhere—

Baroness Williams of Trafford: I noticed!

Baroness Ludford: However, I do not think that the Minister answered my question about other countries.

Baroness Williams of Trafford: I did. The noble Baroness was very involved in her phone. I do not say that as a criticism because I am dying to go on to mine but, if she likes, I will repeat it in a letter.

Baroness Ludford: I will read it. I apologise.

Baroness Williams of Trafford: No worries.

Motion agreed.

Local Government (Structural and Boundary Changes) (Supplementary Provision and Miscellaneous Amendments) Order 2019

Considered in Grand Committee

6.15 pm

Moved by ***Lord Bourne of Aberystwyth***

That the Grand Committee do consider the Local Government (Structural and Boundary Changes) (Supplementary Provision and Miscellaneous Amendments) Order 2019.

The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con): My Lords, last year Parliament approved legislation to establish Bournemouth, Christchurch and Poole—known as BCP—Council, Dorset Council, East Suffolk Council, and Somerset West and Taunton Council in place of the existing 13 councils in those areas. Today, we are considering the fourth statutory instrument consequential to that legislation to effect the practical success of those new councils. A draft of this order was laid before this House on 16 January. If approved and made, it will ensure that all the necessary technical arrangements are in place so that effective local government continues in those areas. We have worked closely on this instrument with all the councils concerned. Their officials have commented on drafts of it and have confirmed to us by email that it fully meets all the local requirements.

The order provides for the following. First, it would establish charter trustees for the unparished parts of the existing boroughs of Bournemouth, Poole and Taunton as the bodies in which the historic rights and privileges associated with those areas are to be vested. For each area, the charter trustees comprise the elected members for the wards of that area. For example, Bournemouth and Poole have the historical right to have mayors, and Poole has the right to a mayor and a sheriff. Likewise, Taunton has the right to a mayor for Taunton. All these rights will vest in the charter trustees for the area concerned. Historic regalia, such as maces, will also vest in the charter trustees.

Secondly, the order vests the market rights in Bournemouth and Poole to Bournemouth, Christchurch and Poole Council, allowing the new council to continue to hold the rights to run charter markets. It also amends the statutory definition of the area of the ceremonial county of Dorset to be amended in the Lieutenancies Act 1997 and the Sheriffs Act 1887. The amendments simply reflect the names of the new authorities and their areas; they do not amend the boundaries.

The order makes provision to ensure that the local government pension fund maintained by Dorset County Council, along with all property rights and liabilities in respect of the fund, will vest in the new Dorset Council. This fund will be the pension fund for employees of that council and of the new Bournemouth, Christchurch and Poole Council, as well as for employees of all other employers in the fund.

This instrument makes provisions to amend the Weymouth Port Health Authority Order 2017, so that references to the joint board made up of the abolished authorities of Weymouth and Portland Borough Council, Purbeck District Council and West Dorset District Council relate instead to Dorset Council, which will be the sole authority for the area after reorganisation. It also makes provisions for the existing social housing finance arrangements to continue for the new councils of Bournemouth, Christchurch and Poole, East Suffolk, and Somerset West and Taunton.

Finally, I should mention that a further new council is being established on 1 April 2019—namely, the newly merged West Suffolk Council. This order makes no provision that council because no matters affecting it would require such provisions. We have nevertheless worked with officers in the predecessor councils of Forest Heath District Council and St Edmundsbury Borough Council, who have confirmed that no provisions for the new West Suffolk Council are required in this order.

These provisions are sensible and necessary consequential changes in the light of the establishment of the new councils Parliament has approved. They ensure a smooth transition to the new arrangements and continued effective local government in the areas. I commend the order to the Committee.

Lord Stunell (LD): I am delighted to participate in what I am sure will be a short debate on this item. My delight is enhanced by the fact that it is the one piece

of business we are considering this afternoon that has nothing whatever to do with Brexit. In fact, as a consequence of the evolution of local government in England, the larger part of it is directed from local areas and the changes in it are at their request—certainly with their active co-operation.

I am delighted that the Minister outlined some of the issues relating to mayors, sheriffs and lords-lieutenant and the role of charter trustees. At one time, I used to think of myself as something of an expert of those things; it is good to see that they have filtered through into this statutory instrument. There is always a huge amount of civic pride about and importance given to these ceremonial roles and tasks. I know that it is important to make sure that they are retained properly.

My only point of any consequence relates to the transfer of the housing debt. Clearly, there has been consultation with the relevant local authorities—and, no doubt, with the Treasury and everybody else who might want a finger in this particular pie. Housing debt for local authorities is a complex topic on which feelings can run high over whether one has got a good or a bad deal out of changes being made. I hope that the Minister can confirm that the agreement on the changes tabled today is fully consensual and that any difficulties that may have arisen during the course of these discussions have been satisfactorily resolved.

