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The following abbreviations are used to show a Member's party affiliation:

Abbreviation	Party/Group
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
Lab Co-op	Labour and Co-operative Party
LD	Liberal Democrat
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 or for the Lords spiritual.

[Continued from column 1508]

Lord Hodgson of Astley Abbotts (Con): I shall intervene very briefly because, as the noble Baroness, Lady Bennett, has reminded us, it is 11.04 pm. I am concerned about the impact of this amendment, if accepted, on fairness. We want to try to encourage people to go through the major routes, first, because it is fair and everyone is treated equally and, secondly, because if they try unofficial ways then they put themselves at risk from people smugglers, the Channel and other methods of illegal entry. I ask the noble Baroness, Lady Ludford, and indeed the Minister whether this would not undermine a fairness element of the system by allowing people who choose to behave in a certain way to jump the queue and take advantage. If that is the case, surely that is undesirable from the point of view of both policy and their personal safety.

Lord Paddick (LD): My Lords, it is late but that does not make this clause or these amendments any less important, although whether at this hour I make any sense is another issue.

The amendments in this group seek to stop the proposed change from it being a criminal offence to "enter" the United Kingdom without a valid entry clearance to "arriving" in the UK without a valid entry clearance. I may have got this wrong but perhaps the Minister will confirm that an example of that is someone transiting through Heathrow Airport who remains airside and then departs on another flight without going through immigration control. The UK border is the e-passport gates and the staffed Border Force control points, so someone transiting has clearly arrived in the UK but has not entered it, or at least they will not have entered the UK unless and until they have passed through the UK border. Similarly, those detained or granted immigration bail are not considered to have entered the UK even after they have left the immigration control area. With the change that the amendments seek to prevent, anyone who claims asylum in the UK territorial seas or at the UK border will be committing a criminal offence, whereas now they do not.

The Government have made much of the "first safe country" principle, which does not actually exist, wrongly interpreting it to mean that people cannot even transit through another country in order to claim asylum in the UK without their claim being deemed inadmissible. This change goes even further. Even if an asylum seeker flies direct from a war-torn country, or a country where they are being persecuted, and arrives on a flight at Heathrow, for example, they will commit a criminal offence. Arguably, that is the case even if they have a visa or do not need one but arrive in the UK for a different purpose—that is, to claim asylum. For example, someone coming from a country where a visa is not required to visit the UK as a tourist for six months or less who then claims asylum at the UK border could be regarded as not having valid entry clearance, as they are allowed to enter the UK for the sole purpose of visiting as a tourist.

As I said on a previous group when I drew the analogy with the misuse of drugs, almost all the provisions in the Bill are targeted at the users—asylum seekers, the victims of war, of persecution and of people smugglers—and not the real criminals of the piece, who are the dealers, or in this case the people smugglers. When I was a police commander in Lambeth, I got into trouble for using undiplomatic language when I suggested on social media in relation to drugs that we needed to help the users and screw the dealers. The more serious point here is that criminalising victims is not the way forward. We support all the amendments in this group that seek to change that. Amendment 124 seeks to extend the statutory defence based on Article 31 of the refugee convention to any new offence—but the new offence should not stand part of the Bill.

Lord Coaker (Lab): My Lords, it is late but this is an incredibly important clause and set of amendments, so we need to spend some time discussing them—the same goes for some of the amendments that are still to come. We strongly oppose the clause and support the amendments and all the noble Lords who have spoken so far.

The clause criminalises people for seeking asylum. It will impact on modern slavery victims. It is unenforceable—indeed, the Government's defence in the Commons was that it would not be used a lot. It criminalises people who have a right to protection for pursuing the only option available to them. As noble Lords have pointed out, the JCHR concluded that the effect of the clause is to criminalise the act of seeking asylum in the UK. Indeed, the Select Committee on the Constitution, another important body of this House, says:

> "Compliance with the United Kingdom's international obligations is a constitutional issue. We endorse the Joint Committee on Human Rights' recommendations"

on this clause. These are serious points being made by bodies of this House, made up of Lords from across the House who are questioning the Government's compliance with the constitution with respect to the JCHR's findings that Clause 39 as it stands criminalises people seeking asylum. I cannot believe that that is what the Government intend. As my noble friend Lady Lister asked, are they saying, "We're right and everyone else is wrong"? Are they saying that the JCHR, the Select Committee on the Constitution and all noble Lords who have tabled amendments are wrong and that this does not criminalise people seeking asylum? If that is the case, we as a House need to hear the Government's justification so that we can compare their arguments with those being put forward by these various bodies and noble Lords.

The Minister may not have this information, but it would be interesting to know what percentage of people granted asylum in the UK in the past five years would have been criminalised under this provision so that we can understand the difference it would have made. I appreciate that the Minister may not have those figures available but it would be useful for the House to understand what the impact of this change to the law would have been in the past so that we can make some judgment about how it may go in future.

[Lord Coaker]

Criminalising a person who is trafficked to our shores will not break the business model of traffickers; it will tighten the control that traffickers have on their victims. We heard in earlier debates that the Government have lowered the threshold for what is deemed a "particularly serious" offence in order to allow the protections of the convention to be disapplied to a refugee, as we see in Clause 37. How does that interact with Clause 39? Will the effect be that arriving in the UK to seek asylum, despite having a totally valid claim, is a serious enough offence to be sent back again? I do not know.

The Government have failed to answer the question that has been asked again and again: how does an asylum seeker arrive in the UK? If the Government's presumption is that you have to stop in the first country where you can get protection, how on earth do you get here? As the noble Lord, Lord Paddick, says, presumably the only way is to fly, but under this offence it may well be that you will be criminalised even if you fly into this country with a visa. So how does anyone claim asylum? I am going to ask this again: how on earth do you claim asylum if you have to stop in the first safe country where you can get protection? How does anyone then get here? Because we are an island, you cannot get here by land without passing through a safe country unless you fly—and Clause 39 will apparently criminalise even those who fly. So how does an asylum seeker arrive here?

11.15 pm

The Minister in the other place, Tom Pursglove, defended the clause largely by saying that it would not get used. He said:

"We are not seeking to criminalise those who come to the UK genuinely to seek asylum"—

although he does not explain how they get here—

"We will be targeting for prosecution those migrants and cases where there are aggravating factors—where they caused danger to themselves or others, including rescuers; where they caused severe disruption to services, such as shipping routes, or the closure of the channel tunnel; or where they are criminals who have previously been deported from the UK or persons who have been repeatedly removed as failed asylum seekers".—[*Official Report*, Commons, Nationality and Borders Bill Committee, 28/10/2021; col. 419.]

But that is not what the clause does. If the Government want the power to prosecute people for these aggravating factors, why is that not the power that they have drafted? They are asking us to pass a law on the basis of saying that they will not use it for most of the people it applies to. Is that right or wrong? If I am wrong, why am I wrong? It will be interesting to hear the Minister's response.

The Minister in the other place also sought to reassure the Commons that the power would not be often used because it would be for the prosecuting authorities to decide whether it was in the public interest to pursue a particular case. In July, the CPS, the Home Office, Immigration Enforcement and Border Force, the National Crime Agency and policing came to a joint agreement that they will not prosecute illegal entry in the case of asylum seekers. I have the press release here. In this clause, the Government are extending powers that their own Border Force and CPS will not say in a press release that they will use. It beggars belief. I will read one sentence:

"The guidance therefore advises that passengers of boats and other vehicles should not be prosecuted".

We are passing a clause that will not be used for the people that the Government want to prosecute. Again, am I wrong? Am I misreading a press release issued by these prosecuting authorities, or not?

The clause extends powers that its own Border Force and CPS say they will not use and have publicly said are not in the public interest. Does the Minister say that is true—are they wrong?—and what discussions has she had with them about it? As drafted, the clause is widely drawn and criminalises something that should not be a criminal act, namely the seeking of help while fleeing danger and persecution. It is also demonstrably, as we have seen, unenforceable. What are the Government seeking to achieve in this clause and how will it be used?

Baroness Williams of Trafford (Con): My Lords, I thank again all noble Lords who have spoken to these amendments. I will start by addressing Amendment 120. I am grateful to the noble Lord and the Joint Committee on Human Rights for drawing attention to this complex problem caused by changes in the way that people have sought to come to the UK through irregular routes, particularly through the use of small boats.

Many of the individuals involved are intercepted in UK territorial seas and brought into the UK because they are in distress and need help. It is right that we do so, but the interception means that legally they arrive in, but do not enter, the UK. The effect of this amendment is to prevent the prosecution of those arriving migrants who are visa nationals and whose actions mean that they did not and could not arrive in the UK and seek entry as required.

The UK is currently experiencing a serious problem of small-boat arrivals with migrants crossing from the continent, sometimes in the process recklessly and unnecessarily endangering themselves and others in small craft which are unseaworthy or wholly unsuitable for the crossing. Many of these vessels break down or founder and are intercepted and rescued by UK personnel on safety of life at sea grounds. The rescued migrants are generally brought to Dover, including pregnant women and children.

We need to reduce the allurement of the UK as a destination of choice for those who disregard readily available opportunities to seek refuge at earlier points in their journey, and thereby call into question their motives for travel to the UK. We wish to encourage migrants to apply for asylum in the first safe country they reach.

At this point, I want to be absolutely crystal clear about our intentions regarding the offence of arrival without entry clearance. This new offence for people arriving in the UK without the required entry clearance applies to everyone who requires entry clearance for entry on arrival to the UK. This offence will cover all asylum claimants who arrive without the necessary entry clearance. As a matter of law, refugees will be in

scope of the offence, but decisions on prosecutions are a matter for the relevant UK prosecution body, which will take into account the public-interest test.

The noble Lord, Lord Coaker, asked whether every illegal entrant would be liable for prosecution the moment that they arrive in the UK. This is not an attempt to prosecute every illegal entrant. Prosecutions will focus on egregious cases, such as cases where the individual has entered in breach of a deportation order or was previously removed as an illegal entrant or an overstayer. We intend to take a firm stance on such cases in order to prevent inadvertently rewarding such individuals with granted leave, rather than punishing their abuse of the system.

Lord Paddick (LD): I am sorry to interrupt the noble Baroness. The Minister seems to be suggesting that this offence is going to be focused on the most egregious cases, but surely that is not a decision for government; that is a decision for the Crown Prosecution Service. Are the Government therefore giving instructions to the independent Crown Prosecution Service on which cases should be prosecuted and which cases should not?

Baroness Williams of Trafford (Con): I was just going to go on to say that we would be working the Crown Prosecution Service with regard to the new offences in the Bill. Although I related the press release referred to by the noble Lord, Lord Coaker, to new offences, the press release that he referred to is related to the existing offences, and not the proposed new offences. I just thought that I would clarify that.

Baroness Bennett of Manor Castle (GP): My Lords, I have a very simple question for clarification. The Minister said that the current Government's intention is only to prosecute egregious cases. Does not the law, as written on the face of the Bill now, create the possibility to prosecute every single case with no defence?

Baroness Williams of Trafford (Con): I have just outlined our policy intent. I was just going to go on to answer the question of the noble Baroness, Lady Bennett. There is a need to seek prosecution where there are aggravating circumstances. For those who arrive without permission and who are not granted refugee status, Immigration Enforcement will continue to remove such individuals from the UK as soon as reasonably possible. On the prosecutions, the aggravating circumstances might include: causing danger to themselves or others, including rescuers; causing severe disruption to services, such as shipping routes or closure of the Channel Tunnel; or cases of persons who have previously been removed from the UK, such as failed asylum seekers. We will take firm action against those who put others in danger by their actions or against those who have arrived in the UK without permission on previous occasions.

Baroness Lister of Burtersett (Lab): This is from a non-lawyer, so it may be absolute rubbish. The legislation says, "This is an offence" again and again. It does not say, "We will treat it as an offence only if it is an egregious matter." Should not the law itself make that clear? Otherwise, any overzealous—

Baroness Chakrabarti (Lab): Forgive me. I hesitate to rise, for obvious reasons, but I will rise anyway because I am a lawyer and this is important. I know that the Minister knows this, because she has a brief that covers other matters, including criminal matters, and she has her noble and learned friend next to her. This is the definition of an overbroad criminal offence. When a Minister has to stand up and say, "Yes, this offence is really broad but don't worry because we intend for it to be prosecuted only in a subset of places", that is the very definition of an overbroad criminal offence, and it should be tightened up to cover the egregious cases that are on the Minister's mind.

Baroness Williams of Trafford (Con): I take both noble Baronesses' point but I hope I have tried to signal what the intent is through my explanation.

On Amendments 121 and 122 in the name of my noble friend Lady McIntosh of Pickering, I thank her for drawing attention to the problem under UK law caused by the difference between entering the UK and arriving in the UK. I should explain that "entry" is defined by Section 11 of the Immigration Act 1971 and involves disembarking in a non-approved area or disembarking and subsequently leaving the immigration control area. Where a person is detained and taken from the area or granted immigration bail, they are not deemed to have entered the UK. The Court of Appeal has held that an asylum seeker who merely attempts to arrive at the frontiers of the UK to make a claim is not entering or attempting to enter the country unlawfully in accordance with the definition of entry in Section 11. This means that individuals who are subject to immigration control and who step foot in the UK because their small boat was rescued by Border Force in the English Channel do not enter the UK in a technical sense—they simply arrive. To provide the CPS with the ability to prosecute appropriate cases when proportionate and in the public interest, Clause 39 must refer both to those who enter the UK and to those who arrive in the UK.

I appreciate the concerns raised today but I am convinced that the amendment, if accepted, would simply encourage others to make those journeys across the channel and encourage those who facilitate that journey.

Baroness McIntosh of Pickering (Con): Would my noble friend say, then, that the person in the boat does not have to reach the mainland? If the boat is apprehended, does that fall within the new provision?

Baroness Williams of Trafford (Con): I will go on to explain that in just a minute, if my noble friend will bear with me. In fact, I will explain it now. When do you arrive in the UK? Basically, it happens when you reach the UK's internal waters. The new offence will be attempting to arrive in our territorial waters, which is 12 nautical miles out. To clarify, internal waters are defined by UNCLOS.

[Baroness Williams of Trafford]

On Amendment 123, at the forefront of our minds are the migrants whose lives are being placed at risk by criminals who act to exploit and endanger them. Clause 39(4) is aimed at those criminals. We must take action to prevent and prosecute people-smuggling. The law as it currently stands accounts only for unlawful "entry" and not "arrival" into the UK. A person who facilitates the arrival of migrants rescued at sea and brought to a UK port where their only intention is to claim asylum, in accordance with a recent Court of Appeal judgment, does not commit an offence under Section 25 of the Immigration Act 1971. The Court of Appeal ruled that this is because the intention of the migrants is not to enter the UK illegally.

11.30 pm

The change in methods and the way people seek to come to the UK through irregular routes, particularly by small boat, shows why the current law is no longer considered entirely fitting. As many individuals are now intercepted in UK territorial seas and brought into the UK, they arrive in but may not technically enter the UK within the current definition. It is this loophole that Clause 39 seeks to close. I hope that explains things to my noble friend.

We must ensure that incidents such as the recent and tragic loss of 27 migrants are not repeated. They lost their lives at the hands of facilitators who provided them with inadequate means to reach the UK safely. If we do not extend the offence of facilitating a breach of immigration law to include facilitating "arrival", we cannot hold these people smugglers to account for such actions. Organised criminal gangs are sophisticated and know that if they ensure that their human cargo is put into the unenviable situation of requiring rescue, rather than safely landing in the UK, the facilitators of such events can escape prosecution. We must close this loophole.

Baroness McIntosh of Pickering (Con): My Lords, I am sorry to labour the point, but may I just confirm that my noble friend is saying that the Government will go after the criminal gangs but will not seek to criminalise the innocent refugees in the boats?

Baroness Williams of Trafford (Con): I am saying that a person who facilitates the arrival of migrants rescued at sea and brought to the UK port where their only intention is to claim asylum in accordance with that Court of Appeal judgment does not commit an offence under Section 25 of the Immigration Act 1971. The Court of Appeal ruled this because the intention of the migrants is not to enter the UK illegally. I am glad I have clarified that again.

Lord Paddick (LD): I am sorry to interrupt the noble Baroness again but surely it must be possible to draft an offence specifically to target the facilitation of someone seeking asylum, rather than potentially criminalising everyone who arrives in the UK seeking asylum.

Baroness Williams of Trafford (Con): My Lords, people do it for different reasons and that is where the difficulty lies. If we do not extend the offence of facilitating a breach of immigration law to include facilitating arrival, we cannot hold people smugglers to account for such actions. Organised criminal gangs are sophisticated. As I said, they know that if they ensure that their human cargo is put into the unenviable situation of requiring rescue, the facilitators behind such events can escape prosecution and this is the loophole that we are trying to close.

I have spoken to Amendment 124 and think it is sufficient to rely on the existing safeguard of prosecutorial discretion to meet our international obligations, rather than to provide an express defence for Article 31 to be applied. In cases where a statutory defence is not available to a refugee, the purposive and humanitarian aims of the refugee convention should be borne in mind by the CPS when considering the public interest test. With that explanation, I hope, the noble Baroness will feel free to withdraw her amendment.

Baroness Hamwee (LD): I am left rather breathless by some of that, as I think some other noble Lords are. Section 25A of the 1971 Act, on helping an asylum seeker to enter the UK, makes it an offence if a person "knowingly and for gain"—that is another issue of course—

"facilitates the arrival or attempted arrival in, or the entry or attempted entry into, the United Kingdom … and … knows or has reasonable cause to believe that the individual is an asylum-seeker".

Are we are being told that that is inadequate? I am really puzzled by the need for this provision in the Bill as expressed this evening—even if expressed in a way intended to reassure those of us who see the provision as a very big problem. Can the noble Baroness give us an explanation of where the lacunae are in Section 25A and precisely how this new offence will be operated?

Baroness Williams of Trafford (Con): Maybe I was not being clear, but I was trying to describe the law as it currently stands. I have just repeated twice to my noble friend Lady McIntosh that, as it currently stands, anyone who facilitates the arrival of migrants rescued at sea and brought to the UK port where their only intention is to claim asylum does not commit an offence. Clearly—under Section 25A of the Immigration Act 1971, and because the intention of the migrants is not to enter the UK illegally—it creates a lacuna for the organised criminal gangs, because they can get round it in that way.

Baroness Hamwee (LD): I just realised that what I meant to ask was whether the Minister has any comment on my point about creating an offence relating to the ETA before we really know how the ETA will operate.

Baroness Williams of Trafford (Con): I had a note about that but I was so fixated on answering the other question from my noble friend and others that I forgot to answer the noble Baroness. She said that she was uncomfortable about making it an offence to breach ETA rules before they have even been commenced. The offence will not come in before we have the rule.

Baroness Hamwee (LD): Before we know what the scheme is, in fact.

Baroness Williams of Trafford (Con): Correct.

Baroness Ludford (LD): My Lords, the noble Baroness has, in her normal manner, made a very good attempt to justify Clause 39, but I think she is on a very sticky wicket. All noble Lords who have questioned, critiqued or criticised this clause have made a very good case. I am not persuaded that the breadth of this, which could criminalise everybody who arrives seeking asylum, is necessary. The Minister has talked about egregious cases of people who were already deported as failed asylum seekers as well as smugglers and traffickers. I still did not understand her reply to my noble friend, because the read-out of Section 25A of the Immigration Act as it stands refers to arriving as well as entering—perhaps I will need to read *Hansard* to understand that.

As of now, I must admit that I am not persuaded of the need for this extremely broad power. As the noble Baroness, Lady Chakrabarti, said, it is the last resort of—I will not say "scoundrel"—a Government who want to cover all the bases, however unjustified. To then leave it up to the CPS whether it prosecutes within such a wide range of possibilities seems unwise. The bottom line is that it is against the refugee convention, which I have read out, to penalise someone who seeks asylum. As others have said, Clause 39 in effect makes it impossible for someone to arrive to claim asylum without attracting the possibility of criminal penalty. That is, frankly, outrageous under refugee law and practice. I am afraid I remain as horrified by this clause now as I was when I moved the amendment, but at this stage I beg leave to withdraw it.

Amendment 120 withdrawn.

Amendments 121 to 124 not moved.

Clause 39 agreed.

Amendment 124A

Moved by ***Lord Coaker***

124A: After Clause 39, insert the following new Clause—

"Guidance on security of reporting for victims of crime

(1) The Secretary of State must issue guidance to such public authorities and other persons as the Secretary of State considers appropriate on—

(a) the prohibition of automatic sharing of personal data for immigration purposes;

(b) specified circumstances in which data may be shared regarding victims of crime for the purposes of offences under section 39.

(2) The Secretary of State may, from time to time, revise the guidance issued under subsection (1).

(3) The Secretary of State must arrange for any guidance issued or revised under this section to be published in a way the Secretary of State considers appropriate."

Member's explanatory statement

This new Clause would require the Secretary of State to make provisions for safe reporting. This is to probe how the duty of law enforcement to investigate offences under Clause 39 will interact with their duty to support victims of trafficking and seek prosecution of human traffickers.

My Lords, this group is about safe reporting, which is the ability for trafficking victims and migrant victims of domestic abuse to report crimes to the police without finding themselves criminalised or deported for their immigration status. This follows directly on from the discussion we have just had about the new offences under Clause 39. Amendment 124A would require the Secretary of State to provide guidance on a safe reporting mechanism and specify the circumstances in which data may be shared regarding victims of crime for the purposes of offences under Section 39. This is to raise a specific question about victims of trafficking who are caught by the newly tightened offences of arrival and entry into the UK. I declare my interest as a member of the Rights Lab working on modern slavery at the University of Nottingham.