Without any detailed knowledge, I wonder whether that would be true in the case of the Somerset West district authority, which is a very small authority of limited means. On the same thread, the other side of this coin is no change being required on housing debt relating to the West Suffolk district councils coming together, presumably either because they do not have such debt or because there is some other factor that the Minister may be able to advise us on. If the Minister can satisfy the Committee on the question of housing debt figures, that would give us some extra comfort.

Lord Kennedy of Southwark (Lab Co-op): My Lords, I also think this will be a relatively short debate. I have a couple of questions for the Minister. As we have heard, these changes are to local government areas in three parts of the country. The Minister made a point about charter trustees and talked about areas retaining their right to appoint a mayor. The councillors in that ward would then have to appoint a mayor. What happens at the next level? They also get a mayor. We are getting more mayors, who become chairs of councils. We are creating a lot of mayors here. I just want to point that out.

The point about housing debt was well made by the noble Lord, Lord Stunell. I look forward to the Minister's response on that. On chartered markets, it is just a case of carrying forward people's rights.

Generally speaking, I am not against the order as it stands. The only point I would make is a more general observation that I have made it before on other issues, such as local government income. We have a strange kind of patchwork developing all over England. I am not convinced that is necessarily the right way to go. Local government in Scotland and Wales is certainly much more straightforward. When we have all sorts of tiers of local government throughout England, I am not convinced that in the longer term it will make for good government. However, I am not against the order as it stands.

Lord Bourne of Aberystwyth: My Lords, I thank the noble Lords, Lord Stunell and Lord Kennedy, for their helpful contributions. I very much agree about the importance of these statutory instruments on two grounds. As the noble Lord, Lord Stunell, said, it is rather marvellous to debate something that has no Brexit implications at all, which is good news in these very Brexity days in both Houses. It is also refreshing to have something which is all about the traditions of our local government in England, and the capture and retention of those historic traditions.

I was interested to find that Poole is one of only seven towns in the country to have sheriffs. These are quite separate from high sheriffs. One of the other seven is of course Nottingham—we all remember the sheriff of Nottingham—and another is Lichfield; the honourable Member for Lichfield talked about that in the House of Commons. It is great to see those historic roles retained. In the case of Poole, I understand that it retains the keys to a prison where there are no prisoners. I am not sure whether schools or possibly tourists are able to visit it but that is a great thing.

Lord Kennedy of Southwark: I have met many sheriffs of Nottingham in my time, as I used to work in the east Midlands. What is interesting is that the sheriff is a member of its council in Nottingham. The position is very famous, so everybody wants to meet the sheriff, but in civic terms it also has a deputy lord mayor and a lord mayor. When people move up others do not want to meet them so much; they want to meet the sheriff, who is a very important figure in the city.

Lord Bourne of Aberystwyth: I thank the noble Lord very much for that intervention. I hope people do not hiss when the sheriff walks into the room, because I am sure they are very different from the sheriff of Nottingham we all remember from legend.

That filtering through of civic pride to which the noble Lord, Lord Stunell, referred is extremely important. Let me try to pick up the two questions that were raised. First, on the transfer of housing debt, the order simply ensures that new councils are properly referenced for calculating their debt caps. I should say that all the provisions here are consensual, so all the councils concerned are happy with that provision. Secondly, the noble Lord sought specific information on West Suffolk. It has no housing revenue accounts, so there are no consequences there.

The noble Lord, Lord Kennedy, asked about the number of mayors. I think precisely the same number is retained, so there are no new mayors but no fewer mayors than there used to be. That is extremely valuable, too.

It is good to see cross-party consensus on this issue. It is typical of the way we operate on these issues, so with that I commend the order to the Committee.

Motion agreed.

International Accounting Standards and European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2019

Considered in Grand Committee

6.28 pm

Moved by ***Lord Henley***

That the Grand Committee do consider the International Accounting Standards and European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2019.

Relevant document: 17th Report from the Secondary Legislation Scrutiny Committee (Sub-Committee B)

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, these regulations, which were laid before the House on 31 January, aim to address failures of retained EU law to operate effectively in the field of accounts and reports of UK corporate bodies. They also address certain other deficiencies arising from the UK's exit from the EU.

The international financial reporting standards, abbreviated to IFRS, are a set of international accounting standards used by multinational companies to produce their annual accounts. They are required or permitted in over 125 countries, including all EEA countries and 15 of the G20 countries.

EU Regulation 1606/2002, known as the IAS regulation, requires that all publicly traded companies in the EU use IFRS, as endorsed and adopted by the EU, when preparing their consolidated accounts. In the UK, the Companies Act 2006 also permits other UK companies to produce their accounts in accordance with these standards. In total, approximately 15,000 companies in the UK use IFRS.