Where a person has arrived illegally in the UK—according to the Government—and at the hands of people smugglers, will law enforcement's first duty be to recognise that person as a criminal under Section 39, or recognise them as a victim of trafficking and seek prosecution of the criminal gang who trafficked them? The concern is that criminalisation under Clause 39 will make victims less likely to present themselves to the police to seek help or to report perpetrators, for fear of their own criminalisation. As we have been told by a number of organisations, protecting victims, and enabling the police to investigate the facilitators of trafficking and the perpetrators of abuse and exploitation, must be prioritised over compelling the police to carry out the role of immigration enforcement. This was highlighted in a 2018 super-complaint by Southall Black Sisters and Liberty on data sharing between the police and the Home Office. The findings concluded that data sharing arrangements are significantly harming not only victims of crime but the public interest, as crimes are not reported and therefore remain unpunished. My question for the Minister is: how will Clause 39 safeguard victims of crime? How will it deal with this data-sharing problem that I have highlighted?

This is a wider application of the same question that Amendment 140 poses on safe reporting for victims of domestic abuse. We strongly support Amendment 140 in the name of the right reverend Prelate the Bishop of London, to which my noble friend Lord Rosser, the noble Baroness, Lady Meacher, and the noble Lord, Lord Paddick have added their names. This amendment is back before this Committee following multiple votes of support for migrant survivors of abuse by this House on the Domestic Abuse Bill; following the upheld super-complaint from Southall Black Sisters; and following a government review which decided that no change was needed.

I will stop here as I know the hour is getting late, but this is a very important amendment. It deals with something that has always bedevilled this system—namely, that victims are sometimes in a situation where, because of the exploitation they experience, they have committed what the Government and law enforcement may consider a crime. None the less, they are victims. If we want to catch and deal with the perpetrators, we must understand the victims' circumstances and use them as witnesses to bring those who commit these offences to justice. I beg to move.

11.45 pm

The Lord Bishop of London: My Lords, Amendment 140 in my name and those of the noble Baroness, Lady Meacher, and the noble Lords, Lord Rosser and

[The Lord Bishop of London]
Lord Paddick, asks the Committee to consider again the debates that we had during the passage of the Domestic Abuse Bill. Indeed, this amendment was passed in your Lordships' House last year, only to be rejected by the Commons.

In short, the issue is that immigration enforcement and the sharing of data too often serve as a significant barrier, preventing survivors of domestic abuse coming forward and receiving the help they need. Research from the Latin American Women's Rights Service, to which I am grateful for its support and briefings, has repeatedly shown that in cases of domestic abuse and other forms of violence against women and girls, victims with insecure immigration status are unlikely to approach the police because they believe that the police will prioritise their lack of legal status instead of protecting them as victims of a serious crime. As many as 50% of domestic abuse victims never report the crimes committed against them.

Immigration enforcement is not perceived as a neutral or safe space for victims, or one conducive to safeguarding, but as an agency concerned primarily with enforcement, which defaults to detention and deportation as its primary tools. How could it be the opposite when the focus of the Bill and years of policy from the Home Office have been weighted towards deterrence, enforcement and hostility? In seeking to eliminate abuse, too often the cost of the hostility in the system is borne by the genuine victim in need of help. Every front-line agency has been consistent in making this point; indeed, the Government themselves concede it. The *Domestic Abuse: Draft Statutory Guidance Framework* states that perpetrators routinely use immigration status as a tactic of coercive control towards migrant women. The evidence therefore that fear of immigration enforcement serves as a barrier is overwhelming.

It is worth emphasising again that this fails victims, who are often trapped in abusive situations, but also fails law enforcement. If victims are not confident in their ability to come forward, they cannot access valuable intelligence needed to identify and prosecute abusers and exploiters. This situation results in migrants being denied safety and justice, and offenders going unpunished and remaining free to abuse others, creating a significant threat to public safety.

During the passage of the Domestic Abuse Bill, the Minister answered that the Government were waiting for the results of the Home Office review of the treatment of victims of domestic abuse and argued that data sharing is necessary for safeguarding. On both points, I believe the debate has moved on since we were last here and I hope that the Government may be more amenable on this occasion.

Since the passage of the Domestic Abuse Act, the independent domestic abuse commissioner has published her review *Safety Before Status*, which states in its recommendations:

> "The Home Office's data-sharing review and Code of Practice should … establish a firewall between the police and the Home Office, alongside safe reporting mechanisms and funded pathways to support and legal advice".

We have already heard that this comes in the wake of the super-complaint submitted by Liberty and Southall Black Sisters, which ruled that this data sharing and confusion of function between enforcement and safeguarding causes "significant public harm". It is extremely disappointing that, faced with the super-complaint and the independent domestic abuse commissioner's report, and with the evidence from front-line agencies, that the Government continue to argue that this data sharing is necessary. The government response to the super-complaint put before Parliament last December lays out some legitimate details about the practicalities of creating a firewall and I do not dispute that there is work to be done on finding the best practical route forward.

However, the proposed remedy—the immigration enforcement migrant victim protocol—,is not a credible alternative. It is extraordinary that in response to fears over the ties between police and immigration enforcement, the solution should seek to actually expand the role of immigration enforcement in the process with proposed visits from immigration enforcement officers. That does nothing to allay the fears of victims, and it ought to be of enormous concern that so many key agencies in the sector have refused to engage further in the development of the protocol.

It is not too late to take an alternative path. Amendment 140 has the support of the sector and would provide a route to a more effective firewall between data use for the purpose of seeking or receiving support and assistance and immigration enforcement. I beg to move.

Baroness Meacher (CB): My Lords, I rise with a heavy heart and no optimism to support most strongly Amendment 140 in the name of the right reverend Prelate the Bishop of London. I also support Amendment 124A in the name of the noble Lord, Lord Coaker.

Amendment 140 would provide the single most important protection for migrant victims of domestic abuse by preventing the sharing of information between police and the immigration service if a victim reported that a crime had been committed against her. The Government know very well the coercive and controlling behaviour to which migrant victims are subjected, whether or not they have insecure status. The perpetrator can quite happily threaten the victim, who is probably unaware of the rules of immigration. Apart from protecting these victims of crime, the amendment would have an important value to society: if victims felt empowered to report their abuse then criminal perpetrators could be brought to justice, and others would be protected from their criminal behaviour.

My reason for pessimism is that, with strong support from the Latin American Women's Rights Service and others, I tabled a very similar amendment to the Domestic Abuse Bill, which became law in 2021. The Government rejected that amendment, arguing that they needed to wait for the outcome of the then ongoing Home Office review of the effects of the continued co-operation between the police and immigration enforcement. At that time the Minister proposed a compromise clause providing for a statutory code of practice relating to data processing for immigration purposes.

At that time we were hopeful of some progress, but the Home Office published the findings of its review and argued that data sharing with immigration enforcement was essential to protect victims; I do not think I quite

get that, but that was the argument. It rejected the possibility of establishing a firewall that would have allowed victims with insecure immigration status to approach the police to report crimes and, at the same time, to feel safe. Instead, it proposed an immigration enforcement migrant victims protocol, as the right reverend Prelate the Bishop of London has mentioned. We do not accept that as a safe alternative to a firewall.

I have questions for the Minister. First, will the Government check whether it remains the case that one in two migrant victims with insecure immigration status does not report crimes against them to the police for fear of disbelief, destitution, detention and deportation? Secondly, the Government plan a medium-term—why medium-term, I am not sure—piece of work to identify safeguards to mitigate the deterrent effect of data sharing. When will that "medium-term" work begin, and when it will end? Thirdly, will the results of that work be reported to Parliament? That seems to me to be vital.

Lastly, when the job of immigration enforcement officers is to deal with migrants who are in the UK illegally, what immediate steps are planned to stop them undertaking their role in relation to vulnerable, possibly trafficked, migrants with insecure status? I look forward to the Minister's response.

Lord Paddick (LD): My Lords, there are two amendments in this group. The first, Amendment 124A, is about offences under Clause 39, which cover the majority of immigration offences. It seeks to provide a mechanism whereby victims of crime can safely report offences to the police without fear of the police sharing that information for the purposes of enforcing offences under Clause 39. As the noble Lord, Lord Coaker, explained, if the Government are serious about going after the people smugglers, they need to protect the victims of those people smugglers so that those people can come forward and give evidence against them and convict them.

Amendment 140 is specifically about preventing the personal data of victims of, and witnesses to, domestic abuse from being used for any immigration control purpose. This is not just about domestic violence but about rape and sexual exploitation, all of them offences where victims are reluctant to report to the police what has happened to them for fear of not being believed. They are offences where there is universal agreement that more needs to be done to encourage victims and survivors to come forward, to charge those responsible and to convict the guilty.

I was a serving senior police officer when I was the victim of domestic violence and even I did not report it, so imagine what it must be like if victims or witnesses are also concerned, rightly or wrongly, about their immigration status, particularly where the perpetrator exploits those concerns to threaten the victim or witness that if she reports the abuse to the police, he will make sure that they are reported to the immigration authorities —let alone about the police passing on information unprompted by the suspect.

It is about priorities. I know that everything is a priority for this Government—whatever the Oral Question is about, the Answer is invariably "X is a priority"—but surely it is more important that a perpetrator of domestic violence and other unreported offences is convicted than that those instrumental in bringing the offender to justice are deported or removed. Of course, some might find that their concerns about their immigration status are unfounded, but you should not have to be a victim of crime to find that out.

The Government must do two things. First, they must not allow, as the amendments suggest, the personal data of migrant survivors of domestic abuse and other underreported crimes that are provided or used for the purposes of seeking or receiving support or assistance to be used for immigration control purposes.

Secondly, the Government should establish safe and confidential ways for people to establish their immigration status so that they can make informed decisions about taking steps to regularise their situation. That might even mean voluntary return, but they would maintain control. In other countries, helping overstayers to leave voluntarily is shown to be very effective compared with enforced removal. We strongly support the amendments.

Lord Sharpe of Epsom (Con): My Lords, I thank the noble Lord, Lord Coaker, and the right reverend Prelate the Bishop of London for having tabled their Amendments 124A and 140, and for again giving the Committee a chance to discuss this important topic. Noble Lords will recall that this issue was debated at some length during the passage of the Domestic Abuse Bill, as referenced by the right reverend Prelate.

Indeed, Section 81 of what is now the Domestic Abuse Act requires the Home Secretary to review the processing of domestic abuse data carried out by certain public authorities for immigration purposes, to prepare and publish a report setting out the findings of that review and to lay a copy of that report before Parliament. We conducted that review last year and the report was published on 15 December. The review examined the legal framework and policy considerations concerning the data-sharing arrangements between the Home Office and police in respect of migrant victims and witnesses of crime with insecure immigration status, as well as the wider considerations of public policy relating to policing and crime, including domestic abuse. During the review we engaged extensively with the police, the domestic abuse and modern slavery sector, the domestic abuse commissioner and the Independent Anti-Slavery Commissioner.

Taking all that into account, and all the evidence provided, the Home Office review recommended establishing an Immigration Enforcement migrant victims protocol, which has been referred to in this debate, to give greater transparency to migrant victims and their dependants on how their data will be shared. The protocol will set out that no immigration enforcement action should be taken against that victim while investigation and prosecution proceedings are ongoing and the victim is receiving support and advice to make an application to regularise their stay. It will set out, in line with the code of practice for victims' rights, what information and signposting could be offered to migrant victims to help them regularise their stay and thereby reduce the threat of them being subjected to coercion and control.

Midnight

It is worth expanding on this a little. It is in the public interest that individuals without lawful status are brought into the immigration system to enable their status to be resolved, but it may also protect the public, including vulnerable migrants, from individuals who are considered a harm to their local communities. I wish to emphasise that the immediate priority is always the welfare of the individual and to ensure that all vulnerable migrants receive the support and assistance they need, regardless of their immigration status.

In addition to the protocol, which will be implemented by the end of August 2022, we are considering ways in which we can enhance our support for migrant victims of domestic abuse and encourage reporting of crime to the police. This includes strengthening Immigration Enforcement's vulnerability strategy so that caseworkers can provide the most effective response, as well as engaging with migrant communities to build confidence and trust.

In answer to the right reverend Prelate the Bishop of London, the proposals to cease or delay data sharing between the Home Office and other authorities on migrant victims and witnesses of crime with irregular immigration status would be harmful to both the safeguarding of those victims and witnesses and to the public interest. Neither would they provide a clear commitment to no enforcement action being taken while migrant victims address immediate needs for information required to access services, support and advice, which would result in delays, prolonging uncertainty for victims. The introduction of Immigration Enforcement's migrant victims protocol provides that commitment for relief from immigration enforcement action.

Data sharing is already strictly regulated, and the Home Office complies fully with the requirements of the law. The immigration exemption applies only when there would be a prejudice to effective immigration control. It is not applicable and therefore would not be used in the scenarios referenced in this amendment and, as such, it is not possible to disapply it. As outlined to this House in other debates, whenever the Home Office uses the immigration exemption it must always be in a targeted, limited way that is proportionate, necessary and lawful. The immigration exemption in the Data Protection Act 2018 enables the Home Office to redact certain information related to any ongoing operational activity and related matters or any security checks that may have been carried out where to release it would be likely to prejudice the maintenance of effective immigration control.

Data is shared where it is proportionate and in the public interest. It allows the Home Office to maintain effective immigration control by helping to identify those who are present in the United Kingdom without valid leave, to prevent abuse of our immigration controls and to identify people at risk. The amendment could therefore have the unintended consequence of making it more likely that victims of trafficking and exploitation are not identified and that those who exploit them will therefore not be brought to justice.

Accurate and current information about a migrant victim or witness enables the Home Office to work with authorities to identify vulnerabilities and safeguarding needs and to assess whether the migrant may be eligible to qualify for the leave under the Immigration Rules or bespoke routes. Securing immigration status may allow eligible migrants access to a range of benefits, including legal advice and health and housing provisions. There is often an immediate need for this to safeguard victims.

In addition, Section 82 of the Domestic Abuse Act 2021 confers a power on the Secretary of State to issue a code of practice relating to the processing of domestic abuse data for immigration control purposes by specified public authorities. The Home Office and the National Police Chiefs' Council are working together to develop the code of practice alongside the Immigration Enforcement migrant victims protocol. I appreciate the case that the right reverend Prelate made, and her concerns, but the Government are of the view—

Lord Hodgson of Astley Abbotts (Con): My Lords, my noble friend referred to the National Police Chiefs' Council producing guidance. This is not a statutory body, and one of the issues I have with the amendment from the noble Lord, Lord Coaker, is that the guidance and positioning in relation to parliamentary scrutiny needs to be very clear because, as has been pointed out, it is a very important matter. When I hear that a tertiary body which is actually a limited company—it is not even a quango—is going to be involved, my confidence is not increased. I hope that, if we are going to talk further about this, we are going to make sure that a proper degree of parliamentary scrutiny occurs both if the noble Lord, Lord Coaker, pushed his amendment and if my noble friend wanted to proceed along the lines he described to the Committee just now.

Lord Sharpe of Epsom (Con): I thank my noble friend for that intervention. I remember the debate on the fact that it is not a statutory body. I also remember that it is being reviewed at the moment, I think by the chief executive, so there will be more to say on that in the future.

The Government are of the view that the amendment is unnecessary, given the provisions in the Domestic Abuse Act, the findings of our review, our plans to publish an immigration enforcement migrant victim protocol and the joint code of practice with the NPCC, notwithstanding the points that my noble friend has made. For those reasons, I ask the noble Lord to withdraw his amendment.

Lord Coaker (Lab): My Lords, I thank the Minister for his reply and for the care he took to try to answer the various questions. Of course, I will withdraw the amendment at this stage, but I have to say to the Minister that there is a very real issue out there around immigration enforcement vis-à-vis victims, those who have been trafficked or those who have been trafficked and subjected to domestic abuse. The system at the moment commands no confidence or trust among a wide range of people who need our support and help. They are terrified of the immigration system. They are terrified that, as soon as they co-operate with the police to help bring criminal gangs to justice, they will be put before an immigration tribunal and forced to

leave the country. That may be wrong and there may be protocols that say that that is not correct and police officers who reassure them, but that is the reality of victim after victim I meet and no doubt many others in this Chamber meet. I am sure the Minister will have met victims who say exactly the same. Despite the reassurances, that is what they feel. These are the victims that we speak to—goodness knows how many others there are who hide away for fear of authority and for fear of that enforcement process. The Government are clearly aware of it and believe that what they are doing will change it. To be frank, I have my doubts, but we will see where it gets to. With those comments, I beg leave to withdraw the amendment.

Amendment 124A withdrawn.

Clause 40: Assisting unlawful immigration or asylum seeker

Amendment 125

Moved by ***Lord Coaker***

125: Clause 40, page 41, line 40, leave out subsection (3)

Member's explanatory statement

This would give effect to the recommendation of the Joint Committee on Human Rights to maintain the current position that the offence of helping an asylum seeker to enter the United Kingdom can only be committed if it is carried out "for gain".

Lord Coaker (Lab): I beg to move Amendment 125 on behalf of m noble friend Lord Rosser. Again, it is unfortunate that we debate this incredibly important group of amendments and incredibly controversial clauses. Essentially, this group of amendments deals with and looks at the Government's proposals to criminalise those who assist asylum seekers for no gain of their own, including potentially saving lives at sea and what colloquially we now call pushbacks.

Clause 40 would remove the words "and for gain" from Section 25A of the Immigration Act 1971. Presently, under Section 25A(1) it is an offence if a person

"knowingly and for gain facilitates the arrival or attempted arrival in, or the entry or attempted entry"

of an asylum seeker into the UK. Amendment 125, in the name of my noble friend Lord Rosser, opposes the removal of "for gain". I am grateful to Peers who have also put their names to the amendment.

This amendment—the so-called Nicholas Winton provision—has become famous as part of the Bill which would have criminalised Sir Nicholas for saving the lives of hundreds of children had it been law at that time. The Government, showing some of the confusion that reigns around this part of the Bill, accepted that their original proposals could have criminalised the saving of lives at sea and introduced amendments on Report in the Commons to clarify that an offence is not committed if the act is done

"by or on behalf of, or co-ordinated by … Her Majesty's Coastguard"

or an overseas equivalent. It is quite astonishing to realise that, in the first place, it was going to penalise the people they wanted to operate the law on their behalf. That clarification is welcome, but it is worrying that the issue needed to be clarified in the first place. But it does not address all the issues. Facilitating entry for your personal gain—including, for example, monetary gain—targets this power on those who smuggle and traffic people as part of a business model. The Government's change breaks that model and extends the offence to people who provide aid to those in distress.

The amendments in the group demonstrate the remaining issues. Amendment 126, in the name of the noble Baroness, Lady Jolly, to which I am pleased to have added my name, addresses the duty on a master of a ship to assist those in distress at sea. International Maritime Organization guidance provides that the master of a ship

"has an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found. This is a longstanding maritime tradition as well as an obligation enshrined in international law."

What does the master of a ship do if they are acting on their own initiative? Are we certain that the clause, as it stands, means that anyone in any circumstances, who is not operating under the co-ordination of the coastguard or under any authority of the state but is simply sailing their boat, yacht or ship, can stop and help someone, even if that means facilitating a group of people in a dinghy who are on their way to the UK? Are the Government saying that this is fine?

Amendment 128, in the name of the noble Baroness, Lady McIntosh of Pickering, raises the question of what happens when the coastguard does not co-ordinate or ask for intervention but a boat assists people in distress at sea. She has asked me to mention this amendment, which I support, as she is unable to be here. This is the situation that the Government have put us in: that we have to clarify issues concerning rescue at sea. The Government are in a mess about this. We need to understand exactly what the Government are saying, and what they are saying to those who are in command of boats or ships and save lives at sea. The Minister might like to tell us what it means with respect to both our own territorial waters and outside of those. What happens if we were 13 miles off the coast, which is outside our territorial waters, picked up somebody and then came back with them? Is that illegal? What happens in those circumstances? There is complete confusion from start to finish about what all of this means.

If that was not enough, we then come to the powers astonishingly included in the Bill: the powers to "stop, board,"—and the one that cause a huge amount of disquiet —"divert and detain", included in primary legislation in Schedule 6 to the Bill. Amendment 132, in the name of my noble friend Lord Rosser, would provide that the powers set out in Schedule 6

"must not be used in a manner or in circumstances that could endanger life at sea."

My noble friend Lord Dubs and the noble Baroness, Lady Ludford, have added their names to the vital Amendment 131, which would prevent these powers being used against unseaworthy vessels including dinghies. Do the Government agree, or does the structure of the ship matter? It would be interesting to have clarification from the Minister.

We have already discussed the Dublin III regulations today. We used to have civilised, reciprocal arrangements for the safe return of asylum seekers to neighbouring

[Lord Coaker]
states, where appropriate. We should be talking about bilateral negotiations, not about turning dinghies around in the middle of the channel by unsafe methods.

12.15 am

In evidence to the Commons Home Affairs Committee, Dan O'Mahoney, the Clandestine Channel Threat Commander—I did not even know that title existed, but there we go; full marks and a prize to whoever came up with it—who has been sacked or moved sideways or whatever happens now, so that worked, explained that

"all of the migrant vessels currently are classified as in distress, because they are unseaworthy and the people operating them do not have maritime experience."

These are the boats that we are talking about pushing back.

The Government are asking this House to debate this today, under time pressure, when they are still debating between themselves whether this could be allowed to happen. I know that the Government Chief Whip is anxious about this, but this is incredibly important. The Government are saying different things. The Ministry of Defence has ruled out a policy of pushbacks by the Navy; this has been publicly declared by the Defence Minister, James Heappey, who gave this message. Yet the Home Secretary, only a couple of days ago, went to the Home Affairs Select Committee and contradicted the Defence Minister. She said that he did not have the facts and that this policy was a "work in progress". The military has briefed that it will not pursue this policy, amid widespread concern that it is illegal and risks causing deaths. So what is the Government's policy? Is the Home Secretary right, or is the Ministry of Defence right?