Once the UK leaves the European Union, the EU framework for adopting IFRS will no longer apply. These regulations provide for the continued use of IFRS by implementing a national framework that provides continuity and clarity to UK business, and they aim to provide such continuity and clarity by bringing the European framework for adopting IFRS into UK law. This will ensure that UK-registered companies will not have to change their processes for preparing annual accounts.

The powers to endorse and adopt these international standards for use in the UK will be transferred to the Secretary of State. These transferred responsibilities will be bound by process and scrutiny. Furthermore, assessment criteria consistent with those in the European regulation will apply to all new endorsement decisions in the UK. They are that the standards provide a "true and fair" view of an undertaking's financial position and that their adoption is conducive to the,

"long-term public good in the United Kingdom".

The regulations also specify that, for all new endorsement decisions, the Secretary of State must consult stakeholders with an interest in the quality and availability of accounts, and that the final decisions will be published. The Secretary of State will be required to lay a report each year before Parliament detailing the carrying out of his responsibilities.

Further, the regulations provide for subdelegation of the endorsement and adoption powers to a designated UK body. A subsequent affirmative SI will transfer these powers to a new UK endorsement board. We currently expect this board to be hosted by a subsidiary of the Financial Reporting Council. As such, it will benefit from the FRC's existing operational processes, such as HR and premises. The FRC's role will be limited to monitoring governance and due process of the endorsement board. It will have no role in the process for adopting standards.

As the Committee will be aware, a comprehensive and detailed report of the independent review of the FRC, making 83 recommendations, was published in December. The Government welcome and share the review's vision for a new regulator with a new mandate, new leadership and stronger statutory powers, and will take swift action to deliver that. The FRC's role in relation to the endorsement board will be transferred to the new regulator once it is operational.

Throughout the development of these regulations, the Government worked closely with businesses and regulatory bodies. Informal consultations were carried out with companies, their advisors and investors. In addition, a dedicated stakeholder group also helped inform decisions about these regulations. Stakeholders were strongly in favour of both establishing a UK framework for the continued use of IFRS and the requirement for consultation before an international standard is adopted for use in the UK.

The regulations also make amendments relating to societas Europaea companies, or SEs: a Europe-specific type of public limited liability company that will not be able to register in the UK after EU exit. Regulation is already in place to convert automatically existing UK entities on exit day into a new corporate form—a UK societas—to ensure that they have a clear legal status. The amendments in the regulations relating to these entities do three things. First, they preserve a particular employee involvement provision to maintain employment rights wherever practicable. Secondly, they apply the Overseas Company Regulations 2009 to SEs registered in other member states. This will ensure that UK branches of entities registered in other member states are treated in the same way as UK branches of any other overseas company. Finally, they make a number of minor consequential amendments to other legislation, such as replacing references from SEs to UK societas to ensure that the UK has a functioning statute book on and after exit day.

A de minimis impact assessment of the regulations estimated low overall costs to business. The IFRS-related changes were estimated to have an equivalent annual net direct cost to business of £2.4 million per year. The estimated impact for the SE-related changes was £10,400 per year. Both figures are under the £5 million threshold necessary for a full impact assessment.

I commend these regulations to the Committee and ask the Committee to support and accept them. I beg to move.

Lord Hodgson of Astley Abbotts (Con): My Lords, I begin by congratulating the Minister's team—it is always said that the British Civil Service is the best in the world. They must have realised that their Minister

might take a bit of incoming over the FRC tonight, as they produced this headline for the front page of the *Financial Times*: "FRC to make way for stronger accounts watchdog after a string of audit failures". To get that on the front page of the *FT* just as we are to discuss the FRC as a possible delegated body is above and beyond the call of duty.

I need to declare some interests. I have served in the City for most of my life and remain a director of a number of limited companies, which are listed in the register of your Lordships' House. I am also a member of Sub-Committee B of the Secondary Legislation Scrutiny Committee, which considered these regulations. I am coming back to have a second bite at the cherry, having had a go under the noble Lord, Lord Cunningham.

I will make a couple of points. It is easy—my noble friend, in his emollient style, flows so easily over the issues—to think that accounting standards are humdrum and commonplace. In fact, their exceptionally wide-ranging implications are felt in every part of our corporate system. They have an impact on directors and their boards and companies; if you serve as a company director, the two great things your lawyers and accountants always tell you about is trading while insolvent and maintaining capital. Failing to do that exposes you to some nasty and unpleasant risks and penalties—quite rightly. On the other side, they are for investors who need a clear basis on which to decide whether to invest their money in a particular venture.