I know that the noble Baroness will have the answer, because I raised exactly the same issue with her a few days ago and said that she obviously could not contradict her own boss, the Home Secretary. She said:

"I agree with the noble Lord and I will clarify the point on this issue. He knows that I will clarify that for him."—[*Official Report*, 3/2/22; col. 1088.]

So what is the Government's policy on pushbacks? Is it the Ministry of Defence's or the Home Office's, or is it still to be worked out? Clarity is needed now.

I will finish by saying that a policy of pushbacks has extreme risks for those who are victims of trafficking or of slavery, and those who are potentially seeking asylum. As the JCHR noted, if victims of trafficking or slavery are in UK territorial waters, the UK authorities are under a duty to take steps to protect these victims to ensure that they are not placed in a situation where they fall again into the hands of traffickers, and to investigate and take action against potential perpetrators.

So I say to the Minister that the only people it punishes at this time are the smugglers, who take advantage of people who are fleeing the unimaginable. I beg to move.

Baroness Jolly (LD): My Lords, I am very grateful to have the support of the noble Lord, Lord Coaker. I introduced Amendment 126 and 127 to bring the Bill into line with international and domestic law regarding the duty of the master of a vessel to respond to a distress signal at sea if he, or she, is able to do so. By removing the words "for gain" from the facilitation offence, a dilemma is created. Those who help asylum seekers are likely to be prosecuted, yet there is also a duty on the master of a vessel to respond to a signal of distress at sea. This dilemma was recognised, in part, by the Government, and an amendment was introduced on Report in the other place—but it does not go far enough. It does not fully recognise the unique duty placed on the master of a vessel to respond to a distress signal without delay.

New Section 25BA of the Immigration Act 1971, as introduced by this Bill, provides protection from prosecution only if the rescue is co-ordinated by HM Coastguard or another search and rescue organisation. This may not always be the case, even in genuine situations of distress, especially for small vessels that are not equipped with modern communications equipment and methods of raising electronic distress alerts.

The United Nations Convention on the Law of the Sea is clear. Article 98 states:

"Every State shall require the master of a ship flying its flag ... to render assistance to any person found at sea in danger of being lost".

The Safety of Life at Sea Convention's Regulation 33 states:

"The master of a ship at sea which is in a position to be able to provide assistance on receiving a signal, from any source, that persons are in distress at sea, is bound to proceed with all speed to their assistance".

The Assistance and Salvage at Sea Convention of 1910, which is still current, states:

"Every master is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost."

This long-standing duty of a master to render assistance to those in peril at sea in customary and in conventional international law is brought into effect through the distress messages regulations, which say:

"It shall be the duty of the master of a ship, on receiving at sea a distress alert, to proceed with all speed to the assistance of the persons in distress".

Noble Lords will detect that these quotations have a common theme: that it is a specific duty on the master of a vessel to respond to a distress message without delay. It does not matter whether a search and rescue organisation is involved or not. Of course, it would be preferable that it was, but the duty on the master of a vessel to act immediately remains in all circumstances. In my view, it would be wrong to prosecute the master of a vessel for doing what the law requires him to do.

Similarly, there are specific duties on the masters of vessels when requisitioned, in distress situations and following a collision at sea. Although the Government amendment provides a defence for rescuers, it cannot be right that in obeying the very clear duties from the distress signals regulations, the master of a vessel may then face prosecution from another area of domestic law.

In times of conflict, the first Additional Protocol to the Geneva Conventions specifically prohibits the prosecution, conviction or punishment of a person for rescuing anyone in peril at sea. I believe that this protocol sets a minimum baseline for how one human

being should treat another, whatever their status or circumstances. It cannot be right that we should adopt a lower standard in times of peace than we do in times of war. I beg to move.

Baroness Bennett of Manor Castle (GP): My Lords, I rise to speak to this group of amendments. My noble friend Lady Jones of Moulsecoomb has added her name to Amendment 125, which has broad cross-party support. There are lots of different ways of approaching the same problem here. In some ways, it seems to me that Amendment 125 minimises the offence to making it only if it is done for financial gain. That is one way of coming at this, but, as we can see from the number of amendments—the Committee will be pleased to know that I will not run through them all—there is a huge amount of concern about this. When we look at the people who have signed some of the amendments, it is a pity that they are not able to be here tonight, for a variety of reasons. I will quote the noble Lord, Lord West, on the issue of pushbacks, who is on the record as saying that

"someone is likely to end up dead".

That is the reality of what we are talking about here.

The noble Baroness, Lady Jolly, referred to the UN Convention on the Law of the Sea, under which every state is required to render assistance to any person found at sea in danger of being lost and must proceed with all possible speed to the rescue of persons in distress. I do not think that there is any way that pushback can be lined up with that.

However, it is interesting that the amendment in this group signed by the noble Lord, Lord West, states:

"Nothing in this paragraph authorises any action or measure which is inconsistent with … international or legal obligations."

What conditions have we got to when we have to write an amendment saying that we will follow international law?

I do not know which of these amendments is the right one. In some ways Amendment 132A would seem to cover it, because it says we should obey international law, but, as the noble Lord, Lord Coaker, said in his energetic introduction—I want to come back to one more point—it is not just the Ministers who appear to disagree with different parts of the Government.

A tweet from the MoD five days ago stated that:

"The @RoyalNavy and @RoyalMarines will not be using push back tactics in the English Channel".

I can only applaud that. However, the next part of the tweet is curious:

"although a military commander will retain the existing ability to instruct Border Force to use them when appropriate."

I come back to the point about not breaking international law while saying that something is unacceptable for the Navy but is acceptable for Border Force under the instructions of the Navy. As the noble Lord, Lord Coaker, said, what an absolutely disgraceful mess we are in.

Lord Macdonald of River Glaven (CB): My Lords, Amendment 132A is in the name of the noble Baroness, Lady Kennedy of The Shaws, to which I and the noble Lord, Lord West, have added our names. It would require that nothing in Schedule 6

"authorises any action or measure which is inconsistent with the United Kingdom's international legal obligations."

The reason for this amendment is that there appears to be a grave risk that pushbacks, as they have become known, would be inconsistent with certain international legal obligations that the United Kingdom has entered into. That is because they may easily conflict with the right of those fleeing persecution to seek asylum, the prohibition on collective expulsion, the duty to render assistance to those in distress at sea and the prohibition on refoulment.

As the noble Lord, Lord Coaker, made clear, pushbacks also raise the spectre of other rights violations, including violation of the right to life. This is because such manoeuvres are likely to be extremely dangerous, with a high risk of damage, injury or even drowning. Those who are familiar with the English Channel know that it is not a hospitable place, and we all know that the craft used by these refugees are flimsy and unseaworthy. So this policy, if it were ever to be implemented, courts disaster. It would take just one tragedy to expose this and, I assume, to shame our country before the world.

The policy is probably unworkable for two reasons. First, boats can be returned to French territorial waters only with France's consent, which has not been forthcoming and is unlikely to be so in the future. Secondly—some may say to their credit—it seems quite unlikely that Border Force officers would agree to implement the policy. I would like the Minister, if she would be so good, to explain how the pushback policy would be consistent with the right of those fleeing persecution to seek asylum, the prohibition on collective expulsion, the duty to render assistance to those in distress at sea and the prohibition on refoulment. If it is not consistent with those obligations, it is not consistent with international law.

Baroness Hamwee (LD): My Lords, it is right to put on record that the noble Lord, Lord Macdonald, has been sitting here for over nine and a half hours in order to say that. It adds to the weight of his points, which I very much support, and I know that colleagues will speak to this.

12.30 am

I will say a word about another alarming provision which is dealt with by Amendment 125. The Government may say that they would not regard it as an offence for a lawyer who is paid by a client to represent his client, but it looks as if Clause 40 says that.

That was not in fact my first thought, which was about all those humanitarian organisations—some of them quite formally organised and some of them fairly loose-knit groups of volunteers and concerned citizen—who aid asylum seekers, including people who have yet to make a claim. To take out the words "for gain" from Section 25A(1)(a) seems to put them in its sights, and I am quite clear that it is not adequate to say that a provision will not be used against them. I am quite confused about quite a lot of things at 12.30 am. Why do the Government want to take out the words "for gain" from that section when they already have Section 25A(3), which says

"Subsection (1) does not apply to anything done by a person acting on behalf of an organisation which … aims to assist asylum-seekers, and … does not charge for its services"?

I hope I have not just suggested another change to Section 25A.

[Baroness Hamwee]

All this amounts to the fact that the Government are, so far, defeated by the task of describing directly what a smuggler is. We should be dealing with this in the positive, not potentially criminalising other people because we cannot find the right way to define smugglers, who are the ones who should be in our sights.

I have three tiddlers—or maybe they are not—in this group. Amendment 128A probes the significance of what is meant in new Section 25BA by an individual being "first" in danger. It occurred to me that it might be government generosity in extending the relevant period. Amendment 129A asks for confirmation that there will be consultation on the penalties relating to failure to secure a goods vehicle. Similarly, Amendment 129B asks for confirmation about consultation on regulations relating to offshore workers.

Baroness Ludford (LD): My Lords, I will speak to Amendments 130, 131, 133 and 135, which all stem from JCHR reports.

Amendment 130 aims to restore the Government's original intended drafting. That said that the Secretary of State could authorise action only in respect of certain vessels if the UN Convention on the Law of the Sea, which my noble friend Lady Jolly mentioned, permitted it. However, a government amendment in Committee in the other place deleted that provision. The Minister might like to explain to us why the Government did that. In any case, Amendment 130 prefers to restore compliance with international law in giving orders to foreign ships. After all, the Ministerial Code requires Ministers to comply with the law, including international law, and that must surely include the UN Convention on the Law of the Sea.

Amendment 133, like Amendment 132, is designed to ensure that powers in maritime enforcement, including any force used, cannot be used in a manner that would endanger life at sea—which is pretty self-explanatory. If the Government cannot accept that, it would be rather shocking.

Amendment 131 seeks to ensure that pushbacks are used against unseaworthy vessels—again, a bit of a no-brainer.

Amendment 135 aims to put liability in any civil proceedings squarely with the Home Office, not with an individual immigration or Border Force official. There are significant risks that the powers introduced in Clause 44 and Schedule 6 may break human rights law. The Bill seeks to remove civil as well as criminal liability from officers. This means that anyone suffering harm would have no recourse to an effective remedy. The Government would escape being held to account for killing or injuring a person through negligence or gross negligence. Such impunity is unjustified. It is contrary to various provisions in the European Convention on Human Rights and the HRA. Amendment 135 clarifies that, although individual officers may not personally be liable, the Home Office retains responsibility, accountability and liability in any civil proceedings. I suggest this is where it should lie.

Baroness Chakrabarti (Lab): My Lords, justice and immigration offences should make a distinction between those seeking illegal entry and desperate people seeking asylum or who eventually receive it. Immigration offences must also make a distinction between the trafficker and the rescuer. They are two completely different creatures. Surely there is wit and wisdom in government to be able to make a distinction in the Bill in relation to these two categories of humanity.

I too congratulate the noble Lord, Lord Macdonald of River Glaven, on his patience and his eloquence about why putting people's lives at risk at sea is contrary to international law. I fear that international law is not always the most persuasive argument with the Government so instead I just say: let us not put people's lives at risk at sea. It is cruel and inhumane. It is not who we are. It is just plain wrong.

Lord Paddick (LD): My Lords, I have been disciplined in my responses to previous groups. This group of amendments is so diverse and of such importance that I am left with no choice but to cover the ground comprehensively.

Amendment 125 seeks to prevent the change proposed in the Bill from targeting people smugglers who seek to exploit victims of war and persecution for profit to making it a criminal offence knowingly to facilitate the arrival, attempted arrival, entry or attempted entry into the United Kingdom of an asylum seeker, whether the person profits from the exercise or not. The only exemptions from the offence are where Her Majesty's Coastguard—or a similar overseas organisation—or those acting on behalf of or co-ordinated by such an organisation are involved.

Can the Minister confirm that those on a vessel which by chance, unprompted, comes across a sinking boat filled with asylum seekers would have to seek permission from the coastguard before attempting to rescue and save the lives of those in danger of drowning—otherwise they would commit an offence?

I understand that new Section 25BA of the Immigration Act 1971 would provide a defence for the person charged with a facilitation offence. That is not an exemption from committing the offence, or even being charged with it. Surely, at the very least, a person who assists someone in danger or distress at sea should be exempt from this offence.

Amendments 126 and 127, in the name of my noble friend Lady Jolly, restrict such an exemption to the master of a ship. As my noble friend explained, under both domestic and international law, it is the master who is under a legal obligation to respond to a distress signal. It could be anyone who comes across such a situation and acts out of a moral duty to save lives. I am not sure what the legal definition of a master of a ship is. As my noble friend has said, the coastguard may not be aware or involved at the critical initial phases of an emergency at sea. Lives could be lost if emergency action is delayed.

Amendment 128 makes a similar point to include cases where the coastguard would have become involved if it had known about the incident. My noble friend Lady Hamwee asked for an explanation of what is meant by

"first in danger or distress at sea".

Although that may seem obvious, it may be a subjective judgment. When does an overloaded boat change from placing the occupants at risk to placing them in

danger? Does the boat have to start sinking before they can legally be rescued? Are the Government really saying in new Section 25BA(3) that a ship on its way to a UK port that picks up asylum seekers who are in danger of drowning and are 49% of the way across the Channel from France to England must divert to a French port because

"the United Kingdom was not the nearest place of safety on land to which the assisted individual could have been delivered"?

This needs a serious rethink before we get to Report.

As my noble friend Lady Hamwee explained, Amendment 129A is about the penalty to be imposed for failure to secure goods vehicles and for carrying clandestine entrants, and seeks to probe whether there will be consultation on that penalty.

Clause 42 is about those working in UK waters, who are to be regarded as having arrived in or entered the United Kingdom by being in UK waters. Can the Minister explain why this clause is necessary and whether there will be consultation on these regulations? This is in reference to Amendment 129B.

Schedule 6 is about maritime enforcement. Can the Minister explain how a UK enforcement officer can exercise powers in foreign waters or international waters, even against a foreign ship or a ship registered under the law of a relevant territory? Amendment 130 adds the safeguard—which is in existing Section 28M in Part 3A of the Immigration Act 1971—that authority for the exercise of powers must be given only if enforcement action complies with international maritime law. Similarly, Amendment 132A would ensure that nothing is done that is inconsistent with the United Kingdom's international legal obligations.

Amendment 131 tries to ensure that enforcement action, such as pushbacks, could not be taken against unseaworthy vessels. Amendment 132 aims to ensure, more broadly, that enforcement action cannot be used in a manner that would endanger lives at sea. As my noble friend Lady Ludford said, this would appear to be a no-brainer.

We then come to legal immunity, both criminal and civil. Section 3 of the Criminal Law Act 1967 states that:

"A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

Whether the use of such force is reasonable is a matter for a court to decide, and it is the sole responsibility of the person using that force. An armed police officer, for example, whatever they are ordered to do, retains legal responsibility for firing his or her gun. Are the Government saying that an armed police officer who believes that he has been ordered—as in the case of Jean Charles de Menezes—to shoot a suspected suicide bomber, still retains legal responsibility for his actions, but the Border Force officers who push back and sink a boat containing asylum seekers who then drown are not legally responsible? Why should Border Force officers receive immunity in the exercise of potential lethal force, but police officers do not? Is there a difference between those against whom the potential lethal force is likely to be used? Can the Minister explain why there is a difference? My Amendment 134 would remove such immunity.

Amendment 136 removes immunity from criminal proceedings only, as the JCHR proposes a different way of dealing with civil claims in Amendment 135, making the Home Office responsible for any civil claim, rather than individual officers. Can the Minister say whether such an amendment is necessary, if civil liability were to remain? Chief constables have vicarious liability for the actions taken by their police officers and staff in the execution of their duty in the event of a civil claim; that is, the chief police officer is sued rather than the individual police officer.

12.45 am

The head of Border Force, or the Home Office, should also be vicariously liable for the actions of Border Force officers in the event of any civil claim. Can the Minister confirm whether that is the case?

The sea is a treacherous place, which is why, under international law, all vessels are required to go to the aid of others in distress or in danger at sea. The Government should be doing everything they can to save lives at sea, not seeking to prosecute those attempting rescue or providing immunity to those who put lives at risk. These measures are abhorrent and morally repugnant, and we support all the amendments in this group.

Baroness Williams of Trafford (Con): My Lords, I will start with Amendment 125. I agree with the need to protect those acting with good and honest intentions in bringing asylum seekers to the UK and to see that they are not treated in the same way as organised criminal facilitators. I am grateful to the noble Lord, Lord Coaker, for raising this point.

Noble Lords will know that, historically, individuals have felt compelled to take compassionate action, and the Government applaud all those who acted throughout history, often at grave personal risk, to bring people to safety. It should also be noted, however, that they were often working with the knowledge of the Home Office and charitable organisations. We have always worked with and listened to humanitarian individuals and bodies that aid and assist refugees, victims of modern slavery and other vulnerable people, and we will continue to do so.

I reassure the Committee that those working openly and transparently with the published aims of an organisation that does not charge for its services to assist asylum seekers, and under its direction, need not fear these measures. However, individuals taking action that ignores lawful controls may well be liable to prosecution. We will very carefully examine the individual circumstances of each case and work with the Crown Prosecution Service in England and Wales, the Crown Office and Procurator Fiscal Service in Scotland, and the Public Prosecution Service for Northern Ireland, which will determine whether a prosecution is proportionate and in the public interest. That relates to the point made by the noble, Lord Paddick, and I will come to that point when we talk about turn-arounds later

To be clear, in answer to the noble Baroness, Lady Ludford, our purpose in removing gain from this offence is more readily to target people-smuggling, where organised crime gangs will conceal their tracks and make it as difficult as possible to prove that they

[Baroness Williams of Trafford]
are gaining financial reward to the standard required for a successful prosecution. We also note that the amendment we tabled at Report in the other place to protect members of the RNLI from the scope of the offence of facilitation, while acting in line with the principles of saving lives at sea, was welcomed by the Joint Committee on Human Rights.

Baroness Ludford (LD): Unless my brain has gone completely to mush at this late hour, I do not think that I objected to that at all. My point was about the UN Convention on the Law of the Sea and breaching international law.

Baroness Williams of Trafford (Con): My brain has also gone to mush—let us all just reveal here—but I thought that she originally asked about the purpose of the provision, and I thought I was answering that. Hopefully, I will also get on to answering her points later.

The bodies or individuals who provide assistance in search-and-rescue missions and who are acting on behalf of, or co-ordinated by, Her Majesty's Coastguard, are protected from prosecution for the offence of facilitation. A defence is also provided for seafarers acting in good faith, where their assistance is not co-ordinated by the coastguard. This puts it beyond doubt that organisations and individuals who rescue those in distress will not be convicted of people-smuggling offences. A separate defence is also available for masters of ships who discover stowaways on board after leaving port and who then dock in the UK, as long as they appropriately notify the authorities.

It should also be noted that we are retaining the defence available to persons acting on behalf of organisations whose aim is to assist asylum seekers and who do not charge for their services.

The noble Lord, Lord Coaker, asked me about people acting outside UK territorial seas. If the act is co-ordinated by HMCG or equivalent, they are protected from the offence. If they are intercepted and brought into territorial waters, we would not prosecute unless there were egregious factors such as the ones we talked about earlier. However, it is right that, in investigating a serious offence, all available evidence be considered and all relevant behaviours taken into account. We are at present limited by an unrealistic requirement to show financial gain that does not take account of the reality of international organised crime. Under the amendment, by retaining for gain we would place an unrealistic burden on our law enforcement officers and prosecutors in seeking to bring to justice those engaged in these activities.

I turn to Amendments 126 to 128. I understand the concern expressed by the noble Baroness, Lady Jolly, that in such circumstances the masters of vessels should not be charged with a facilitation offence. I assure her that those international obligations were taken into account, including the one she mentioned, in drafting new Section 25BA of the 1971 Act. If the masters of vessels act independently of Her Majesty's Coastguard, we have provided a defence for persons who show that they had to assist an individual in danger or distress at sea at the time between their first being in danger and their being delivered to a place of safety on land.

To the noble Baroness's point, that defence means that we will assume that, in such circumstances, masters of vessels are telling the truth and acting in good faith unless we can disprove it beyond all reasonable doubt, but it is right that we should be able to investigate in any event. That is designed to stop people smugglers from pretending to rescue migrants with the intent of escaping prosecution.

Baroness Chakrabarti (Lab): On that specific point, it looks as though that is a defence. Therefore, the burden would be on the rescuer to demonstrate these things about the moment when the individual was in distress at sea, et cetera. That is very different from saying that these people are not covered by the offence, because the burden shifts on to the person who has potentially been arrested and charged and is having to make out the defence, does it not? I do not think the burden switch is quite what the Minister wants to happen.

Baroness Williams of Trafford (Con): What I was trying to say was that, unless we can disprove it beyond all reasonable doubt, the defence has to establish that someone assisted an individual in danger or distress at sea in that time. Therefore, the burden is higher on us than it is on the defendant.

Lord Paddick (LD): I am terribly sorry to interrupt the noble Baroness, but there is no exemption for a rescuer from the offence. The person could be arrested and charged, because the defence is only for someone who is charged. Any rescuer is at risk of being arrested and charged, and having to prove in court that they were a genuine rescuer.

Baroness Williams of Trafford (Con): It is probably important to be clear here that an offence has not been committed. There is no defence to the offence. There is defence in court, and it could be established by the courts only that an offence had been committed. On the point made by the noble Baroness, Lady Chakrabarti, it is an evidential burden only. If I can move to Amendment—

Baroness Bennett of Manor Castle (GP): My Lords, I am sorry, but I feel that there is something really important here. I am not a legal expert, but it seems to me that there is a comparison with where a householder has sought to defend themselves against a burglar. A number of laws have been introduced. This Government, I believe—certainly Governments of a similar hue over recent years—have brought in attempts to ensure that people are not charged in that situation.

Baroness Williams of Trafford (Con): Yes. The point I am making, in response to the point made by the noble Baroness, Lady Chakrabarti, is that the defence would be to the evidential burden only and we would have to prove beyond reasonable doubt—the burden is different.

Baroness Chakrabarti (Lab): My Lords, I am sorry but this is so important and I do not want to be bullied into submission because of things that happened earlier.

The bottom line is that Her Majesty's Coastguard is protected: it does not commit the offence. But there is a different formulation for those other rescuers. It is a defence for them, if they are charged, to show—they have to prove—these factual matters. They are in the loop; they are in the zone of being convicted and that is just not right. That is not fair. That is like saying, "You commit the offence of breathing but don't worry, your defence will be that you weren't raping and breathing at the same time." This is a flip of the burden and it is very dangerous for those innocent rescuers.

Baroness Williams of Trafford (Con): Rescuers have to prove to the evidential burden. In order to prosecute, we have to prove beyond reasonable doubt. In proving to the evidential burden, there is no offence committed if the defence is proved. Noble Lords look confused.

Lord Paddick (LD): My understanding is that the Crown Prosecution Service makes decisions on the basis of the public interest and whether there is a 50% or more chance of conviction. To convict somebody, the case has to be proved beyond reasonable doubt. For the person to be charged and to face a court hearing, that is not the standard of proof the Crown Prosecution Service applies. It is when it believes it has a 51% or more chance of conviction.

Baroness Williams of Trafford (Con): I do not know what the noble Lord's question is.

Lord Paddick (LD): The Minister is talking about evidential levels: the evidential level the prosecutor has to prove, versus the evidential level the defence has to prove. That is not what we are talking about. We are talking about Her Majesty's Coastguard being exempt—it does not commit an offence under this legislation. Anybody who is operating outside of working with it is not exempt. They can be arrested and charged, and then they have to prove that they were a genuine rescuer. That is the point.

Baroness Williams of Trafford (Con): Would the Committee be content if I wrote further on this matter? Excellent.

I am not quite sure where I had got to. Amendment 128A in the name of the noble Baroness, Lady Hamwee, gives me the opportunity to explain the defence provided to persons who are not acting under the co-ordination of HMCG but who can show that they assisted an individual in danger or distress at sea at any time—I think I have just said that.

It is appropriate to set a clear timescale of when the defence will apply to assistance to those in danger or distress. This means a starting point from when the person was first in danger or distress at sea and ending at the time when the person was delivered to a place of safety on land. It does not include assistance given before the assisted individual is first in danger or distress. This is to make it more difficult for unscrupulous criminal gangs to benefit from the defence by either changing their operations to pick up migrants immediately after they have left the French coast and then ferrying them to the UK, or claiming that they are assisting migrants before they reach a point of being in danger or distress at sea by providing life jackets—possibly at additional cost—when they begin their crossing.

1 am

I would like to make it clear that, with this defence, there is an evidential burden on the person charged. This requires the individual to tell the investigating authorities the facts of the case, and it will then be for the prosecution to disprove these beyond all reasonable doubt. This means that it is extremely unlikely for someone to be charged unless the authorities have concrete evidence to the contrary, such as intelligence suggesting that they are linked to people-smuggling gangs, or the same person launching multiple "rescues" over several days with no good reason for being at that location.

On Amendment 129A, I am happy to take this opportunity to reassure the noble Baroness, Lady Hamwee, that the Government have already stated publicly that we will conduct a public consultation with such persons as considered appropriate before determining the level of penalty for the new offence and bringing a level of penalty code of practice into operation.

On Amendment 129B, it is entirely reasonable—merely a small imposition—to ask a migrant's sponsor or the migrant themselves to provide confirmation of their arrival and departure. These requirements are already a core feature of the immigration system and should be familiar to employers and migrants alike. Any regulations made under Section 11B will be subject to a negative procedure and follow well-established parliamentary procedures for the making and laying of immigration regulations. Additional layers of scrutiny and consultation are therefore not required by way of inserting the requirement to consult into legislation.

I have noted Amendments 130, 131, 132A and 133, which seek to ensure that the maritime enforcement powers cannot be used in a manner that would endanger lives at sea and must be in accordance with international maritime law. I take this opportunity to praise the noble Lord, Lord Macdonald of River Glaven, for waiting all these hours to ask his question. In terms of violation of the right to life, our priority first and foremost is always to save lives at sea, and it is therefore compatible with the European Convention on Human Rights.

On Amendments 130 and 132A, as I have said, safety of life at sea will remain the priority for any interceptions of small boats crossing the channel, and their use will always be in compliance with international obligations in the context of maritime safety. Allowing specific types and sizes of vessel in effect to be exempt from the exercise of these powers would incentivise people smugglers to use those vessels and thereby potentially endanger lives even further. Trained officers deployed to deliver tactics using these powers will also be operating within a clear set of procedures which are regularly reviewed and designed to ensure that no actions are taken that endanger lives.

On the point about the MoD versus the Home Office/Home Secretary, the Defence Minister James Heappey said last month that, throughout the last 12 months, the Home Office and the Ministry of Defence have

[Baroness Williams of Trafford]
worked closely on countering the small boats challenge. Details of how the joint working continues, with the MoD playing a greater operational role, are being worked through, and noble Lords can expect a further update in due course. I do not agree with the description that the MoD publicly rebuked the Home Secretary for claiming that it might use turnaround tactics. As I have said, the MoD and the Home Office have worked closely to tackle illegal migration.

On issues of injury or death at sea in taking migrants to a place of safety, the noble Lord, Lord Paddick, made a comparison with an officer being ordered to shoot, as in the Jean Charles de Menezes case. We must balance things so that facilitators do not exploit the law to offer a taxi service to rescue migrants just off the French coast—probably at extra cost to the migrant—and then ferry them to the UK. If there is good reason to bring the migrant to the UK, for example because of a storm, this is taken into account in the offence, as in the example cited by the noble Lord, Lord Paddick.

With regard to Amendments 135 and 136, any exercise of maritime powers must take account of our international obligations. In relation to Amendments 132 and 134, I assure noble Lords that all operational officers in Border Force have received and passed the appropriate training.

I hope that, with those explanations and my promise to write, noble Lords will be happy not to press their amendments.

Lord Coaker (Lab): I thank the Minister for her response, but I must say to her that a letter will not do on the question of people at sea. Her Majesty's Coastguard is exempted; others are not. It is as simple as that when it comes to saving life at sea. The evidential tests, and everything else the Minister referred to, will not be solved by a letter. The Government will need to bring forward an amendment to the Bill which deals with this situation, otherwise the confusion will continue. We all look forward to the letter, but it will not solve the problem the Minister was trying to solve when addressing the various questions raised about why others should feel protected when they are not exempted in the way the coastguard is. How will they operate when it comes to approaching a boat that is in trouble and full of, say, migrants or asylum seekers? We can only imagine what will be going through their minds. I am sure they will rescue people, but they should not be in the position of not knowing whether they are committing an offence by doing it. That is what the case will be. In certain situations, they actually will be committing an offence. It is not good enough. This matter should be solved by primary legislation, not by a letter, however well intentioned, from the Minister. It will have to be looked at.

I will also say to the Minister that some of the other things she was saying, about what will happen and who is doing what, are confusing. Let me give one example about the MoD and the Home Office. What is the line of command there, and who is in charge? Will a naval commander report to the Home Secretary on how it is operated? I do not think so. Again, this needs to be clarified. Who is controlling the Border Force? That will go through the Home Office, but what will the MoD expect? The confusion is immense. It is a very real problem with which the Government are trying to deal, and we all appreciate that. I will withdraw the amendment but there is a lot of confusion, which needs to be resolved. The usual surefootedness of the Minister on a couple of those matters will require, as I say, more than warm words and a letter.

Amendment 125 withdrawn.

Amendments 126 to 128A not moved.

Clause 40 agreed.

Clause 41 agreed.

Amendment 129 not moved.

Schedule 4: Penalty for failure to secure goods vehicle etc

Amendment 129A not moved.

Schedule 4 agreed.

Clause 42: Working in United Kingdom waters: arrival and entry

Amendment 129B not moved.

Clause 42 agreed.

Schedule 5 agreed.

Clauses 43 and 44 agreed.

Schedule 6: Maritime enforcement

Amendments 130 to 136 not moved.

Schedule 6 agreed.

Clause 45: Removals: notice requirements

Amendment 137 not moved.

Amendment 137A

Moved by ***Baroness Hamwee***

137A: Clause 45, page 48, line 19, after "removed" insert "which must not be different to the destination stated under subsection (3)(c) in the notice of intention to remove"

Member's explanatory statement

This amendment, along with Baroness Hamwee's amendment to Clause 45, page 48, line 28, is intended to probe the destination to which a person may be removed.

Baroness Hamwee (LD): Amendments 137A, 137B, 137C and 137D relate to removal notices. They seek an assurance, if that is possible—I do not think the Bill suggests otherwise—that the destination of a person liable to be removed is not changed during the process. Change can be benign if it is "from" somewhere to which a person has no connection or their experience there is one of persecution, but of course it could be "to" such a place. That is the first couple of amendments.

By proposing an amendment to the period of notice given, I hope to understand what considerations go into the period of notice. The Bill proposes five working days and I have suggested 15, but, as I say, this is a probing amendment. I raise this not just out of curiosity but because the person being removed will have to get his life in order and will need to know the date.

I do not want to tread—at least not very much—on the toes of my noble friend Lady Ludford regarding the opposition to Clause 47 standing part, which is in this group, but perhaps I may say a word about that now. Immigration bail is not a privilege that can be removed due to lack of co-operation, as is the term. That could include anything from the most trivial act. Immigration bail should be the default position and detention the last resort. I recall, a little hazily, that bail was not being operated as was intended, and the Government addressed this some years ago. Obviously, they did not like what had been happening because, as I understand it, the Government wrote to the president of the First-tier Tribunal expressing surprise at the level of grants of bail. The president felt it necessary to remind the Home Office that, as an independent judiciary, it is the courts that decide bail applications, in accordance with the law.

Why do the Government think that this change is necessary? Previous compliance—"co-operation" is the term used in the Bill—is already taken into account by the Secretary of State and tribunal judges when deciding whether to grant bail. Bail hearings are already unequal. One quite often hears the lawyers in this House talking about the need for an equality of arms; there is not one here, and the Government are introducing in the Bill more procedural requirements for applicants to meet at various points in the process—points at which they might be accused of being unco-operative.

The clause is likely to prolong the detention of people who will be released at the end of their detention—we know that; we have debated it on other occasions—and detention is harmful to the individuals and costly to the public purse. Compliance with immigration bail is actually very high—I will not tax the Committee by reading out the figures I have here. Expanding the use of detention to enable it to be used as a punishment for non-compliance, without procedures and protections arising from the rule of law, is notable. Detention is an administrative rather than a criminal process. It should not be used as punishment or deterrence; its use should be to effect removal from the UK, and a lack of co-operation should not be a reason to incarcerate or punish. I beg to move.

1.15 am

Baroness Ludford (LD): My Lords, I shall overlap with my noble friend in speaking to the proposal that Clause 47 should not stand part, in the name of the noble Lord, Lord Dubs. It is about immigration bail and immigration detention—I am starting to feel that I am in detention myself.

The JCHR expressed in a report a few years ago its

"serious concerns about the detention decision-making at the Home Office",

and recommended that such decision-making should be independent, to distance it from decisions on removals and deportations. The fact that over a period of three years, from 2019 to 2021, the Home Office paid out £24 million in compensation to 914 people that it was found to have locked up unlawfully bears out the wisdom of the JCHR's recommendations.

Clause 47 adds additional matters to the existing practice to which Home Office decision-makers and the First-tier Tribunal must have regard when making decisions on immigration bail. Clause 47 says that nonco-operation with the immigration process should be a factor, but detention should be used only if it is necessary and proportionate. Given that the decision-maker must already consider whether a person is likely to comply with bail conditions—as my noble friend mentioned—failure to co-operate can be taken into account in that context if relevant. Taking it into account when not relevant could result in arbitrary detention, in breach of Article 5 of the ECHR.

The NGO Bail for Immigration Detainees observed to the JCHR that, since Part 2 introduces new strict procedural time limits, people who fail to comply with them would be at risk of being deemed to be nonco-operating with the immigration process, and thus at risk of being and staying detained rather than getting bail. This appears both unjust and expensive, and I therefore suggest, in my name and that of the noble Lord, Lord Dubs, that Clause 47 should be struck out of the Bill.

Lord Paddick (LD): My Lords, my noble friend Lady Hamwee's amendments seek clarification on the destination to which a person is to be removed and propose that the notice of removal should be 15 and not five days, to give enough time for the person to put their affairs in order, among other things, before removal—whether the notice is a first notice or a replacement notice. As my noble friends have explained, Clause 47 is about immigration bail and, again, as in previous clauses, directing decision-makers to place inference on whether a person has failed without reasonable cause to co-operate.

There is no need, other than for propaganda purposes, to place such a requirement in primary legislation. A bail decision, like all other bail decisions, should be based on the likelihood of the subject to surrender to bail. The behaviour of the subject—for example, a lack of social ties or a fixed address, or the fact of having absconded in the past—may give indications as to whether they are likely to surrender to bail, but this clause is unnecessary, other than for the purpose of a right-wing Government crowing about how they are going to be tough on those fleeing war and persecution. It should not stand part of the Bill.

Lord Coaker (Lab): My Lords, on Clause 45 there are concerns about priority removal notices, but I am aware that at least part of the clause, to standardise the five days' notice before removal, was welcomed by the JCHR. I welcome the questions put forward by the noble Lord, Lord Paddick, and the noble Baroness, Lady Hamwee, and I look forward to the Minister's response to them.

One reason the Government have given for standardisation is to ensure that there is time built in for the person to seek legal advice. However, the clause does not include any practical guarantee of access to legal advice. Can the Minister explain how the Government will ensure that legal advice will be provided? As has been discussed in previous debates, the legal aid sector is under pressure, so it will be interesting to know how the Government expect that to work.

There are also concerns over Clause 47, as the noble Baroness, Lady Ludford, just outlined. Detention is a tool that should be used where it is purposeful,

[Lord Coaker]
needed and proportionate. The deprivation of liberty is significant, and it is also a tool which, as we know, is exceptionally expensive to the taxpayer. Where a person's previous conduct is relevant, such as where it makes them likely to abscond, that is already taken into account. We have also already taken into account where the person may have a detrimental effect on the community, such as by being a threat to public health or public order, or where we need to protect another person. So what does this provision add, other than to use detention, and charge it to the taxpayer, where it may not be strictly necessary?

Currently, we are not getting the use of detention right, as the Minister will know. Can she confirm how many cases there have been of unlawful detention in the past few years, and at what cost that has been to the public purse? In the other place, it was said that more than 500 people were wrongly detained, causing the Home Office to pay out more than £15 million over the past two years. Also, is it not the case that the majority of people in detention are released rather than removed, with their costly detention having served no purpose? At this stage, we are not convinced that this suggested change will improve things rather than making them a bit worse.

Baroness Williams of Trafford (Con): My Lords, first, in answer to the question from the noble Lord, Lord Coaker, I am sure that the figures that my honourable friend gave in the other place must be correct.

I will start with Amendments 137A and 137B. I am grateful to the noble Baroness, Lady Hamwee, for drawing attention to the framework on destination and route for removing migrants who do not have required leave to remain in the UK. Under Clause 45, the migrant must be given a written notice called the "notice of intention to remove", which informs the migrant of their five working days' minimum notice period, during which they cannot be removed from the UK, and the destination to which they are to be removed.

Prior to the migrant's removal, we must also give them a written "notice of departure details", which informs them of the date of removal to the destination stated in the notice of intention to remove. Where the destination differs, or there is a change in route that involves a stopover in a country that is not designated as safe, we must give the migrant a further notice period so that they have time to seek legal advice regarding this new information. It seems that the goal of Amendments 137A and 137B is to ensure that the destination stated in the two notices is the same. Clause 45 already provides a safeguard to ensure that applicable changes to destination or route require a separate notice period, and therefore the amendments will not make any difference to the status quo.

Turning to Amendments 137C and 137D: the sole purpose of the notice period is to give migrants time to seek justice. But we must balance the common law right to access justice with the need to be able to operate an effective immigration control that involves the enforced removal of migrants who have been found to be in the UK unlawfully and have not departed voluntarily. The current position on notice periods is that most migrants are given a minimum of 72 hours, although some get five working days. We want to make the system simpler and more straightforward so that migrants and their legal advisers know what to expect and so as to reduce any confusion over whether the migrant is given the correct amount of time.

The impact of Clause 45 is that some people will get more time to access justice than is currently the case. It should be noted that this is a minimum timeframe. The current timeframe has not been directly challenged in the courts, and the courts have not found a minimum period of 72 hours to access justice to be unlawful. But it is clear that sufficient time to access justice must be provided, and the Secretary of State therefore has discretion to extend this on a case-by-case basis if justified by the circumstances.

We must also keep in mind the impact of the notice period on the length of time a migrant might spend in immigration detention. At present, in most scenarios, the migrant is in detention during the notice period. The justification for the detention is often based on the imminence of the migrant's removal and hence the heightened risk of their absconding. Of course, each case is considered on its own merits and a decision to maintain detention takes into account numerous factors, such as vulnerability, family ties, et cetera.

I do not think that many in the Committee would be in favour of increasing the time a migrant spends in detention, especially taking into account the cost to the taxpayer and the potentially adverse effects of continued detention on the migrant. Five working days strikes the right balance and provides more protection to migrants as compared with the status quo.

On Amendment 137D, I understand that the noble Baroness, Lady Hamwee, may be concerned that this process will be open-ended—that a removal date may be pushed back so that the migrant may be left in no man's land indefinitely and detained for a long period, having no regard for access to justice for any changes of circumstances in that time. That is not the Government's intention. If a removal date is deliberately moved back, and not within the provisions of proposed new Sections 10B, 10D or 10E, we will give the migrant a fresh notice period. This will be set out in our policy guidance published on GOV.UK.

Clause 47, as it stands, does not change our powers of detention. We will not detain indefinitely, and this will not mean that people will be detained solely due of non-compliance. For detention to be lawful for the purpose of removal, there must always be a realistic prospect of removal within a reasonable timescale. Nor does it mean that bail will automatically be refused for all people who are non-compliant with immigration and removal processes without reasonable excuse. It is just one of several factors that we think should be considered when deciding whether to grant immigration bail.

The current system incentivises non-compliant behaviour: a person can deliberately create obstacles to their removal in order to significantly improve the likelihood that they will be granted bail. It is not right that a person's non-compliance enables their release, and it should be taken into account as a factor when considering whether to grant immigration bail. We are aware that the tribunal may already consider a person's compliance with immigration processes when deciding

whether to grant bail, but there is nothing currently in place that ensures that this behaviour is considered consistently or indeed given focus equal to the factors already particularised and considered in every case.

1.30 am

Baroness Hamwee (LD): My Lords, given the hour, I shall say simply that I am grateful to the Minister, as always; her careful and detailed responses deserve to be read properly when one can see the print. I beg leave to withdraw the amendment.

Amendment 137A withdrawn.

Amendments 137B to 137D not moved.

Clause 45 agreed.

Clause 46 agreed.

Schedule 7 agreed.

Clause 47 agreed.

Amendment 138

Moved by ***Lord Paddick***

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

"Immigration rules since December 2020: report on effects

(1) Before bringing any provisions of this Part into force by regulations, the Secretary of State must commission and lay before Parliament an independent report on the effects of its immigration rules on the UK economy and public services since December 2020.

(2) The areas to be covered by the report must include but are not limited to—

(a) food supply;

(b) fuel supply;

(c) hospitality and tourism;

(d) the NHS;

(e) social care; and

(f) construction."

Member's explanatory statement

This new Clause would require the Government to commission and publish an independent report on the effects of its Immigration Rules on the UK economy and public services since December 2020.

Lord Paddick (LD): My Lords, in moving my amendment I shall speak also to the other amendments in the group. The contention of many noble Lords and many NGOs, including the UNHCR, is that the measures contained in the Bill will not achieve the objectives the Government hope will result. In addition, tightening immigration controls, including ending European Union free movement, is believed to be having a detrimental impact on the UK economy and public services. Worker shortages in the National Health Service and social care, and shortages in the agriculture, hospitality and construction sectors, are all believed to be the result of changes made to the Immigration Rules since the end of the Brexit transition period.

A points-based immigration system may allow unlimited numbers of highly paid workers to enter the UK, but what about lower-paid but essential workers who are now excluded? Amendment 138 requires an independent report to be laid before Parliament on the impact on the UK economy and public services of changes to the Immigration Rules since December 2020, and further requires that the immigration control provisions in the Bill are not brought into force until that has been done.

As I have said in debate on previous groups, a decade ago, the Home Office was processing more than twice as many asylum claims as it is now but had fewer delays and fewer successful appeals against its decisions. For the record, in 2002, 84,132 people sought asylum in the UK and in 2019 it was 35,737. There are also far fewer removals and far more illegal immigrants living in the UK than there were then. It appears that the Home Office is less efficient and less effective than it was a decade ago.