Years ago, I was sitting where the noble Lord, Lord Stevenson of Balmacara, is now sitting, leading the Opposition on what became the Companies Act 2006, to which my noble friend referred in his opening remarks. We spent quite a bit of time on the Section 393 "true and fair" view, which is a statutory requirement. If there is to be a clash between international standards and UK law, UK law must prevail because it is the law of this country. In those circumstances, how will we determine the final arbiter of what is true and fair?

I will give the Committee a brief example because although it may seem quite simple to decide what is true and fair, it is exceptionally difficult. Revenue and recognition have been a problem behind a number of companies recently—notably Carillion—where you have a long-term contract with an assured client, perhaps the Government. Let us say it is a 10-year contract. You will have to put in some additional work in year one to provide the systems that are going to last the 10 years. Boards and auditors will argue fiercely about how this should be done. Some people would say that to show that you would make a loss in the first year of a 10-year contract, when you will make additional profits in the next nine, is not a true and fair view from the investor's point of view. A true and fair view can be conservative and restrictive, or neutral, or positive and expansive. Of course, in the case of Carillion, it was positive and expansive and they recognised too much revenue early on.

These concepts go to the heart of our corporate governance and systems—and the public trust in and have confidence in those systems—so these are not just economic decisions; they have big political implications. I would argue that while the Secretary of State may appropriately delegate some of the detailed powers, he or she needs to retain an overarching power to ensure that the system works properly. Noble Lords on the Committee will have seen the ABI briefing, which says:

> "We disagree that the Secretary of State should delegate all his functions to the Endorsement Board. Firstly, we think it would be counterproductive and secondly, we think it inconsistent with the aims of the Withdrawal Act … We strongly urge that, in the House of Lords debate on this SI, assurances are sought from the responsible minister that the new SI will provide for active political oversight of the Endorsement Board by the Secretary of State".

If these matters are to be delegated in their entirety, this country will lose part of its political influence in international negotiations surrounding changes in these worldwide standards. That will impede the UK Government in ensuring that future IFRS continue to reflect the interests of UK companies. That would be a strange decision for us to take in the light of us looking to hew a more independent line, post Brexit. I hope that my noble friend can reassure me and the Committee that there is a real understanding of the political implications that overarch the accounting technical implications of this statutory instrument. That is my first point.

My second point concerns the body to which any delegation may be made. I do not want to dance on the grave of the FRC, but some of the reports to which my noble friend referred in his opening remarks are absolutely devastating. The points include that the FRC,

"is not fit for purpose",

and that it,

"has serious problems in how it recruits top staff".

Another point states:

> "A new body should have statutory funding and a clearer remit".

Another states:

> "The watchdog needs some new powers".

One wants an assurance from the Minister that this unfortunate body, which has undergone regulatory capture in the views of many, will not have anything other than a passing interest in the establishment of the body that will enforce the regulations in the future.

It would be helpful if my noble friend could give the Committee more detail on how we will move forward. When his department wrote to the Select Committee of the noble Lord, Lord Cunningham, on which I sit, it said:

> "The Department is currently working with the FRC to build capacity to set up the new Endorsement Board (EB) in time for EU Exit".

We must be quite well on in that process, since we are only 10 or so days away from it. The Committee was also told:

> "In addition, stakeholder input helped us define the extent of the FRC's role in relation to the new Endorsement Board".

It is important that we get some clarity on where we are in that process. We really do not want stuff to be set in concrete at this point. We need to know how the FRC will slide away and how the new endorsement board will be set up in the next two or three weeks.

Inevitably, particularly tonight, our focus is on Brexit and associated issues. However, this statutory instrument and its successor, which will bring the

[Lord Hodgson of Astley Abbotts]
endorsement board into being, will have serious long-term implications for our corporate governance, the way our companies operate and the confidence of investors in our corporate system—all of which have come into question in recent years over a series of failures and scandals. We need to learn from that and plot a better course for the future. I look forward to hearing from my noble friend how the Government anticipate that being done.

6.45 pm

Baroness Bowles of Berkhamsted (LD): My Lords, I have followed IFRS for some significant time, and it was part of my remit as chair of the Economic and Monetary Affairs Committee of the European Parliament. I also declare an interest as a director of the London Stock Exchange plc. Not only does that entity use IFRS, it is also a benefit for international companies to be able to list and report in IFRS or other standards deemed equivalent to UK standards. Having said that, my experience with IFRS has taught me to be wary of its limitations.

This is a very important statutory instrument because it is about the accounting standards under which companies prepare their financial reports, and of course those financial reports are audited using those standards and form a key part of annual reports. IFRS therefore plays a key role in audit and the standard of audit, and it will not have escaped your Lordships' attention that audit, audit regulators and auditors have been or are coming under scrutiny in inquiries by Kingman, the CMA, Brydon and the BEIS Select Committee.

One of the lesser realised things about IFRS is that it is meant only for group level consolidated accounts, its purpose being international comparability. It is only for group level consolidated accounts that there is an EU requirement. A recent article published on 8 February this year by Nick Anderson, a member of the International Accounting Standards Board, states:

"it is important to remember that IFRS Standards, if only because of their international nature, cannot reflect in detail specific requirements of the multitude of different capital maintenance regimes among the more than 140 jurisdictions that now require the use of our Standards".

However the UK, under the FRC, has gone further and converted UK GAAP into IFRS-like rules. An interesting impact assessment from the FRC, published in March 2013, explains:

"The FRC is issuing FRSs 100 to 102 (the Standards) following extensive consultation to move current Financial Reporting Standards (current FRS) towards an IFRS-based framework".

The rest of the impact assessment looks rather more like a business plan for the big four, and, of course, we know from the Kingman review that the FRC is a captured regulator that was designed to take account of the companies and professions that it regulated.

IFRS tends to flatter accounts—the accounts of stakeholders—because it allows the inclusion of unrealised profits. It is this expansion of the conceptual framework of IFRS into company-level accounts—which continue to be updated as IFRS is updated—that has distorted UK financial reporting and made it depart from company law, which requires a prudent approach not a neutral one, and is central to the ongoing inquiries concerning audit.

Why do the public think they have been let down by auditors and had no warning? Auditors have followed a righteous-by-process approach of "true and fair according to accounting standards", which has always been the FRC's touted recommendation. The FRC has always wanted to get rid of parts of company law that it does not like. It wrote to the DTI in 2005 saying, "In short", the Accounting Standards Board,

"is firmly of the view that outmoded and costly company law rules must swiftly be brought up to date".

Against that background, it has taken a fair bit of campaigning and interrogation to get fulsome recognition that the company law true and fair test is an overarching requirement. From watching the evidence heard in the BEIS Select Committee from auditors, the fact of separately complying with company law seemed lost on most of them, yet it is in the Companies Act.

So I am grateful for the clear statement made by the noble Lord, Lord Henley, in reply to my Written Question HL13690. I am sorry it is one of 96 such Questions in and around these kinds of issues, but it has done a lot of good so far. Anyway, the Answer states:

"The true and fair test in section 393 of the Companies Act is the overarching test that is applied to a company's annual accounts. If a company produces accounts, in accordance with the legal requirements, which are inconsistent with the Companies Act requirement to give a true and fair view, then the directors must depart from the accounting standards to the extent necessary to give a true and fair view. Particulars of any such departure, the reasons for it and its effect must be given in a note to the accounts.

The IAS Regulation (EU Regulation No. 1606/2002) includes requirements to consider the accounting standards system as a whole. Article 3(2) of that Regulation provides that a new form of international accounting standard can only be adopted if it is not contrary to the principle that an undertaking's accounts must give a true and fair view of the undertaking's assets, liabilities, financial position and profit or loss. This requirement ensures that no new form of international accounting standard is adopted for use in the UK if the application of that standard would lead to companies in general contravening the true and fair test".

As I said, I thank the noble Lord for the comprehensive reply.

This statutory instrument will replace the EU regulation, but two things are clear from the noble Lord's reply: company law has an overarching true and fair test; and the true and fair principle applied in the endorsement process does not replace the company law test. Would the Minister confirm that I have stated that correctly and that the true and fair principle requirement in the UK endorsement process does not replace the Section 393 company law true and fair test? That is an essential statement in the context of how financial reporting and audit must be conducted for me to approve these regulations. It is a little pedantic, but some may say that this is a new law compared with the EU one that previously applied.

The second major part of this SI is about who we can trust to be in charge of IFRS standards, both in the UK and representing the UK in international discussions, because the instrument provides the Secretary of State the ability to delegate that decision-making and representation to a new body, named in the Explanatory Memorandum as an endorsement board to be hosted within the FRC.

I do not know when the SI was drafted, but perhaps it is unfortunate that it does not take account of the Kingman report into the FRC, which yesterday the Secretary of State confirmed would be followed. The search for the new chair and deputy has started as part of a process that has to lead to a change of culture, new terms of reference including the public interest, and the ending of self-regulation and cosy relationships with stakeholders consisting of the very companies, entities and professions to which regulation from the FRC applies.