Amendment 141 calls for an independent operations management review of the processing of asylum claims in the Home Office and of the removal mechanisms for those whose leave to remain has expired. The review should be about accuracy and fairness as well as efficiency. My consultancy fees are very reasonable, but the Home Office might not consider me independent enough to carry out such a review. But seriously, we need to understand why the Home Office is not as effective and efficient as it was.

The Minister repeatedly cites the impact of the coronavirus pandemic on the ability of the Home Office to operate effectively, although the number claiming asylum dropped significantly because of Covid as well. If the hold-ups are due to the short-term impact of the pandemic, there is no need for all this draconian legislation aimed at reducing the numbers claiming asylum. We need to establish the real reasons for long delays in initial decisions, and for the failure to remove those whose asylum claims have failed.

The Minister talked about what people voted for in 2019, by which I presume she meant "taking back control of our borders". Not only has visa-free entry from the EU and EEA countries continued since we left the EU, but citizens of 10 more countries have been added to those EU and EEA citizens who can now use the e-passport gates at airports, for example. Whereas before, these individuals would have had to supply the address of where they would be staying and demonstrate that they had sufficient funds to sustain them during their visit without working illegally, now they just waltz in, no questions asked. Of course, with no record of where in the UK they are going and no active follow-up if they fail to leave, it is possible for these individuals to remain in the UK indefinitely and to work in the grey market.

Amendment 191 would require the Secretary of State to publish a report on the number of people living in the UK in the past five years without leave to remain. The report would have to contain information on those entering with or without a visa, the type of visa if they entered using one, and the number of such persons who have been removed. If there are too many immigrants in the UK—the facts are contested, and I accept that public opinion may not reflect the facts—the public need to know how many of these overstayers are the result of failed asylum claims and how many are overstayers for other reasons.

Taking back control of our borders does not mean throwing them open to even more people and taking no effective action to remove those who overstay. Our contention is that asylum seekers are being unfairly

[LORD PADDICK]
targeted and stigmatised by this Government and this Bill. The reality is very different, but without the facts, no one can be certain. Amendment 193 in the name of the noble Baroness, Lady Neville-Rolfe, makes a similar point, although the data she would require to be published is itself targeted on asylum seekers.

Before we take drastic measures that target the 6% of immigrants to this country who are asylum seekers, we need to know what is going on with the other 94% and with the people—estimated to be over a million—who are no longer legally in the UK. I beg to move Amendment 138.

Baroness Neville-Rolfe (Con): My Lords, I will speak to Amendment 193 in my name, and I am grateful to the noble Lord, Lord Green of Deddington, and my noble friend Lord Hodgson of Astley Abbotts for their support. Indeed, I should say that I am grateful to the noble Lord, Lord Green, more broadly, as he has been kind enough to speak more brilliantly than I could have done to amendments in my name during my lonely period of Covid isolation. I am also grateful for the good wishes of others in my absence.

Noble Lords will know of the importance that I attach to numbers and to reporting in all Bills that we scrutinise in this House. My Amendment 193 would require the Secretary of State to ensure that information is regularly published on immigration, including data on both asylum and other immigration—just to clarify to the noble Lord, Lord Paddick—and also weekly figures on those entering the UK across the English Channel. I note that I might have drafted that more generously to include other sea routes used by small boats bringing migrants to the UK, as the dreadful people smugglers shift to any viable sea route.

I have tabled the amendment for two reasons. First, many years ago when I was the home affairs adviser in the Downing Street Policy Unit, I discovered just how difficult it was to get up-to-date figures out of Croydon. The International Passenger Survey improved things, but I believe that it is no longer routinely completed at UK points of entry. I need to understand from my noble friend the Minister what data the department is now collecting on immigration and asylum, how often this is published and how up to date it is when it is published. Since Brexit, the system has changed. It makes it doubly important to have proper data, and to have it regularly—I think there is agreement across the Committee on that. I worry that that is now lacking. This matters, whatever your position on immigration. It is vital to have adequate provision of housing, schooling and other aspects of the care and employment of migrants. We also need to know how the population is growing or steadying.

Secondly, there have been reports in the media that the regular daily or weekly count of migrants crossing the channel might be discontinued, possibly as part of a move to give the Royal Navy control of enforcement. I have no issue with the latter—my son is in the Navy Reserve and the British Navy warms our hearts. However, I cannot accept this needless reduction in transparency.

It is too late to argue about what has been said by the previous speaker, but I have sympathy with some of the amendments in this group, in so far as they relate to the provision of proper data. Everyone—from the Secretary of State herself to hard-working Members of this House—needs to have reliable and regular facts. Brexit is an enormous change and we need to be sure that the flow of migrants—some welcome, some less so—is turning out as anticipated.

Lord Hodgson of Astley Abbotts (Con): My Lords, I have put my name to Amendment 193. I last spoke at 11.04 pm and it is now 1.30 am, so I understand that I need to push on.

My noble friend has made the case for Amendment 193 and the importance of data. As some Members of your Lordships' House know, I am very interested in demography and the overall shape of the population of this country: how it is growing and the impacts of that, and the long-term impacts, because these things take 25 or 30 years to reach their full impact. In judging the population growth of this country, there are really only two hard numbers: the number of births and the number of deaths and the natural increase. The rest are, to a greater or lesser extent, all estimates.

My noble friend referred to the International Passenger Survey. It is of course voluntary, so people do not have to answer. It is a statement of intent when they do answer, so they may say, "I am going to be carpenter in Birmingham", but end up a carpenter in Cardiff, because that is where the jobs are. It is very imprecise in the quality and quantity of its data. We need a major drive on getting accurate figures, because that would dispel some of the accusations, allegations and anecdotes that tend to bedevil discussion of these matters. In that sense, I support what my noble friend wishes to achieve in Amendment 193.

I also support what the noble Lord, Lord Paddick, is trying to achieve, particularly in Amendment 141A, on overstay. That is another issue about which the public is very concerned and we do not have a clear picture. A clear picture would be really valuable in lowering the temperature and getting some transparency.

I also want to speak to his Amendment 138. When I first saw it, I thought that the noble Lord, Lord Paddick, had had a damascene moment. Then I saw that he had swerved away from the real implications of what he could have sought to achieve with this amendment. If we are to have a sensible discussion about immigration, population change and impact, it needs to be wider than what the noble Lord is seeking to achieve in Amendment 138. It needs to think about the impact on our demand for housing, as referred to by my noble friend Lady Neville-Rolfe. We live 2.1 people per dwelling, so if we have 40,000 asylum seekers, we will need 17,000 homes; and if we have 250,000 immigrants, as we have at the moment, we will need 100,000 homes. There are wider implications which our fellow citizens are rightly concerned about. There is also the impact on our environment, building, the green belt, farmland and our ability to feed ourselves, and our ability to reach our climate change goals, all of which are of great concern to different interest groups around the country.

I have just had some polling done ahead of my Private Member's Bill. Some 71% of the people questioned feel that this country is overcrowded. Some 63% think

the Government do not have a plan in place to do anything about it. If the polling is rescheduled just to address the minority population, 64% of them think it is overcrowded and are concerned about what may lie ahead during the coming years.

1.45 am

The idea in Amendment 138 is interesting. It proposes that an outside body should comment on some aspects of this problem. I am disappointed that this is essentially what the Migration Advisory Committee is doing—not exactly, but very close. It would be hugely important if the noble Lord, Lord Paddick, were to reframe it to take in the broader impacts on our society. People are interested in and worried about this. They are concerned about what is happening in their community—to housing, the green belt, farmland and our climate change goals.

Amendment 193 says that we need the numbers. We need to know about the overstayers, as Amendment 141A proposes. If the noble Lord, Lord Paddick, could find it in his heart to broaden this issue out and consider it in its widest sense, it would address the in-built concerns that many of our fellow citizens have and would like to see addressed. I should like to see my Government address it, but if the noble Lord, Lord Paddick, is able to persuade this Committee some other way, he will have my support.

Baroness Bennett of Manor Castle (GP): My Lords, I am sure the Committee will be pleased to hear that I am not going to engage with all the ways in which I disagree with the perspective of the noble Lord, Lord Hodgson of Astley Abbots. I will address these amendments specifically.

While I do not necessarily disagree with the intention in Amendment 138 to seek more information, this is entirely in the wrong place and creates confusion. Despite the Long Title of the Bill being about immigration, it is overwhelmingly focused on issues of asylum and refugees. As we have said in other debates, mixing up the right to asylum and the refugee commitments we have made over the course of decades with issues of migration is a real category error. Amendment 138 should not be here.

I particularly want to comment on Amendment 141, which is a call for a report on the operation and effectiveness of the Home Office. In relation to subsection (1) of the proposed new clause, a disturbing perspective is that one of the Home Office's great problems is that it has two jobs: one is to police and control; it is also supposed to facilitate and assist people coming to the UK when they arrive here. Given its association with the phrase "hostile environment", it is known for controlling and policing, rather than for facilitating and assisting. Following the Windrush scandal, the Green Party proposed that the Home Office should be split into a ministry of the interior, focused on law and order, and a department focused on providing support and assistance for refugees and migrants. That would make a lot of sense. Subsection (2) of the new clause proposed in the amendment tabled by the noble Lord, Lord Paddick, which talks about efficiency including fairness, addresses this to some degree. However, if we are to have any kind of assessment of the Home Office, we cannot look at one side without looking at the other.

Given the hour, I shall stop there.

Lord Coaker (Lab): My Lords, the noble Lord, Lord Paddick, has picked up a number of important points with these amendments. I think the crucial one is Amendment 141, which is for an independent review of the efficiency of the system for processing claims. The backlog of asylum claims, as we have talked about—and as the Government actually accept—is one of the biggest challenges we face in this area. We could resolve that problem by speeding up the process, and getting the appeals process right—where I think over half the claims are successful—would do a lot to help the system. If the Government do not accept Amendment 141, what plans do they have to address the problem that it seeks to overcome?

Every amendment in the group is about fact-finding, evidence and asking the Government to be transparent with data, which is absolutely fundamental to confidence and trust. We all have the problem with data: I quote one figure; the Minister quotes another; you look somewhere else and there is another figure—partly because people use different start dates, different timeframes, et cetera. But getting the data right is really important so that the public can see what is going on, for good or bad.

In respect of that, Amendment 193 is particularly important, especially proposed new paragraph (b), which seeks to probe. What are the Government going to do about the daily migrant figures in respect of those crossing the channel? We know that the news is extremely bad at the moment. The numbers have increased dramatically and now we read that the Home Office is preparing to stop publishing daily figures and go to quarterly figures. That is talked about as a possible plan. What are the plans with respect to that? It looks like burying bad news. They are embarrassing figures, particularly to the Home Secretary, who says consistently that she will bring the migrant crossings under control. All we have seen is them go up and now we see that the way the Government are going to solve it is by refusing to publish the figures daily in the way that they are now. What is the truth of that, what are the plans and what is going to happen with that? At the end of the day, what is at stake is not whether or not it is embarrassing for the Government but the confidence and trust that the British public have in the figures that we produce and in the Government of the day in dealing with this problem.

Lord Sharpe of Epsom (Con): My Lords, I thank the noble Lord, Lord Paddick, for tabling Amendment 138, which I will deal with first.

Before the introduction of the new points-based system, the Government commissioned the independent Migration Advisory Committee—the MAC—to advise, over three reports, on the impacts of EEA migration on the economy and society in the UK, how to align the immigration system with a modern industrial strategy, what best practice could be used to attract the skills from around the world that the UK labour market needs, and issues around salary thresholds in the context of the immigration system. When undertaking its work, the MAC looked at impacts on the economy and public services, as well as on the welfare of the resident population, as a matter of course.

In addition, the Home Office published detailed impact assessments for the main features of the new points-based system, setting out the policy objectives,

[Lord Sharpe of Epsom]
intended effects and likely impacts, including for the skilled worker route, the global talent route and the graduate route.

Both the Home Office and the independent MAC keep the operation of the immigration system under regular review, and the Home Office will fully evaluate the new immigration system in due course. The MAC published its second annual report on 15 December, which looked at a range of topics, including the current labour market and the role of immigration. Its next commissioned report to be published and laid before Parliament, expected in April, will be a review of the impact of the ending of free movement on the social care sector. On the ending of free movement, it is worth noting that while it has tightened requirements for EU and EEA nationals coming to the UK to work, the broader skills threshold and lower salary threshold have benefited non-EEA nationals who want to come to the UK. The global market is not focused just on the EEA.

On Amendment 141, the Government of course recognise that we should always be striving for maximum efficiency. Making decisions quickly and accurately is in the best interests of the individual concerned, as well as representing value for money for the taxpayer and, where there is abuse of the immigration system, ensuring that it is dealt with effectively.

The Government do not think, however, that paying management consultants to look into these matters later this year is necessary, well timed or a good use of public money. I must observe that when we are talking about consultants, we are usually abused by the Opposition Benches for overspending on them. Reports by the Independent Chief Inspector of Borders and Immigration, the National Audit Office and others continue to provide insights and good practice to build on, as well as highlight the complexities and frustrations of the system within which Home Office staff have to operate.

I should like to assure noble Lords that, as part of our work to operationalise the Bill, we are drawing up plans to monitor and evaluate its impacts and to develop the evidence base to support further policy work. We also publish immigration quarterly statistics, including on asylum and returns.

I turn to Amendments 141A, 191 and 193. I can assure noble Lords that the Home Office publishes a whole range of immigration data on a regular basis and has done so for many years. We regularly publish statistics on data collected under the exit checks programme, which shows the proportion of people known to have left the country or obtained further leave to remain by the end of their visas. It cannot, however, show the number of people who have overstayed their visas, as they may have left the country and their departure has not been linked to their visa.

We regularly review the statistics that we publish as a department in line with the code of practice for statistics and, where it is clearly in the public interest to do so, we will publish new statistics and amend existing statistics to ensure that they continue to provide transparency around key government policies. We have recently announced our intention to publish a quarterly statistics report on irregular migration, which will include statistics on the number of people crossing the English Channel in small boats. In answer to the question of the noble Lord, Lord Coaker, the first release will be February—this month.

Where it is clearly in the public interest to have more frequent releases of information, we will consider that, as we have done with the EU settlement scheme, for which we publish monthly statistics. However, we must weigh up the need for more statistics against other considerations. This includes the practicalities and costs of producing robust, assured data derived from our operational systems, presenting data in a way that enhances the public's understanding of key issues and puts the data into appropriate context, as well as the need to prioritise the department's resources.

I turn to the specific elements of Amendment 141A. The noble Baroness, Lady Hamwee, and the noble Lord, Lord Paddick, also asked for reassurance as to the steps taken to monitor the operation of each visa regime. The UK keeps its visa regime under regular review. Decisions on changes are always taken in the round and a range of factors are considered. As part of this, we assess both visa national and non-visa national schemes in terms of risk and reward to UK interests, using data from a range of sources that span across immigration and national security interests.

The Government are committed to strengthening the security of our borders by ensuring that everyone who wishes to travel to the UK, except British and Irish citizens, has permission to do so before they travel. To fill the current gap in advance permissions, we will introduce an electronic travel authorisation scheme—the ETA scheme—which has been referred to already, for visitors and passengers transiting through the UK who do not currently need a visa for short stays or who do not already have an immigration status prior to travelling, which will be discussed in more detail on the last day of Committee.

Noble Lords further asked for details on how overstayers are tracked and monitored within the UK. The Home Office uses a multifaceted approach to tackling illegal migration, balancing the most effective measures with ensuring the proper and efficient use of taxpayers' money. I was asked why it is so difficult to remove people who have overstayed. We deal with significant and complex challenges when seeking to return those with no right to be in the UK to their country of origin or lawful place of return. They can include travel documentation, late applications, late appeals and broader non-compliance with a lawful returns process. The Government are doing everything possible to reduce legal challenges and to increase the numbers of those not entitled to remain in the UK being removed.

In answer to a question, somewhat tangentially, on the Covid-19 pandemic, it has affected our ability to remove as many people as in previous years. That is obviously due to travel restrictions being in place, among other things, including fewer scheduled airlines operating, and significant disruption to other services that support the removal of failed asylum seekers, such as court closures and delays.

Overstaying is against the law, unnecessarily costs the taxpayer money and is unfair on law-abiding migrants who come to the UK through the legal channels. Those who have no right to remain in the UK and do

not return home voluntarily should be in no doubt of our determination to remove them. The Home Office takes its responsibilities to uphold the law with the utmost rigour. This Bill and the wider *New Plan for Immigration*, the most comprehensive reform in decades, will provide the path to fixing this broken asylum and illegal migration system.

There will always be some who refuse to comply with the Immigration Rules without contact with the relevant authorities and I assure the Committee that the Home Office never gives up trying to trace those individuals and act against them. For those in the UK with no right to stay, we offer an in-house voluntary return service to aid their removal from the UK. Ultimately, there are those who will not leave the UK; we will arrest, detain and remove those who are most resolute in maintaining an unlawful presence in the UK. Given all that, I ask the noble Lord to withdraw his amendment.

2 am

Baroness Neville-Rolfe (Con): I thank my noble friend for the helpful tour d'horizon, but I think he was saying that the weekly figures for the numbers of those entering the UK across the channel will now cease and be replaced by quarterly figures. If I have misunderstood that, perhaps he could let me know. It would be helpful before Report to see some examples of the various statistics that he outlined, to see whether they actually supply the data that we feel we need for the future, to monitor developments in this important area.

Lord Sharpe of Epsom (Con): That is right, yes. We will publish those statistics as my noble friend said.

Baroness Neville-Rolfe (Con): It would be helpful to access them; it is very difficult as a Back-Bencher. The quarterly/weekly point was the key one.

Lord Coaker (Lab): I just want to be clear: the Government are moving from daily statistics on the number of migrants crossing the channel to publishing those quarterly. When is that going to happen? Has it happened already? Where was it announced? What is the reason for the change?

Lord Sharpe of Epsom (Con): I think I said that the first set of statistics of that type will be published this month, in February. Discretion needs to be maintained to ensure that we can respond to new and emerging issues. I do not know when the decision was originally taken.

Baroness Neville-Rolfe (Con): But that means that we will no longer get daily or weekly figures. We will get only quarterly figures in future.

Lord Sharpe of Epsom (Con): Yes, that is my information.

Lord Coaker (Lab): Why is it happening? So far as transparency and trust in the Government's figures on migration and what is clearly a difficult problem are concerned, why do they believe that the public would see this as anything other than burying bad news? Does the Minister believe that the Government would have changed the figures to quarterly if they were really good?

Lord Sharpe of Epsom (Con): I am not sure that I can answer that question.

Lord Paddick (LD): My Lords, I thank the Minister for his comprehensive reply, although clearly some of the answers have not met a favourable response from the Committee. I have a couple of points. First, we need to understand why the Home Office appears to have been much more effective and efficient 10 years ago than it is now in the number of claims processed, the backlog and the number of successful appeals. Despite his reply, we are still no further forward in understanding why that was the case and he gave no indication that we would ever know. It is important to know, because a lot of the Bill is about reducing the number of asylum claims to relieve the pressure on the Home Office—but it was dealing with twice as many claims 10 years ago.

The noble Lord, Lord Hodgson of Astley Abbotts, was concerned about the statistics I was asking for not being comprehensive. He talked about concerns about overcrowding. Some 94% of immigrants to this country are not asylum seekers and refugees, and 94% of this Bill is about asylum seekers and refugees. Having said that, I beg leave to withdraw the amendment.

Amendment 138 withdrawn.

Amendment 139

Moved by ***Baroness Ludford***

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

"Requirement for the Secretary of State to waive the full capacity requirement

In section 44A of the British Nationality Act 1981, for "may" substitute "must"."

Member's explanatory statement

This would give effect to the recommendation of the Joint Committee on Human Rights to require the Secretary of State to waive the requirement for a person to have full capacity if it is in that person's best interests to do so.

Baroness Ludford (LD): My Lords, Amendment 139 is another suggestion from the Joint Committee on Human Rights. I move it in the name of, and at the invitation of, the noble Lord, Lord Dubs.

I am not sure why this amendment is in this place because it actually refers to Part 1 of the Bill, but anyway, that is a mystery. Clause 7 allows the Secretary of State the discretion to grant British citizenship or British overseas territory citizenship to adults where they would have had that citizenship but for historical unfairness or other exceptional circumstances. Clause 7 specifies that it applies to adults only where they are "of full age and capacity".

Requiring a person to be of full capacity in order to benefit from these provisions would seem to discriminate, potentially, against people who do not have full capacity.

[Baroness Ludford]

Section 44A of the British Nationality Act provides that where full capacity is required, it may be waived if that is

"in the applicant's best interests."

This is obviously welcome, but it is not immediately obvious why those lacking full capacity should not always have the requirement for full capacity waived if it is in their best interests. Hence, the proposed amendment is to Section 44A of the BNA so that the Secretary of State "must", not "may", waive the requirement for a person to have full capacity if it is in the applicant's best interests, so as not to unfairly disadvantage those lacking full capacity.

Lord Paddick (LD): My Lords, we support this amendment for the reasons that my noble friend has explained.

Lord Coaker (Lab): My Lords, we have little to add. This seems to be a common-sense change that embeds an existing waiver, so that it applies in all cases where it is in a person's best interests. It would be helpful if the Minister could detail for the House what is practically understood by "full capacity" and give examples of situations in which this requirement may be waived.

Baroness Williams of Trafford (Con): My Lords, the Secretary of State has discretion to waive the full capacity requirement, and the introduction of this amendment would make it a statutory requirement rather than a discretionary power for the full capacity requirement to be waived if doing so would be in the applicant's best interests.

I know that prior to the change made in 2006, UKVI sometimes had to refuse an application even where, in the opinion of the applicant's carer or responsible family member, it would have been in the applicant's best interests to grant it and the applicant met all other relevant criteria. This was clearly an undesirable position and we think it has been rectified successfully by the introduction of the current discretionary powers, since when no applications have been refused solely on full capacity grounds. This indicates that the 2006 change has been more than adequate in allowing decisions to be taken in the best interests of the applicant, in line with the principles set out in the mental capacity legislation and the Adults with Incapacity (Scotland) Act 2000.