The Explanatory Memorandum states that the endorsement board is being set up as a subsidiary body. The noble Lord, Lord Hodgson, has already drawn attention to the fact that it appears that that process is well under way. In any event, it seems that the setting up of a new and independent regulator requiring legislation would also take a certain amount of time. However, Kingman also said that there should be various immediate changes. As well as a change to the FRC leadership, he specified improvements to the FRC's internal systems and controls, including a centrally managed complaints procedure. I am not sure how that is going because I am still seeing reports of aggressive and threatening letters from solicitors being sent to complainants. That is not the culture or central procedure that I want to see.

Kingman also recommends applying the provisions of *Managing Public Money* and applying the Regulator's Code, the Freedom of Information Act and the Public Contracts Regulations. There is little evidence that that has yet been done, and there is nothing much in this statutory instrument, other than FoI, to ensure that the body receiving delegated powers is compliant with the list of things that Kingman has recommended.

I will not repeat what Secondary Legislation Scrutiny Committee's Sub-Committee B has said, other than to recognise that it has made the point that the Secretary of State will need to be confident that the FRC is in an appropriate condition to be able to host the new body properly. In paragraph 11 of Sub-Committee B's report, there is an explanation of the work that BEIS is doing with the yet-to-be-reformed FRC to build capacity to set up the new endorsement board. The usual stakeholders have been consulted. It looks as though they are the same ones that it is recommended the FRC gets less attached to—businesses which are the bodies to be regulated and their advisers. At a guess, might that happen to include the big four? I am not quite sure what the robust transparency provisions that the stakeholders have helped with are. The paragraph states that the SI includes the "long term public good", but that comes from the EU regulation, not stakeholders, and anyway it refers to the standards, not the endorsement body.

The unreformed FRC will be in an oversight position, but the policy intention—it is just an intention; it is not written in the legislation—is that the chair and board members will be operationally independent. What does that mean if there is oversight from somewhere else? What does it mean if there are HR processes, which I would take to mean recruitment of the people on the board? Where is the public input? Where does it charge the body rather than the standards with the public interest? When is the FRC applying the public interest recommendations from Kingman? Will delegation be deferred until then, and, in any event, has not the setting up of the endorsement board already been influenced in the old and suspect way? The whole project seems to have been rushed, premature and, I fear, unreformed.

Finally, why hand over important negotiations on UK requirements in IFRS to a regulator that has been so publicly criticised and, despite ongoing efforts, will have a long way to go to free itself from the cognitive capture that is so embedded throughout its organisation?

I understand the sensitivity that tweaking standards can tweak profits, and the UK way is not to have politicians doing standards, but there is the relatively unique circumstance in accounting standards that the profession dominates the standard-setting process. Bankers do not set banking standards and market participants do not set market operation conduct rules, so why should accountants set their own standards? At the very least, the Secretary of State needs to retain the ability to intervene.

In the EU, endorsement and representation power lies with the Commission, and the Parliament also has a veto. I do not see why in this instance, because there is this unusual circumstance of accountants setting their own standards, there should not be the intervention of some kind of Secretary of State and parliamentary procedure. Yet again, I find that Australia appears to be doing things better, because that is just what it has done. I would say that, if it is good enough for Australia, it is good enough for the UK.

7 pm

Lord Stevenson of Balmacara (Lab): My Lords, I declare my interest as a retired fellow of the ACCA. Although I have not practised as an accountant very much during my membership—very little, in fact—I retain an interest in the processes of accounting and the impact it has on business and the economy as a whole, which have been so well described by the noble Lord, Lord Hodgson, and the noble Baroness, Lady Bowles. Both have contributed a great deal to the debate, which leaves a number of very uncomfortable questions for the Minister to try to respond to. I am afraid we will probably not get to the bottom of them today. They have set out an agenda, particularly the noble Baroness, for work that needs to happen over the next few months if we are to get the best out of the current changes.

I will put another review on the table as well, which we have not yet had an opportunity to discuss in our House. I hope there will be an opportunity to do so in the not too distant future. Very significant changes are being made through what appears to be a process of correspondence and speech-making between the new chair of the CMA and the department, under which what looks like a substantial shift of public policy on competition issues will be introduced to put consumer interests at the heart of much competition policy—a change which I would welcome.

This would be a significant change in the powers and abilities of the CMA to investigate and to seek out remedies where malfeasance has been found, and a completely different sense and sensibility relating to

[Lord Stevenson of Balmacara]
the work that has previously been done under the CMA on investigations more generally. I say that because it seems a rather important leg of the various bodies involved in a broader conception around how public trust is to be generated in economic operators. One could also add that a similar responsibility towards consumer interests and consumer focus is needed for the regulatory powers in financial services, for which the Minister will be aware we have been arguing for some time, if we are to get the best out of that system. That has been much discussed in the context of whether there should be a duty of care on financial organisations dealing with consumers, a matter to which we will no doubt return.

By way of introduction, I align myself with the two speeches that have already been made, and will ask three questions on the Explanatory Memorandum. I will preface those with the point made very strongly by the noble Baroness, Lady Bowles, but raised also by the noble Lord, Lord Hodgson, that it is the cruellest of misfortunes for those who have been responsible for designing this new structure that they are trying to find analogues for the existing system in Europe, which has run and operated our overall structure for reporting on public accounts and public bodies, when the whole of that structure is being completely refigured through the FRC review and the consultation now going through. The question that concerns me most is about the structure being proposed. The Secretary of State takes on, broadly speaking, the responsibilities of the Commission, but the political control is reduced to a situation which we find more commonly in Britain than in other countries—about which the noble Baroness, Lady Bowles, has been fairly critical—where the devolved responsibilities are to a body that is being created out of nothing and allocated to a body that is in transition and will not have proper supervisory powers. There is a real problem in this, particularly since, as we read in the recent consultation about the independent review of the FRC, about a third of the recommendations are in category three. As the Minister will know, this relates to reforms that will require primary legislation and have wider ramifications, and therefore require deeper consideration and wider consultation.

I do not understand how the Government think they can get away with a process changing the nature and function of an important construct that relates to a whole economic activity and the accounting process underpinning it in terms of public trust—and do so when they are signalling that they will not be in a position to do it until they get primary legislation ready, let alone through, at a time when it seems impossible to legislate on anything except Brexit. I will leave the Minister to respond to that if he can.

My questions in response to the points raised so far are relatively straightforward. First, in paragraph 7.5 of the Explanatory Memorandum, the policy intention is for the Secretary of State to delegate the function to an independent endorsement board when it is constituted satisfactorily in 2019. Am I right in assuming that this is what is referred to in the Chapter 1 recommendations on the need for a statutory authority, which will require primary legislation? If so, can we have more information about the timing? It does not seem likely that it will be finished this year, let alone in time to enforce the work. I would be grateful for a comment on that.

Secondly, paragraph 7.6 makes the point that the instrument enables the Secretary of State to revoke the delegation to the endorsement board if he or she wishes. Is that right? I do not regard that as good law. It is certainly not parliamentary language. Can we have some examples of the sort of issues that might be raised? The only example we have here is the endorsement board being deemed unsuccessful—but by whom and under what criteria? Do we have any principles under which that judgment can be made? If so, what are the processes under which it will happen?

Thirdly—I have already touched on this point—the principles of financial reporting are taken without question as providing a "true and fair" view of undertakings and a position "conducive" to the long-term public good. These are familiar words. They are contained in the IFRS and apply in the UK GAAP but they are not without some difficulty in terms of their overall understanding. They require judgment at the local level in terms of the individual accounts and in the round about whether the processes were correct. The instrument places an obligation on the Secretary of State to consult those with an interest in the quality and availability of accounts. In pursuit of my concern that the consumer and the broader public interest require a much broader cut through this, can the Minister confirm that the consultation process will include not just the Big Four and the accounting professions, and look genuinely at the wider stakeholder interests?

Lord Henley: My Lords, I thank all three noble Lords for their interventions, which were based on considerably more expertise than I have. I hope they will be tolerant of my response. If I fail to answer any questions I might have to write to them.

It might be helpful if I remind them of the purpose of these regulations. As usual they have the words "EU exit" in them. They are designed for a no-deal exit and ensure that the IFRS can continue to be endorsed and adopted for use by UK-registered companies after exit from the EU. They are laid using powers under the EU withdrawal Act 2018. It is again worth reminding noble Lords of the constraints within that Act and that the powers within it would not allow the Secretary of State to go wider into some of the other matters that are of concern to all three noble Lords. That is why, as I made clear earlier, that there will be a further SI later on.

We have been talking about Kingman who, as we know, published his report on 18 December. We also know that my right honourable friend the Secretary of State issued his initial consultation on the recommendations on that only yesterday and that the closing date for responses is 11 June. No doubt all three noble Lords have copies of that. I think I saw a tweet from the noble Baroness, Lady Bowles, on it today, so I presume she has seen a copy. I regret that we are not in a position to debate it today, but there will be many other opportunities to debate it and to feed in responses in due course.

To some extent, that deals with the initial concern from the noble Baroness about whether the FRC is a suitable body to host the new endorsement board, in light of Sir John Kingman's report and the response that will have to be made to that. As I said, there are the constraints of the EU withdrawal Act. My right honourable friend is trying to deal with the deficiencies so that we can get on with the eventualities, should there be a no-deal Brexit.