It is not the only area of nationality law that is discretionary. It is right that the Secretary of State's ability to waive the full capacity requirement is discretionary in nature, to allow her fully to consider all the relevant factors which apply to the applicant. But where it is in an applicant's best interests, we expect UKVI to continue to exercise discretion over the full capacity requirement, employing the necessary sensitivity and flexibility in the consideration of applications. We do not believe the proposed amendment would serve any more practical benefit than is already derived from the existing provisions. I hope the noble Baroness, on behalf of the noble Lord, Lord Dubs, will withdraw the amendment.

Baroness Ludford (LD): My Lords, the Home Office is inordinately fond of discretion rather than the clear rules which would mean that applicants and other users knew where they stood. This reminds me of the debate we had last week on comprehensive sickness insurance: although there was a welcome concession by the Minister on one aspect—family reunion—she said that no application for naturalisation had been refused on the ground of a historical lack of CSI. The Home Office was relying there on "we have never refused it", just as it is here. Well, if you have never refused it, you do not need the discretion, and it could become a rule, as Amendment 139 specifies. That would mean that everybody was clear about their rights and did not have to gamble, sometimes paying fees, without knowing how the discretion will be used. However, the Home Office turns round and says that it has never refused anybody, which is meant to earn Brownie points. It seems to me that it is all one way: the Home Office wants to keep its discretion, keep people in the dark and maybe make them pay fees, without knowing if they will get what they are paying for.

It is late and I am quite cross—and on that note I hear what the Minister says and I beg leave to withdraw the amendment.

Amendment 139 withdrawn.

Amendments 140 to 141A not moved.

Clause 48: Interpretation of Part etc

Debate on whether Clause 48 should stand part of the Bill.

Baroness Hamwee (LD): My Lords, I remarked some time ago that the noble Lord, Lord Macdonald, had sat through nine and a half hours of debate. I think the noble Baroness, Lady Neuberger, has sat through over 11 hours waiting to speak to this group of amendments, and I really feel I should let her go first—but I am not going to. My noble friend Lord Paddick and I oppose all the clauses in Part 4 standing part. I am well aware that noble Lords would like something quite cursory, but in opposing this whole Part of the Bill, I think I need to explain why.

The first of the clauses is Clause 38, which is, you might say, pre-sequential on the other clauses. The basis for all our objections may be summed up in the heading to Clause 51, "Use of scientific methods in age assessments". This is not a scientific subject. Any noble Lord who has looked years later at school photograph will understand that. I was always at the back because I was one of the tallest in the class. My best friend, two months older than me, was tiny and she had to sit on the ground in front of the first seated row. We are not all the same and we do not all develop in the same way and at the same rate.

We are told by the Refugee and Migrant Children's Consortium, a coalition of more than 60 organisations—and the point is made by others in the sector—that even those from similar ethnic backgrounds, who have grown up in the same social and economic environment, display significant physical, emotional and developmental differences. It says:

"These differences can be exacerbated by experiences of adversity, conflict, violence and the migration process."

I am glad that it mentioned that last. Noble Lords will appreciate that those are all factors which, as far as I know, were not experienced by a class of girls in Manchester in the 1960s, so that did not account for all the differences.

2.15 am

Anyone who takes an interest in the subject will have heard that the registration of births and the importance of chronological age differs across the world, that often individuals have never had any official identity document, that dates may be calculated in a different manner, or that there is confusion about the calculation. Documents may have had to be destroyed en route. I accept that sometimes that is done cynically by an asylum seeker, but that is by no means always the reason. It may have been at the instigation of traffickers and smugglers, or documents may have been lost. Because age assessment is not scientific, inevitably sometimes a young adult may be treated as a child, but noble Lords should consider the balance of risk—in other words, as one example, the risk of placing a child in accommodation with adult strangers. The British Dental Association has sent noble Lords a briefing regarding its opposition to these provisions, and it is very powerful.

Before I run through other specific amendments, I want to say that I very much support Amendment 151C in the name of the noble Lord, Lord Coaker. I am pleased that my noble friend Lady Ludford's name is added to it. I would improve it by extracting the references to the clauses that we get rid of; I would apply it to all age assessments.

Amendments 142 and 143 would make it a matter for the local authority to decide how to proceed, without reference to the Secretary of State. Age assessments are a function of child protection and safeguarding. If central government is to get involved, that should be to support social workers, who really do not need to be undermined. Amendments 144, 145 and 150 would substitute a reasonable degree of likelihood for the balance of probabilities as the standard of proof. Why include a standard of proof above the current standard? By definition, a higher standard will increase the risk of a child being treated as an adult.

Amendment 149 is to Clause 52, which allows the Secretary of State to make regulations about the consequences of an age-disputed person showing a "lack of co-operation". I am very uneasy that the Secretary of State can make—and, obviously, keep making and varying—regulations that mean that conclusions can be drawn. It is sort of the equivalent of "no comment", but the implication is, "You've got me there, guv." Conclusions will be drawn from someone so young, whether they are under or over 18, who does not know the language well or perhaps does not know it at all, who is intimidated—whether or not that is intended—by the whole situation, and who is affected by his or her experiences.

We support Amendments 146 to 148 in the group but, in brief—not that brief, but not that long, given the seriousness of the subject—we want to see the back of these clauses, which are not worthy of a nation that welcomes refugees.

Baroness Lister of Burtersett (Lab): My Lords, I speak to Amendments 146 and 148 in my name and that of the noble Baroness, Lady Neuberger, who has sat there so patiently—well, I am not sure about patiently, but she has sat there so long, getting increasingly frustrated, I think, at the late hour, and understandably so. I am really grateful to her for staying to give her support. I speak also in support of Amendment 147, to which I have added my name. I have tabled my amendments on behalf of the British Dental Association, which also supports Amendment 147, and I am grateful to the association for its help. Its grave concerns echo those of many relevant professional bodies such as the BMA, the Royal College of Paediatrics and Child Health, and the British Association of Social Workers, together with children's and refugee organisations, the UNHCR and the JCHR.

It is regrettable that the entire content of Part 4 was added towards the end of the Commons Committee stage, meaning there was no pre-legislative scrutiny of the controversial measures in this part, making it impossible for MPs to table amendments to it in Committee. This was quite rightly criticised by the Constitution Committee. It is adding insult to injury that we are now expected to scrutinise these important clauses in the middle of the night—at 2.20 am. I just want that noted in *Hansard*: 20 past two in the morning. These are really significant clauses, and this is absolutely ridiculous. I want that put on the record. An issue as important and sensitive as this deserves detailed and in-depth scrutiny, and the Government have made it very difficult to deliver that. Just notice how many noble Lords there are left here. I am amazed that there as many as there are, but this is not the kind of scrutiny these clauses deserve, and it will be important that we scrutinise them better on Report than we otherwise would have.

Reading the briefings from various professional organisations, I think that two clear messages recur. First, the use of so-called scientific methods to assess age in this context involves a wide margin of error. Secondly, it is unethical. I repeat that: it is unethical. The method mentioned most often in the Home Office communications is dental X-rays. I remind the Minister that the British Dental Association has been unequivocal in its condemnation of the use of dental age checks and has vigorously opposed the use of dental X-rays to establish the age of young asylum seekers. It considers this method highly inaccurate for assessing age, but crucially points out how unethical it is to expose children to radiation when there is no medical benefit. X-rays might not be considered an invasive procedure, but they carry a small risk of long-term physical impact, the association tells me. This risk is cumulative. Successive exposures increase the risk, meaning each exposure over a lifetime must be clinically justified. The BDA says that:

> "For this reason best practice in this area dictates that exposure to radiation should be kept as low as reasonably possible … X-rays should be carried out … only where there is a well-defined potential clinical benefit, which must always outweigh the potential clinical harm."

Clearly, if used for age assessment, an X-ray carries no clinical benefit. Importantly, this method is also not nearly as accurate as the Home Office would have us believe. The BDA points out that:

[Baroness Lister of Burtersett]

"Numerous studies have shown that, despite improving technologies, the use of dental X-rays can over- or under-estimate the age of adolescents significantly … The rate of dental maturation can be affected by factors such as nutritional status, infections … which are highly variable among migrant populations in particular. Genetic factors and ethnicity can also cause variation."

While a number of European countries have been using dental X-rays for age assessments, many are showing a desire to move away from this method. For example, in Italy, dental age checks were used widely until 2017. However, the difficulty in interpreting results, especially considering medical factors such as malnutrition as well as ethical concerns over the procedure, meant that the country moved towards a broader spectrum of examination, and now any radiological tests have to be authorised by court order as a last-resort measure. Dentists and doctors are health professionals, not border guards. They should be allowed to put their patients' health first and not be put in a position to make judgments that are clinically or ethically inappropriate.

In the light of all this, I am very concerned about these clauses, particularly Clause 51. It states that the scientific methods that will be used for age assessment will be specified in regulations only after the Government have sought scientific advice that the method is appropriate for assessing a person's age, but it does not specify what would constitute "scientific advice" for this purpose. The supposed safeguard needs to be significantly strengthened to ensure that the relevant medical, dental and scientific professional bodies are consulted, not just on the accuracy of the proposed methods but on whether the method is appropriate and ethical. Amendment 146 ensures that there are stronger safeguards in this respect.

I am also concerned that Clause 51(9) dictates that age assessment methods which are not specified in regulations under subsection (1) can nevertheless still be used. This means that, even if a method were considered inaccurate, unethical and/or otherwise inappropriate when the Government sought scientific advice, it could still end up being widely used. I would appreciate the Minister's explanation as to why he believes that such a loophole is necessary and why we would want to allow methods which, after careful consideration, were deemed by experts not to be appropriate still to be used. I urge the Government to delete Clause 51(9) as my Amendment 148 does.

Finally with reference to Amendment 147, under Clause 51(6) and (7) an age-disputed person would have little choice but to agree to any proposed method. That is not free, informed and genuine consent—a key legal requirement before any medical procedure is carried out. This is, as the BDA says, quite simply coercion. I urge the Minister to consider the potential scenario where an underage asylum seeker who might well have suffered abuse, including possibly sexual abuse, is considered not credible because they refuse to undergo an invasive dental examination, and I urge him to delete Clause 51(6) and (7).

Finally, I also urge the Minister to ensure that the newly created Age Estimation Science Advisory Committee, which will give guidance to the Government on scientific methods of age assessment and set out best practice on the use of such methods, includes members representing all the relevant dental, medical and scientific national bodies. I hope he can give us an assurance on that point.

Baroness Neuberger (CB): My Lords, I support the noble Baroness, Lady Lister of Burtersett, in her Amendments 146 and 148. I thank her and the noble Baroness, Lady Hamwee, for their sympathy, but they too have been sitting here for a very long time, whereas I got here relatively late—admittedly after quite a long day, and I will be here late tomorrow.

This part of the Bill is seriously concerning. We know, as the noble Baronesses already said, that age assessment techniques are notoriously inaccurate. These so-called scientific techniques are opposed by the BMA, the UNHCR, the Refugee Council, the medical and dental royal colleges and all sorts of associations and many others; I am immensely grateful to all those organisations that have provided briefing on this matter.

It is very late indeed, and I am extremely glad that we have the time on the record in *Hansard*. However, I want to quote the Minister in the other place, because it is important that we concentrate on this. The Minister said that

"the Secretary of State may only specify a scientific method of age assessment in regulations once she has sought scientific advice and determined that the method in question is appropriate for assessing a person's age. I expect that scientific advice to also cover related ethical considerations".—[*Official Report*, Commons, Nationality and Borders Bill Committee, 2/11/21; col. 559.]

This kind of age assessment is unethical per se; therefore, we need to question this quite deeply.

The use of these techniques, as the noble Baroness, Lady Lister, said, does not benefit the children or young people concerned, so how on earth can they be justified and ethical? We already know that medical methods used for age assessment can be invasive and potentially harmful—ionising radiation is one example. To make it all worse, the evidentiary burden on local authorities assessing age is increased in the Bill, and they may be compelled to provide evidence to the Home Office even where no doubts have been raised about a child claimant's age. That means that there is the potential to increase the number of unnecessary age assessments conducted, and the risk that children are incorrectly assessed as adults and diverted to adult reception and immigration processes, which might include detention.

This really is unethical. Other countries may be doing it—although they are increasingly desisting from it on ethical grounds. I do not believe that we should allow it. It was confirmed in Committee in the other place that the Government will determine that any scientific method is appropriate for assessing a person's age and comply with all relevant frameworks in relation to the scientific methods chosen. Given this, will the Government put a commitment to obtain written approval from relevant medical and dental bodies on the face of this Bill? That is the very least that we can expect of something that is, on the face of it, so unethical.

2.30 am

Baroness Neville-Rolfe (Con): My Lords, I rise to support Amendment 151, which is in the name of the noble Lord, Lord Green of Deddington, and speak to

my Amendment 151A. I think it is fair to say that I have been utterly appalled by the number of asylum seekers pretending to be children—more than 1,100 migrants in the 12 months to September 2021, according to Migration Watch. I understand that this represents a big rise in this fraud, with 66% of concluded decisions in the year to September 2021 being persons who are 18 or over. This is despite the fact that many arrivals arrive without documents. The number will of course grow as the numbers across the channel in boats grow—assuming we can get at those numbers.

There are also substantial incentives for adult asylum seekers to be treated as children, such as the granting of housing and wider support. However, it is the wider implications that are worrying me. Mature boys put alongside vulnerable girls in schools can wreck their progress and even lead to abuse. Mixed ages in social care are a recipe for disaster. And it can be worse than that: the Parsons Green bomber pretended to be 16 when he was much older.

The noble Lord, Lord Green, tabled his amendment because he believes that the system for checking the age of asylum claimants is so loose that it gives the benefit of the doubt to those saying, without proof, that they are minors. So I think there is some agreement that there is a problem here. But all of that is a long way of saying that we must have an extremely rigorous system of age assessment, and I look forward to hearing from my noble friend how this will be achieved in practice. I particularly support new subsection (3) proposed by Amendment 151 which, if adopted, would prevent those of undetermined age being placed alongside minors in schools or accommodation, because this is at the heart of my concern.

From listening to today's debate, it is obvious that this is an area of widespread concern—and for different reasons, depending on your perspective. I therefore tabled Amendment 151A, which would require a review of the age assessment provisions after two years to ensure that they are effective in providing a robust system of age verification. A report will be made to Parliament so that we can all assess progress. I hope that this simple idea will find favour with the House.

Baroness Ludford (LD): I will speak to Amendment 147 in the name of the noble Lord, Lord Dubs, and support Amendment 151C in the name of the noble Lord, Lord Coaker. I share the dismay of others that we are discussing a whole part of the Bill between 2.15 am and, maybe, three in the morning. We are being punished because we want decent scrutiny of this Bill. The refusal of the Government to allow us the extra day we need in Committee is disgraceful.

Anyway, given the difficulties with assessing age, occasionally young adults may be treated as children. However, as long as there is good supervision in children's placements, this is less of a risk than when children are incorrectly treated as adults and placed in immigration detention alone, accommodated with adults and with no safeguarding measures.

A significant number of disputes are not actually about whether an individual is a child or an adult but about whether they are a 15 or a 17 year-old child, so they are not relevant to whether the individual will be categorised as an adult or a child. Current Department for Education statutory guidance states that local authority age assessments should be carried out only when there is reason to doubt that the individual is the age that they claim, and

"should not be a routine part of a local authority's assessment".

The Association of Directors of Children's Services says that they should not be undertaken unless "absolutely necessary". Clause 48 would result in almost every child without recognised documentation going through the age assessment process. That is excessive.

Amendment 147 would delete Clause 51(6) and (7), as the noble Baroness, Lady Lister, said, so that refusal to consent to scientific procedures should not feature in an assessment of credibility. The British Association of Social Workers calls that part of Clause 51 "grotesque coercion"—I think that another organisation also referred to coercion—and one can see why. Amendment 151C, which was tabled by the noble Lord, Lord Coaker, and supported by me and the noble and learned Baroness, Lady Butler-Sloss, would rightly impose strict conditions on any procedure. I expect that we will hear more about that.

Age assessment is not susceptible to a scientific silver bullet. It needs a multiagency holistic approach. Scientific methods can be very invasive and even traumatic for a young person, and are hugely controversial. The Government seem to be seeking a quick fix, but it will not work and is neither legitimate nor—as the noble Baroness, Lady Lister, said—ethical. In addition, the Government are leaving themselves a lot of scope to legislate by regulations. If it were not this time in the morning, I would have said more, but I will leave things there.

Baroness Bennett of Manor Castle (GP): My Lords, I express the Green group's support for everything said by the noble Baronesses, Lady Hamwee, Lady Lister, Lady Neuberger and Lady Ludford, and for all the attempts to rein in the Government's intention here. We have all received many briefings addressing this, but I shall refer to that from the British Association of Social Workers, which speaks of the Government

"ploughing ahead despite warnings from the sector".

As the noble Baroness, Lady Lister, said, those warnings of course include the absolute medical experts in this area. If we were to take advice here from either the medical experts or Migration Watch, I know which I would take.

I want to make one observation and take the Chamber back 12 hours to when the noble Lord, Lord Purvis of Tweed, in an Oral Question on international development, spoke about a child being born in Sudan on the floor, with the umbilical cord severed with a stick. Think about what the life of a child growing up in those circumstances is like. That child will probably look, sound and behave differently from a gently nurtured child in the British environment. It may be hard to identify their age, but they are still developmentally a child. They still have the vulnerabilities of the British child; indeed, given all the experiences that they have likely been through, it is not hard to imagine that they have far more vulnerabilities, which we have a responsibility to protect. That responsibility is moral, but also legal.

Lord Hodgson of Astley Abbotts (Con): I have just two sentences, really. I think it is unfair of the noble Baroness, Lady Bennett of Manor Castle, to disregard Migration Watch's evidence in the off-hand way that she does. If she thinks it is inaccurate, that is one thing, but as an organisation it produces figures for which there is an evidential basis. It should not be disregarded just because it raises uncomfortable truths.

I understand the ethical concerns raised by the noble Baronesses, Lady Lister and Lady Neuberger, and others. On the other side of the scale is the question of maintaining public trust and confidence. We have a system that works clearly. It is important that we should bear that in mind, so the provisions of Amendment 151 seem to have some sense. In particular, I think that my noble friend Lady Neville-Rolfe's suggestion of a review when we have had a chance to see how it all works, watch the evidence, hear the experts, look at the problems, and see what works well or not so well is an excellent idea. I therefore hope that the Government will think about Amendment 151A as providing some bridge between the two sides of this particular argument.

Lord Paddick (LD): My Lords, like the tightening of restrictions on claims of modern slavery, which we will come to in a future group, here we have another solution in search of a problem, although here the proposed solutions are dubiously credible, as noble Lords have said.

Yet again, the Home Office statistics are misleading. In cases where the age of the child is in doubt, it transpires that the person concerned was in fact an adult in less than half of cases in 2019, and that was only in cases where those concerned were suspected of being an adult. Instances of adult asylum seekers claiming to be children in the hope of preferential treatment certainly does not justify the measures set out in Part 4; they are disproportionate to the problem they seek to solve.

I am surprised that we have got this far in the debate and that nobody has mentioned the Royal College of Paediatrics and Child Health—

Baroness Lister of Burtersett (Lab): I did.

Lord Paddick (LD): Perhaps I was not listening—I do apologise. It says that puberty assessment and bone age assessment have been proved scientifically to be unreliable and that paediatricians should not be involved in age assessment. The RCPCH and other medical practitioners, such as dentists, as we have heard, consider it to be unethical to expose anyone to radiation from X-rays unnecessarily for non-clinical purposes. It also believes that age assessment requires informed consent, as other noble Lords have said, which it does not believe vulnerable young people such as asylum seekers are able to give.

No other child would be required to undergo such intrusive and potentially harmful procedures without the consent of a parent or guardian, yet the Government propose to subject unaccompanied child refugees to such procedures where consent would be given by

"another person, of a description specified in regulations made by the Secretary of State".

Can the Minster explain who such a person might be and in what circumstances they would be able to give consent on behalf of the child, or is this yet another case of, "We can't see how we can get around this problem, so let's just say we'll put it in regulations"?

Clause 51(7) says that refusal to undergo age assessment without a reasonable excuse should be taken as damaging to the credibility of a person. As others have said, this is coercion, plain and simple. In any event, the Royal College of Paediatrics and Child Health provides reasonable excuses for not engaging in the kind of scientific methods the Government are proposing, so there is no point in the Government pursuing scientific methods to establish age; there is a reasonable excuse for refusing to engage in the process.

Part 4 should not stand part of the Bill. To be clear, Clauses 48 to 56 should not stand part of the Bill, and the rest is window dressing.

Lord Coaker (Lab): My Lords, it is late, but we need to spend a little time on this whole part of the Bill. Notwithstanding the lateness of the hour and the few Peers who are here, we should not underestimate the number of people across the country who read our deliberations and debates and use them to inform their own views and to find out where the Government and others stand. It is important that we do this.

2.45 am

The Government recognise the significant safeguarding risks of age assessment being done inappropriately, using what are, frankly, untrustworthy methods or without relevant expertise. Their own Explanatory Notes reference this, saying:

"This situation carries significant safeguarding risks. An incorrect determination can result in adults being placed with or alongside children. Conversely, if a child is wrongly assessed to be an adult, they will be deprived of the statutory support owed to them."

Noble Lords can see why this is such an important group and part of the Bill for us to discuss.

We support the concerns raised by the amendments in this group on the freedom of local authorities to use their own expertise to deliver their duties under the Children Act 1989, the changes to the standard of proof required and the need for methods of age assessment to be approved by relevant professional bodies, and we support the particularly crucial amendment to ensure that methods about which no scientific advice has been sought are not able to be used. We also support Amendment 146, in the names of my noble friend Lady Lister and the noble Baroness, Lady Neuberger, who have both spoken on that.

The British Association of Social Workers has warned of the age assessment proposals and the problems they cause. Our key concern with these clauses is that they risk violating children's rights. These are children who have been through trauma, who may have been trafficked, and who may be on their own in the asylum system. Amendment 151C, in my name, would put in common-sense safeguards and restrictions on the use of age assessments to ensure that they do not include unverified methods which claim to be scientific and that they are carried out according to recognised standards.

I am grateful to the noble Baroness, Lady Ludford, and the noble and learned Baroness, Lady Butler-Sloss, for their support for this amendment. It would require

assessments to be done only where there is significant reason to doubt the age of a person, and to be conducted by a social worker and in accordance with the existing leading guidance. It would require an age assessment to be conducted, allowing for an impartial multiagency approach, drawing on all relevant expertise, and it would prevent the Home Secretary approving scientific methods without approval from the relevant professional bodies.

If the Government are not willing to accept the amendment, will the Minister tell us which part of it he feels is not relevant to safeguarding children, considering that it would simply ensure that the process is run by those with relevant expertise and without the use of unapproved methods claiming to be scientific?

The Advocate-General for Scotland (Lord Stewart of Dirleton) (Con): My Lords, I begin by thanking noble Lords who have tabled amendments and contributed to the debate for the thoughtful reflection on the clauses in the Bill which those amendments embody.

Many people who claim to be children when arriving in the UK do not have any definitive documentary evidence to support their claimed age. Unfortunately, some individuals seek to take advantage of the benefits of being treated as a child. A person's age has serious consequences for their eligibility to access services under children's legislation, and it also has significant ramifications for their treatment under the immigration system, so it is absolutely vital that the Home Office has sufficient information about a person's age.

There are serious safeguarding risks associated with wrongly allowing adults to access services and spaces that should be properly reserved for genuine children, and vice-versa. It can also incur considerable financial costs to the taxpayer and undermine the integrity of the system. It has social costs, as parents and children become uneasy about the classrooms that their children inhabit—I am referring to the concerns raised by my noble friend Lady Neville-Rolfe. These reforms are intended to be a package of separate but complementary reforms designed to mitigate those risks. It is likely that the full implementation of these measures will take some time and occur in stages after the Bill has passed. It is also important to note that the age assessment provisions apply only to those individuals who are subject to immigration control.

As part of these reforms, the Government are establishing a decision-making function in the Home Office known as the national age assessment board, which will have the power to conduct age assessments on people whose claimed age is in doubt. It will not apply to every child or people who are obviously children but to those whose claimed age is in doubt. This is an important measure that will provide local authorities with three options upon encountering an age-disputed person. In such circumstances, the local authority can voluntarily refer the person to the NAAB, carry out an age assessment itself or inform the Home Office that it is satisfied that an age-disputed person is the age they claim to be. The Government want this to be a collaborative effort between central and local government, so that improvements in the system can be driven forward. I assure the Committee that age assessments will be conducted only where there is reason to doubt an individual's claimed age.

Under Clause 52, the Secretary of State may make regulations setting out the principles and processes to be followed by those undertaking age assessments. These regulations will apply to local authorities and the NAAB will create a clear and uniform set of standards and support decision-makers in achieving greater consistency.

Many noble Baronesses in the Committee expressed concerns about the scientific aspect of these tests. Let me make it abundantly clear: the Government do not claim that any scientific method in contemplation is, of itself—to borrow a phrase expressed by a noble Lord opposite—a silver bullet. Even where age assessments are conducted thoroughly and reach reasoned conclusions, they are fraught with difficulty. The Government recognise that. That is why we see these scientific methods, if they are found to come up to scratch, as potentially augmenting a process of understanding and giving a view as to a person's age. At present, such methods have a wide margin of error. There have been examples where such assessments have been conducted on the same individual by different social workers and which came to different conclusions about that person's age. Given that context, the use of scientific age assessments represents an additional and important source of evidence to help decision-makers in what we accept is a difficult task. In answer to the noble Baroness, Lady Hamwee, we make no claim that any method provides a complete answer. Rather, methods are complementary to one another and build up the available data.

Reference has been made to practice elsewhere. As stated by the noble Baroness, Lady Lister, I point out that various scientific methods of age assessment are already in use across most European countries. In Finland and Norway, for example, X-rays are taken to examine development of the teeth and the fusion of bones in the wrist. Given the challenges of assessing an individual's age, we see no good reason why the use of such techniques should not also be properly explored in this country. Again in answer to the noble Baroness's point in relation to ionising radiation, I should say that dental X-rays are an acknowledged diagnostic tool used by dentists in this country and the use of ionising radiation in this country is tightly regulated.

Baroness Lister of Burtersett (Lab): I apologise if the Minister was about to come on to this, but they are not being used as a diagnostic tool here. The whole point is that it is unethical to use such techniques when there is no clinical reason for doing so—but perhaps the Minister is going to address the point about the unethical nature of what is being proposed.

Lord Stewart of Dirleton (Con): The point I was making is that they are used as a diagnostic tool in ordinary dentistry. I apologise to the noble Baroness if I—

Baroness Lister of Burtersett (Lab): Of course, but that is for a clinical reason. I realise that is what he meant, but my point is that then there is a reason for it because there is some problem with the child's teeth, which is why they are using it as a diagnostic tool. Here, there is no problem with the child's teeth; it is

[Baroness Lister of Burtersett]
being used for a completely different reason, and the British Dental Association and others say that that is unethical.

Lord Stewart of Dirleton (Con): As the noble Baroness anticipated, I will be going on to deal with the point that she raises.

There has been criticism of the unscientific basis for this. We have recently set up a new Age Estimation Science Advisory Committee to provide the Home Office chief scientific adviser with independent scientific and associated ethical advice recommendations for best practice and advice relating to issues raised by stakeholders on the implementation of scientific methods. The Home Secretary will decide about scientific methods only after considering the Home Office chief scientific adviser's advice. The range of experts included in that committee is broad and includes medical statisticians, paediatric social workers, anthropologists, paediatricians, radiologists and psychiatrists.

As for the matter of allowing for an adverse inference to be drawn by a decision-maker if an individual refuses to undergo a scientific age assessment as specified in regulations without reasonable grounds, the Government recognise that there may be good reasons for refusing to undergo such a scientific age assessment but, where there are no good reasons for refusing consent, it is entirely right that the decision-maker can make that negative inference. Failure to provide for this would allow someone who deliberately and falsely claimed to be a child to simply refuse to co-operate and face no consequence, and that would undermine our ability to mitigate safeguarding risks. The drawing of negative inferences has precedent—for example, in measures bearing on access to welfare assessment.

In answer to a point raised by the noble Lord, Lord Paddick, the figures that I have are that, in relation to age disputes in the years 2016 to 2020, where such disputes took place, in the majority—54%—the result of the evaluation was that the person claiming to be a child was an adult.

Lord Paddick (LD): My Lords, the figure that I quoted was for 2019, which is the most up-to-date figure. That is perhaps why there is a difference between the figures that the Minister has and the figure that I quoted.

Lord Stewart of Dirleton (Con): I hear what the noble Lord has to say. As I say, the figures that I have bear on a broader field, from 2016 to 2020. Perhaps the discrepancy, if there is one, can be explored in terms of writing, if the noble Lord is content.

These reforms also provide for a right of appeal where there is a dispute as to each age assessment, and such an appeal will be heard in First-tier Tribunal, which will replace the current route of judicial review, which we anticipate will find a more cost-effective and quicker way of hearing these important matters.

In relation to Amendment 148, there is nothing in existing law precluding the ability of decision-makers to use scientific methods of age assessment in appropriate cases. We are aware of a number of cases in which dental X-ray examinations have been used. Clause 51(9) clarifies the pre-existing legal position that scientific methods that may not have been specified by the Secretary of State under subjection (1) may continue to be used where appropriate. However, a negative inference from a person's refusal to undertake a non-specified method cannot be taken under this clause.

3 am

In relation to Amendment 151, as tabled by the noble Lord, Lord Green of Deddington, and spoken to by my noble friend Lady Neville-Rolfe, clear safeguarding issues arise if a child is inadvertently treated as an adult and, equally, if an adult is wrongly treated as a child. We say that our current threshold, which specifically deems a person to be adult when their physical appearance and demeanour very strongly suggest that they are significantly over 18, strikes the right balance, and it was deemed lawful by the Supreme Court judgment in the case of BF (Eritrea). Those who do not meet that threshold are given the benefit of the doubt and afforded the same entitlements as a child. That ensures that our obligations are clear when seeking to safeguard and protect the welfare of children. I am sympathetic to the impulse that prompted this measure.

In relation to the amendment proposed by my noble friend Lady Neville-Rolfe, age assessment of a person is, as we accept, a challenging task, and no single assessment technique is likely to determine an individual's age with precision. We are already drawing up plans to monitor and evaluate the impacts of our policy and develop the evidence base to support further work.

In relation to the amendment tabled by the noble Lord, Lord Coaker, the Government are determined to create a more effective system of assessing age, promoting welfare and safeguarding children. With the national age assessment board, to which I have made reference, staffed as it is by qualified social workers, together with the work that we are doing on establishing a scientific age assessment basis to complement the existing work, which as your Lordships will be aware will be done by means of interview, in terms of Merton-compliant procedures, we hope that these measures will provide a holistic manner for which these difficult and sensitive questions can be addressed on as full an evidence basis as possible. On that reassurance, I invite noble Lords and the noble Baronesses who have tabled amendments not to press them.

Clause 48 agreed.

Clause 49: Persons subject to immigration control: referral or assessment by local authority etc

Amendments 142 to 144 not moved.

Clause 49 agreed.

Clause 50: Persons subject to immigration control: assessment for immigration purposes

Amendment 145 not moved.

Clause 50 agreed.

Clause 51: Use of scientific methods in age assessments

Amendments 146 to 148 not moved.

Clause 51 agreed.

Clause 52: Regulations about age assessments

Amendment 149 not moved.

Clause 52 agreed.

Clause 53: Appeals relating to age assessments

Amendment 150 not moved.

Clause 53 agreed.

Clauses 54 to 56 agreed.

Amendments 151 and 151A not moved.

Amendment 151B

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

151B: After Clause 56, insert the following new Clause—

"Trade agreements containing provisions on visas

(1) This section applies where—

(a) the Government intends to make a trade agreement, and

(b) the proposed agreement includes provision about visas.

(2) Where this section applies, the Secretary of State must not seek to make the trade agreement unless a draft of the provisions on visas has been laid before and approved by each House of Parliament."

Member's explanatory statement

This amendment is to ensure that any visa provisions in trade agreements can only come into effect if they are approved by both Houses of Parliament. This is to ensure that visas are a matter for nationality law not trade agreements.

Baroness Neville-Rolfe (Con): My Lords, I have no wish to delay the House at this late hour, but this is an important provision on which I am seeking assurances from my noble friend the Minister.

The purpose of my amendment is to ensure that any visa provisions in future trade agreements can come into effect only if they are approved by both Houses of Parliament. The need for this has arisen because of reports that the Secretary of State for International Trade plans to grant visas in trade agreements; for example, to Indian nationals as part of the proposed trade agreement with India. As I remember from earlier discussions on trade with India, with which I was involved some years ago, this is what that Government have always wanted.

I am uneasy about this. Visas, whether for study or anything else, are a matter for nationality law, not for trade agreements, and would need to be separately approved, as I have proposed. In the absence of assurances, I will want to return to the matter on Report. I beg to move.

Baroness Hamwee (LD): My Lords, my noble friend Lord Paddick and I have registered our opposition to Clause 69 standing part of the Bill. These are penalties for unco-operative countries—refusing entry clearance, treating an application as invalid, levying extra fees—in fact, two pages of provisions if the country does not co-operate in the return of its nationals by the UK. I knew it would be late by the time we got to this group. I did not anticipate 3.07 am, but here goes.

Clause 69 says a lot about how we see our place in the world. Global Britain we are not. This is more about imperialist Britain—"We know best, and if you do not co-operate with us, we will penalise your citizens" —an excellent way to make friends and influence people and so useful when negotiating a returns agreement. Frankly, I am ashamed. Will that do?

Baroness Bennett of Manor Castle (GP): My Lords, the noble Baroness, Lady Hamwee, was utterly to the point and delivered a very clear message which left me slightly surprised in how quickly she managed to do it.

We are talking about penalising individuals who might want to visit a grandchild, or come to study, who do not have control of their country's visa regime. We are saying that we are going to cut those people off on that basis. We are saying, "Country X has to do what it is told." As the noble Baroness said, this is no way to be a global citizen, as, indeed, is the case with many parts of this Bill.

However, I will finish this evening, given the hour, by agreeing with the noble Baroness, Lady Neville-Rolfe, on democracy and trade agreements. I hope she will embrace democracy around all elements of trade agreements.

Lord Paddick (LD): My Lords, as my noble friend Lady Hamwee said, we do not believe that Clause 69 should stand part of the Bill. The clause allows visa penalties to be imposed on a country if the Home Secretary thinks—forms an opinion—that the country is not co-operating in relation to the return to the country from the United Kingdom of any of its nationals who require leave to enter or remain.

The penalties include not granting entry clearance to the UK to the country's nationals, suspending entry clearance, requiring any application to be considered invalid, or to require the applicant to pay £190 in addition to the normal fee. Can the Minister explain how the Government arrived at £190? As the noble Baroness has just said, why should the ordinary citizens of a particular country be penalised for the actions of their Government, either by fining them or refusing them entry to the UK? What consultation has there been—and will there be—with the Foreign Office about the wider diplomatic picture concerning relations with countries that the Home Secretary intends to target with these measures?

I cannot imagine the Foreign Office being too impressed with a vengeful Home Secretary upsetting the diplomatic apple cart because she cannot have her way on deporting foreign nationals. A decade ago, there was no need for such measures. Why is there a need for them now? As Amendment 151B suggests, while the Home Secretary is making peace with the Foreign Office, perhaps she could ask it not to trespass on her territory by making trade agreements that include granting visa-free entry to the UK as part of the deal. I too agree with the noble Baroness, Lady Neville-Rolfe. I look forward to the Minister's reply.

Lord Coaker (Lab): My Lords, I will not say much about this amendment, but the title of Clause 69 is astonishing:

"Removals from the UK: visa penalties for uncooperative countries".

Although we are rushing through clauses such as this, we will have to come back to it on Report. There are significant questions to be answered. Significant powers are given to the Government in the Bill.

How is pressure to be applied on the Governments of unco-operative countries with a view to improving their co-operation on removals from the UK? Where has this come from? What assessment have the Government made of it? Who else does it? What effect has it had? These are the sorts of things that, in Committee, you should go into real detail and find out about.

I have one specific question, which was also raised in the Commons. There is concern that the measure could shut down safe and legal routes to the UK by impacting on the granting of family reunion visas from certain countries as part of a resettlement scheme. This type of visa is overwhelmingly granted to women and children. When I read *Hansard*, I was grateful that the Minister in the Commons put on record and assured honourable Members that

"given talk of penalties and exemption, family reunion will be an exemption to the penalties"—[*Official Report,* Commons, Nationality and Borders Bill Committee, 2/11/21; col. 567.]

included in Clause 69. Given the importance of family reunion, as has been outlined in our discussions, will the Minister repeat this commitment—that Clause 69 will not, in any way, impact on the visas given for family reunion, even those from designated unco-operative countries?

Lord Sharpe of Epsom (Con): My Lords, I thank my noble friend Lady Neville-Rolfe for explaining her Amendment 151B. We should recognise that the Immigration Rules and decisions about visa requirements are sovereign national powers which rest with the Home Secretary. I sympathise with my noble friend's desire to retain national control over visa policy. We took back control of our borders when we left the European Union. We now have the freedom to set our own rules in the interests of the UK.

Trade and immigration are separate policy areas. The UK does not routinely discuss immigration in trade negotiations. Comprehensive free trade agreements typically include provisions on so-called mode 4 trade in services. These set the terms for the temporary movement of service providers between parties to the agreement. Immigration policy, as opposed to mode 4, is our overarching approach to long-term immigration and border controls.

My noble friend has expressed concerns about the Government's free trade negotiations with India. As is standard in such agreements, I expect we shall explore more mode 4 provisions. These could support British and Indian businesses and consumers in our negotiations with India. It is not a one-way conversation. UK business stakeholders have identified mobility issues affecting UK service suppliers seeking to go to India. We may seek to address these in our negotiations, just as we have done in our free trade agreements with other partners, such as Japan, Australia and the EU. We would expect to do the same in any future comprehensive free trade agreements. Any agreement will be consistent with the points-based immigration system. We will not compromise the principles or functioning of this system.

3.15 am

I note also that Parliament already has appropriate involvement in the scrutiny of free trade agreements and their provisions through the Constitutional Reform and Governance Act 2010—CRaG—process. The legislative framework set by CRaG provides Parliament with the opportunity to undertake scrutiny of a free trade agreement prior to its ratification. Visa and immigration issues are and will remain a sovereign national matter and we will not compromise the principles of the points-based immigration system in any agreement we negotiate. In addition, the CRaG process already provides an appropriate mechanism for the scrutiny of free trade agreements. I therefore invite my noble friend to withdraw her amendment.

I turn to Clause 69. A key function of the Home Office is the removal of individuals with no legal right to be here, either by deportation or administrative removal, usually to their country of nationality. We expect our international partners to work with us to remove such individuals, as the UK does where our own nationals are in another country without the right to be there. This is a critical component of a functioning migration relationship. The vast majority of countries co-operate with us on this matter. However, a small number of countries do not.

It is not right for UK citizens and taxpayers that pressure is put on our public services by foreign nationals with no legal right to be here and who we cannot remove because of poor co-operation from their country. We have to fix this. Clause 69 is designed to give the Government the power to impose visa penalties on the nationals of unco-operative countries. Countries should no longer expect to benefit from a normal UK visa service if they are unwilling to co-operate with us on the matter of returning their nationals who have no right to be here.

These powers are a key part of our *New Plan for Immigration* and a vital step towards removing more easily from the UK those with no right to be here. We will be able to slow down or suspend visa services for that country, and to require applicants to pay a surcharge of £190 when they apply for a UK visa. The noble Lord, Lord Paddick, asked why it was £190. The level of the surcharge has been set with reference to comparative powers elsewhere—for example, in the European Union—and the current cost of coming to the UK as a visitor. We will maintain discretion to vary the level of the surcharge through regulations should the factors that were considered when setting it no longer be relevant.

I was also asked why nationals of countries could or should be penalised for the actions of their Government. It is reasonable for the Government to apply pressure where there has been a track record of a lack of co-operation from any country. It is not fair for our citizens and taxpayers for foreign nationals with no right to be the UK to put pressure on our public services. It is a proportionate and reasonable response to maximise the levers available to us to

improve returns co-operation with our international partners. I stress that there is international precedent and principle for this in bilateral migration relationships. Both the United States and the European Union have powers to impose visa penalties on unco-operative countries. So I am afraid I do not really follow the imperial logic of the noble Baroness, Lady Hamwee, on that.

The noble Lord, Lord Coaker, asked about the likely impact of visa penalties on nationals of unco-operative countries, particularly the effect on vulnerable individuals. We will ensure that the most vulnerable individuals—those with compelling and compassionate grounds for travelling to the UK, including the ones described by the noble Lord—are exempted from the application of visa penalties through a provision in the Immigration Rules using the power under Clause 69(9)(b). Furthermore, Clause 70 requires the Home Secretary to revoke visa penalties as soon as reasonably practicable if a country is no longer unco-operative.

Specifically, Clause 69 sets out when a country may be specified as unco-operative and the factors that will be taken into account when imposing visa penalties. Additionally, this provides detail on the types of penalties that may be applied. Clause 69(6) allows the Secretary of State to vary the level of the surcharge through regulations should the factors that were considered when setting it no longer be relevant.

Baroness Neville-Rolfe (Con): My Lords, I thank my noble friend for his comments on visa penalties and for the debate. I found what he said about trade reassuring on sovereignty. I am less happy on the application of CRaG, because of course that gives us a vote only on a whole trade agreement. It is the provisions on visas or immigration that worry me. If a favourable trade agreement were presented to Parliament, obviously Parliament would not want to vote against that, so we have a little problem. It is late; perhaps I can reflect further on the matter in the coming weeks before we come back on Report. I thank my noble friend for his answer, and beg leave to withdraw my amendment.

Amendment 151B withdrawn.

Amendment 151C not moved.

Lord Ashton of Hyde (Con): My Lords, just before we go, I say on behalf of us all a very big thank you to clerks, staff of the House, the doorkeepers, the team in the Box and all the officials who have helped us tonight.

House resumed.

House adjourned at 3.21 am.

House of Lords

Wednesday 9 February 2022

11 am

Prayers—read by the Lord Bishop of Chichester.

Advanced Research and Invention Agency Bill

Commons Reason

11.07 am

Motion A

Moved by ***Lord Callanan***

That this House do not insist on its Amendment 1, to which the Commons have disagreed for their Reason 1A.

1A: Because it would make provision relating to the administration of financial support provided out of public funds, and the Commons do not offer any further Reason, trusting that this Reason may be deemed sufficient.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Callanan) (Con): My Lords, before turning to the substance of the amendment, I thought it would be a good time to address briefly the other major milestone in the creation of ARIA that we have reached since the Bill was last before this House. On 1 February, Dr Peter Highnam was announced as ARIA's first CEO. I know that Peers had significant interest in this appointment during our previous debate on the Bill, given the critical role the CEO will play in leading the formation of the agency and directing its initial funding.