I shall say something about the consultation on the Kingman review. It is important and we are grateful for the very comprehensive review he gave. We think the recommendations are well-considered, far-reaching and transformational. As noble Lords know, the Government published our initial consultation on those recommendations, highlighting our approach in taking forward the review's recommendations. The Government welcome and share the review's vision for a new regulator with a new mandate, new leadership and stronger statutory powers and intend to move as fast as possible on this. I would say move swiftly, but the noble Lord will have to be tolerant because the process to implement reforms and overhaul the sector must be gone through. In the interim, until the new regulation is in place, the Government will work with the FRC to take forward 48 of the review's recommendations, including addressing issues such as lack of transparency and shortcomings in the enforcement activities. Further detailed consultation on those measures will follow.

Lord Hodgson of Astley Abbotts: One of the words that worries me is "hosting"; this relates to the question raised by the noble Baroness, Lady Bowles. Are we just getting a defective organisation—Sir John Kingman's review makes it clear that it is defective—to be the handmaiden or midwife of this new organisation? What does hosting mean? Does it mean that all the staff are the same? Will there be an independent unit within the FRC? This may be too detailed for this discussion and I would be perfectly happy if my noble friend wrote to us. However, for the reasons we have explained, and in order to have the public's trust, it is important that it must be seen to be independent and not infected with the problems of the FRC.

Lord Henley: I take my noble friend's point. In my opening remarks, I tried to make clear that the FRC would host it purely in terms of human resources and other such matters. It will be an independent body to which my right honourable friend can delegate powers. Some noble Lords—I think it was my noble friend and the noble Lord, Lord Stevenson—asked about this. My right honourable friend will retain overarching power to ensure that that endorsement function operates well. If he retains that overarching power, he can revoke designation and retain overall control.

The endorsement board will be required to report annually to the Secretary of State on carrying out its functions. Sitting with the FRC is a matter of convenience in terms of HR and such matters, but it does not mean that its staff has to come from there. If there is anything more I can say, it might be best if I wrote to my noble friend and copied the letter to other noble Lords. I want to make it clear that the board will be made up of independent members. Its chair will be independent and it will not be part of the FRC. Having used the word "hosting", I am trying to think of some appropriate metaphor but I cannot offhand. I hope that my noble friend will understand what I am getting at.

7.15 pm

The noble Lord, Lord Stevenson, asked about revocation and the appropriate process. We hope that it would be very much a last resort, but it is important that the Secretary of State will be involved in the design of the board and how it carries out its functions. It will have to report to him and he will then be responsible for reporting that to Parliament, which will allow the noble Lord and others to have their involvement. Engagement between the Secretary of State and the board will continue as it carries out its work. I am not sure whether I need to go into the Kingman review much more. As I made clear earlier, it is now a matter for consultation.

The noble Baroness, Lady Bowles, put a large number of questions to me. That also means that I am providing her with a large number of answers, for which I thank, as always, those who advise me. She asked whether I could confirm that the true and fair requirement in the endorsement process does not overrule the Companies Act requirement—I see that she nods. Yes, that is correct.

We are obviously going to debate these matters in considerably greater detail when we get to the other SI that I have promised. As I made clear, this SI deals purely with a no-deal exit. It is important for business to provide it with the certainty that it needs. Other matters can be dealt with in due course as we develop the endorsement board and consider how it should work. I look forward to debating those matters in greater detail with all noble Lords when we come to that SI, just as in due course we will have to deal with the primary legislation required to deal with some other points that will result from the consultation and the report by Sir John Kingman, although that will be some time in the future.

Baroness Bowles of Berkhamsted: I have a couple of comments. The Minister referred to this being done under the withdrawal Act, and that is quite correct. There is no problem with the way in which Regulation 7 and things around it operate. That is a copy-and-paste job and exactly what the withdrawal Act provides for. I do not think that that Act requires there to be any delegation or sub-delegation. It enables such things to happen but does not require them. But it is in there and at this stage we are unlikely to resist the statutory instrument going through.

However, given everything that has been said, the next statutory instrument, which is also affirmative, will have to contain constraints and requirements ensuring proper, not-captured behaviour for there to be the confidence to allow it to go through. There is no problem with the Secretary of State doing an endorsement. There are people who can assist and advise, and the Secretary of State can perfectly well organise consultations and those kinds of things, so I would not consider delay of the next stage sacrosanct. Given the whole situation, the nature of this debate and the concerns from all who have spoken, I hope that that message about the next stage can be taken to the Secretary of

[Baroness Bowles of Berkhamsted]

State. I would be very unhappy about trying to pass something in the next month or so without there being many more safeguards.

Lord Henley: At this stage, all I can say is that I note what the noble Baroness has said. Regarding when the next SI will appear—whether it will be in the next month or so—I cannot say, but I will certainly keep her informed and let her know exactly what our thinking is.

Motion agreed.

Committee adjourned at 7.21 pm.