I hope noble Lords are reassured by Dr Highnam's wealth of experience, as he joins from DARPA where he has served as deputy director since February 2018. I hope noble Lords will agree that he is uniquely capable of stepping into what will be a very important role at such a critical stage of its development. He will take up his post in May, starting discussions with stakeholders in the UK R&D system across academia, business, government and, of course, here in Parliament.

Amendment 1 deals with the conditions that ARIA may attach to its financial support, in response to the considerable concerns that have been so carefully and expertly championed by the noble Lord, Lord Browne of Ladyton. In his concluding remarks on Report, the noble Lord set out his desire, following more informal discussions, to hear my colleague, the Minster for Science, Research and Innovation, outline the Government's position on this issue in the House of Commons. I certainly hope that, having heard the Minister's remarks last Monday, he will have been pleased to hear him go slightly further than I was able to go when we last discussed the Bill in this House.

The Minister gave further assurances on two aspects, which I will quickly repeat here. The first is the seriousness with which he is taking the security of our academic and research communities, and new activities to identify and address risks from overseas collaborations while supporting institutional independence. He confirmed that obligations would be placed on ARIA to work closely with our national security apparatus, to maintain internal expertise to advise ARIA's board and programme managers, and to work with the recipients of ARIA's funding in universities and businesses on research-specific security issues. This will ensure that ARIA's research and innovation is protected from hostile actors, and, most importantly, connected to the Government's wider agenda on strategic technological advantage.

Secondly, and more broadly, the Minister addressed the benefits created by ARIA and our approach to maximising and retaining them. Specific businesses, often in important and emerging areas of technology, have been mentioned many times during our debate on this amendment, and the lack of consistent guiding principles behind the engagement and support that they have received from government has been held up for particular criticism. On this, I hope that noble Lords noted the Science Minister's identification of the serious new machinery of government coming together to drive the agenda of strategic industrial advantage of UK science and technology as a fundamental priority for the Government and for him personally.

The office for science and technology strategy, the national technology adviser and national science and technology council together represent a new and significant architecture to support a new strategic government approach. Clearly, some patience will be needed while this beds in, but the ambition which the Science Minister outlined behind this change should go at least some way towards addressing the concerns that have been raised previously by the noble Lord, Lord Browne.

Similarly, questions have been raised in both Houses about ARIA's obligations to create wider public benefit, and I should reiterate that public investment in research and development, including through ARIA, must drive long-term socioeconomic benefit and deliver value to UK taxpayers. This obligation will be felt by ARIA on several levels: first, through the Bill and ARIA's statutory duty in Clause 2(6) to consider economic growth or economic benefit to the UK, among other considerations. This is the right degree of specificity for primary legislation. Secondly, mechanisms for assessing how effectively ARIA carries out its functions, including this duty towards UK benefit, will be detailed in ARIA's framework document. This was the other set of commitments which the Science Minister provided in the House of Commons.

These mechanisms will enable the action that ARIA takes to respond to its statutory duty towards UK benefit to be evaluated. As the Minister set out, this will include obligations for ARIA to put in place a programme evaluation framework, considering its strategic objectives as well as detailing the contents of its reporting, which the Government and Parliament will use to hold ARIA to account for the value it provides in all the usual ways. Again, it is right that these more specific obligations are included in the framework document, as they must reflect the structure of ARIA's programmes and require greater flexibility. These obligations will be set as ARIA's overall governance and evaluation framework is finalised over the coming

[Lord Callanan]
months, but I should like to echo the Science Minister's comments that we will take seriously the concerns raised in the context of this amendment when doing so, as we share many of them.

The third and final aspect concerns the ways in which ARIA implements the obligations imposed on it—the statutory duty in the Bill and the obligations within the framework agreement that will help to give effect to it. As I have stated previously, we might expect ARIA to do so through its contracting and granting arrangements by requiring financial support to be repaid if recipients do not make an effort to exploit the outcomes within the UK—or, in some cases, by taking equity or retaining IP rights and seeking to maximise the value of these assets within the public sector. The Bill enables ARIA to do these things, but it is an arm's-length body; we have placed a premium on its operational independence, and government should not intervene in its decision-making on these issues.

The questions for us here should be these. Does ARIA have all the powers and tools it needs to choose independently from a full suite of ways in which to deliver these obligations? I would submit that it does. Have we got the balance right in the first place with the obligations to produce and evidence benefit placed on ARIA through the Bill and in the framework document, which we then use to hold it to account? On the second point, I recognise that noble Lords have been pressing for us to go further, and I should reflect that in response to the questions posed in this House, and by the noble Lord, Lord Browne, in particular, we have now made concrete commitments to Parliament about the obligations on ARIA and greatly refined our thinking on the work that it is still to do.

I hope the Science Minister's assurances were useful in demonstrating the seriousness with which these concerns are being taken and our commitment to reflecting a mindset focused on public benefit in ARIA's governance framework, as that document is finalised. I therefore strongly hope that noble Lords will be content with the progress that has been made on this issue and I look forward to reaching further milestones in the creation of this important new public body. I beg to move.

11.15 am

Lord Browne of Ladyton (Lab): My Lords, I thank the Minister for his opening remarks and his comprehensive repetition of what George Freeman, the Minister, said in the other place. To a degree, I am reassured. My concern is how I will know that the Government live up to the undertakings implied in the words of the Minister. I will come back to him in a moment. I intend to be brief.

I particularly thank the Minister for his generous remarks about me, but they ought to be shared by a significant number of Members in all parts of the House who contributed to the debate we had on the amendment. That the House was minded to support the amendment had more to do with Members' combined advocacy than the way in which I introduced it. I also thank the Minister and his office for earlier this week drawing my attention to the Government's recent announcement that Dr Peter Highnam has been appointed as ARIA's first CEO. This man seems uniquely qualified to do this job; I suppose DARPA is the only place that he could have got the experience. He is also uniquely equipped to negotiate the framework agreement with the Government, which will be important to how ARIA works.

I accept that the Commons reason is not challengeable, and I do not intend to debate that or to divide the House on the noble Lord's Motion. However, as the Minister and his office helpfully reminded me a week ago, while speaking to my amendment on Report, I set out my wish to hear the Science Minister address at the Dispatch Box the issues that prompted the amendment in the first place. At least I should address what he said, and I will do that for a few minutes, with the leave of the House.

In the other place, George Freeman acknowledged the importance of ARIA having a duty to the taxpayer to ensure that the intellectual property generated by its investment in R&D is commercialised to the advantage of the UK economy primarily, and to ensure that it is not

"haemorrhaging intellectual property of value to the UK."—[*Official Report*, Commons, 31/1/22; col. 86.]

That reflects what he said to a number of noble Lords who met him before Report. To paraphrase another member of the Government, he gets it and clearly seems to understand the issue. The question is whether the Government have a plan to address this issue and will be able to share the development of the plan with Parliament properly. That is what I want to concentrate on now.

Turning to what the Science Minister said, he first referred to the terms of the amendment and argued that, as drafted, it added only examples of the conditions that ARIA may attach to financial support and, as it already has a general power to do just that, it represented a drafting change that cannot be accepted. There is no merit in this argument. The fact is that the Bill, as already drafted by the Government, already has examples of conditions that ARIA may attach to financial support in Clause 2. They are almost certainly there because the Government want to highlight those powers, not because those examples need to be there to give those powers to ARIA. Our amendment simply adds to their existing list and has a similar motivation—to emphasise and highlight the importance of this power.

On the specific issue of predatory overseas acquisition of IP through foreign takeover of UK businesses where there has been substantial public investment in R&D—there are many past examples of this, to the detriment of the UK economy—the Minister reassured the other place that the National Security and Investment Act 2021, which fully commenced in January, already provides a relevant and sufficient framework for the Government to scrutinise acquisitions on national security grounds. The Minister also referred to a broader strand of work that is under way to enhance that statutory framework, including other unspecified complementary measures designed to help the Government strengthen our protections. Perhaps the Minister can expand on that. He made some general references to it, but I am not clear as to what work is going on. I think the House would benefit if there was further specification.

It may not be appropriate to do it now, but maybe it could be spelled out more clearly at some time in the future.

The Minister reassured the House that the Bill already provides the Secretary of State with a broader power of direction over ARIA on issues of national security, but the amendment was never intended to intervene in the Secretary of State's powers. This is of limited comfort, as my honourable friend Chi Onwurah pointed out, national security in the relevant legislation, the NSI 2021, is narrowly defined, and it does not include economic security, despite attempts by Labour to expand the definition in that Act so that it would include this. It therefore does not address the issue of intellectual property and its economic value.

The Minister then pointed out that the because of the terms of Clause 2(6), ARIA must have regard to economic growth or economic benefit in the UK, and the mechanism for scrutiny by government and Parliament will be in what the Minister refers to as the framework document. This is a weapon which the Government deploy regularly to see off amendments to the Bill. On Report, the Minister used the potential of the framework agreement, and what it could include, five times in debates. The problem is that none of us has seen the outline of the framework document, or even the Government's bid for the negotiations of what the framework document will include. Until we see that, there is no way that any of us can judge its merit as a mechanism for dealing with the issues that we have raised.

Perhaps during the negotiations that can at least now commence after May, when there is a CEO, the Government will undertake to make regular statements, or at least one statement, to the House about their negotiating position, so that we get some sense of whether the many concerns about this Bill that the House has shared with the Minister can be allayed by the framework agreement or document. There is now a CEO and these negotiations can begin.

Finally, in the debate that took place in the other place, at col. 87, the Minister turned to the question of how ARIA responds to the UK's strategic interests in science and technology more generally, where these may not fall under national security. I think he played his ace there: drawing attention first to the integrated review, which he did not expand on, and then to the role of the new Office for Science and Technology Strategy and the national science and technology council, and the Government's ambition to ensure that there is a serious, strategic machinery of government showing a commitment to the strategic industrial advantage of UK science and technology. The Government's argument is strong: we should be persuaded that this will deal with these issues because the Government have a core to their infrastructure that will drive these ambitions. There is a fundamental difficulty with this, however: it is impossible to find, in any government documents, any information about either the Office for Science and Technology Strategy, or the national science and technology council, which is a sub-committee of the Cabinet, other than that they exist and a very broad outline of the first organisation, which is designed to service the second one. I do not know how we are supposed to evaluate the strategic machinery of government, unless we know what they do.

There is something worrying happening to the accountability in our Government at the moment. There is a proliferation of sub-committees of the Cabinet. We have gone from having about six to having 20 in a matter of months. Almost every area of important public policy now has one or more such sub-committees to deal with it. The pattern appears to be—it certainly is with climate change—a strategic sub-committee and an implementation sub-committee. You can find out nothing about what any of these committees do.

So that we know what the relationship between Parliament and these committees now is, I will quote for the benefit of the House what Alok Sharma, the COP president, said to your Lordships' Environment and Climate Change Committee in answer to a very reasonable question, in a questionnaire sent by the committee, about these two key pieces of machinery for climate change. The committee asked him:

"Are the two relevant Cabinet Committees"—

that is, the strategy committee and the implementation committee, which he chairs—

"expected to continue in the long-term, and what plans does the Government have to increase transparency around their proceedings?"

The answer to this is in a letter, which is on the committee's website. I will read it in short, because in the first part Alok Sharma gave the impression that they are intended to continue, but he said:

"With respect to Committee frequency and transparency, it is a long-established precedent that information about the discussions that have taken place in Cabinet and its Committees, and how often they have met, is not normally shared publicly".

So that is it.

If that is to be it for this infrastructure, which sits at the heart of the development of science and technology and ARIA, we will not find out anything. I honestly have no way of knowing whether I should be reassured by what the Minister said in the other place, if that was his ace card. To paraphrase my honourable friend Chi Onwurah in the other place, the Minister has set out that he shares our concerns, but I am afraid that I cannot really assess whether he has a plan to address them, because there is a whole part of what he intends to do that I will never be allowed to know.

Lord Lansley (Con): My Lords, I very much appreciate what my noble friend on the Front Bench has said by way of response to the several debates that we had on the Bill about the centrality of intellectual property, and its protection and exploitation by ARIA. Often in your Lordships' House, we send amendments to the other place, and occasionally—perhaps often—we find that they are not given the weight of debate at the other end that we think they deserve. On this occasion, it did, and I was much reassured by the Science Minister's response, and by the appointment of Dr Highnam to the chief executive post.

I want to raise one question. In the midst of the many reassuring things that were said, including that the powers exist for ARIA, or through the NS&I Act, the framework document remains. I raised one issue on that in an amendment, which was whether under the framework document ARIA would be able to retain and reinvest the exploitation of intellectual property arising from its investments so as to create a

[Lord Lansley]
growing activity in support of its mission of disruptive innovation. I hope that will be incorporated in the framework document. It was not referred to, so I hope that my noble friend will take note of it and that the Treasury will allow this to happen.

Viscount Stansgate (Lab): My Lords, I will not detain the House for long, not least because many of the points I wanted to make have been ably made by my noble friend Lord Browne. I welcome much of the Minister's speech and the appointment of the chief executive-designate. Considering his background, I venture to suggest that by the time he leaves the post he is about to fill, the name of the agency may have changed from ARIA to DARIA. That would reflect his personal background and possibly the way in which developments may move.

I also welcome what was said in another place by the Minister for Science, who the noble Lord, Lord Lansley, referred to. I have a high regard for the Minister for Science and thought that he addressed seriously some of the concerns raised in our debates. However, to echo my noble friend, I point out that the National Security and Investment Act still provides too narrow a basis for protecting what really matters about ARIA, which is the intellectual property that it is going to generate. It is a strange position to be in, but I think that the definition of national security, which does not take into account the economic security of this country and the intellectual property attached to that, would be a mistake and possibly a loophole. I regret the fact that the framework document to which the Minister referred has not yet been seen by anybody, and I hope that in the months and years ahead we will be able to debate that framework and the new scientific architecture, which the Minister rightly referred to, because we are moving into a new era.

It is not often that Governments anywhere launch a new agency with so little idea about what it will do and how it will do it. Nevertheless, I wish it well, and I hope that in the months and years ahead when we come back to discuss ARIA and its development we will be able to see the progress it has made, which I for one hope it will.

11.30 am

Lord Fox (LD): My Lords, it came as no surprise that the Government used their majority to negate the amendment of the noble Lord, Lord Browne. The noble Lord has, in his tenacious way, set out why he regrets that, and I agree with him. It is not to be—it will not go to a vote—but I hope that the ARIA leadership will be more careful when they write the contracts for the money that they will give than perhaps the Government seem to be with enshrining this in law.

I agree with the noble Lord, Lord Lansley, that the Science Minister's comments were very helpful. They were more than we would usually get in these games of ping-pong, and that is to his credit.

As the Minister set out, since we sent this Bill to the other place, the name of the ARIA CEO has been announced. It is nice to see the Minister looking so pleased about things. He often looks quite downcast, so it is quite good for him to arrive with something that he can be pleased about. We wish Dr Highnam all speed and wish him well in what is a very important task.

Others have suggested that we look forward to the framework document emerging. In answer to the previous speaker, I do not think that the Minister has not shared with us something that he is sitting on; the Minister has not seen the framework agreement yet either, because it has not been written. However, we look forward to seeing it as soon as it has.

The Government have also had some important things to say about their focus for future research funding—I am talking here about the UKRI numbers. In their levelling-up White Paper, they announced the intention to increase the percentage of funding from what is rather dismissively called the golden triangle to other institutions, often but not exclusively further north. I should remind your Lordships that I am an alumnus of Imperial College.

Very briefly, I wanted to relate this to ARIA and, more importantly, to the commercialisation of innovation. There is a disparity between universities that are better at commercialising their innovation and thereby having another income stream, and those that are less good at that. I hope that ARIA is able to lead some excellence in that and spread the effective commercialisation of knowledge and innovation better. That would contribute to the Government's levelling-up agenda at the same time.

I also recently met with the UK Innovation & Science Seed Fund—known as UKI2S—which, as the Minister will know, acts as a bridge between public sector research and private capital. I would be interested to know from the Minister how this organisation can fit with ARIA and improve our overall commercialisation. I am sure the Minister will admit that the UK's record on commercialisation has been patchy in the past and could definitely improve. I would suggest that UKI2S is one of the models that ought to be taken into account. I hope that the Minister might meet with me and that organisation to discuss this and how it might play into this space with its track record in order to deliver on the promise of ARIA. I think we all share the Government's desire to—in the Minister's words—drive the agenda for strategic, industrial advantage. With that, we hope that in 10 years' time, ARIA will be seen to have played an important part in achieving that objective.

Baroness Chapman of Darlington (Lab): My Lords, we accept the reason given by the other place for rejecting Amendment 1, but we continue to disagree on the substance. I place on record my thanks to the noble Lord, Lord Browne of Ladyton, for his work on this amendment. His sparkling curiosity and polymath tendencies, combined with his government experience, make him ideally suited to this issue. He has been incredibly generous with his time and knowledge, and I am grateful to him for that.

The noble Lord, Lord Browne, suggested a sensible amendment to protect benefits arising from the UK's creativity and ingenuity in ensuring that the taxpayer—the investor—retains the benefit of it. The majority of noble Lords agreed with my noble friend when we tested the will of the House. In the absence of any measures enabling sufficient scrutiny of ARIA's activities,

we felt we needed this amendment. We are clear that the benefits of ARIA's investments must be felt in the UK. Lords Amendment 1 would have assisted in this; it would have given ARIA the option to treat its financial support to a business as convertible into an equity interest in the business, and thus to benefit from intellectual property created with ARIA's support.

It would also have enabled ARIA to require consent during the 10 years following financial or resource support if the business intended to transfer intellectual property abroad or transfer a controlling interest to a business not resident in the UK. As my honourable friend Chi Onwurah said in the other place, we have to acknowledge that currently

"the UK does not provide a sufficiently supportive environment for innovation start-ups to thrive. That is why we have already lost so many of them."—[*Official Report*, Commons, 31/2/21; col. 89.]

It is welcome that Ministers have said they agree with our concerns. It is just unfortunate that the Government did not want to take this opportunity to act on our shared concerns and seemed to lack the resolve to do anything about it on this occasion. Finally, I wish the new leadership of ARIA and the agency itself well. We look forward to the innovations and inventions that it is able to bring us.

Lord Callanan (Con): I thank the noble Lord, Lord Browne, in particular, and all noble Lords who participated in this brief debate. I do not think there is a huge disagreement between us on this. The noble Lord, Lord Browne, wanted us to be more specific; our point is that ARIA already has the power and ability to do all the things he mentioned, but we want it to retain its operational independence and flexibility.

I will address a number of the points the noble Lord raised. He will have carefully noted, and from his ministerial experience will know, that in the National Security and Investment Act we deliberately did not define what national security is, following the practice of all previous Governments, to give ourselves the flexibility to adapt to changing circumstances.

The noble Lord also asked for further details on what the Science Minister said in the other place. We have published guidance to the sector on trusted research and supported it in publishing that guidance. We have broadened the scope of the academic technology access scheme and defined the rules on export controls as they apply to research activity. The terms and conditions for government research grants were also amended last September to require due diligence and checks for any overseas collaboration.

As expected, a number of noble Lords raised the framework document. The noble Lord, Lord Fox, is right: I have not seen a final version of the framework document precisely because it has not been finished yet. It will be negotiated between BEIS and ARIA's leadership team, including the new chief executive and chairman when he or she is appointed, for which we are currently recruiting. I assure the House that as soon as it has been agreed, we will share it with the House as soon as possible.

My noble friend Lord Lansley asked a very good question about the retention of any possible revenues within ARIA. He will know from his government experience that the Treasury will wish to negotiate these matters directly with the agency, so I will not step on the Chancellor's toes and get myself into trouble by overcommitting him on that. I am sure that ARIA and the Treasury will want to have a full and frank discussion on these matters.

On the questions from the noble Lord, Lord Fox, I assure him that we expect ARIA to work with all partners across the research and development landscape, including on the commercialisation of products. He asked for a meeting with me. I suggest that I am not the right person to meet on that issue; it would be more appropriate for him to meet the Science Minister, who has responsibility for pursuing this support for the agency, and I will certainly put that question to him.

The ARIA team has met UKRI and its sponsors. We are learning lessons from this and other mindsets and models for how ARIA can ensure the successful translation and commercialisation of its technologies. I hope that that provides the appropriate assurances for the noble Lord, Lord Fox.

I think I have dealt with all the questions that were asked. With that, I beg to move.

Motion A agreed.

Dissolution and Calling of Parliament Bill

Report

11.41 am

Clause 2: Revival of prerogative powers to dissolve Parliament and to call a new Parliament

Amendment 1

Moved by ***Lord Judge***

1: Clause 2, page 1, line 9, at end insert—

"(1A) The powers referred to in subsection (1) shall not be exercised unless the House of Commons passes a motion in the form set out in subsection (1B).

(1B) The form of motion for the purposes of subsection (1A) is "that this present Parliament will be dissolved.""

Lord Judge (CB): My Lords, in the recent Committee debate I undertook to reread *Hansard* because I particularly wanted to address the views expressed by those who disagreed with this amendment. I have done so. I continue to respect those views but I do not share them. I am going to urge the House that understandable reasons should give way to compelling ones.

The arguments focused largely on the merits or demerits of the amendment, but in a sense what we were discussing does not really matter because, as I hope I made clear in my reply to the debate, it is obviously not for this House to decide the issue; it is for the other place to do so. It is a decision for the elected Chamber, and we are not elected.

The purpose of the amendment is simple: the objective is to offer the other place an opportunity to reflect again on this hugely important constitutional Bill and see whether it may have second thoughts. If the second

[Lord Judge]
thoughts lead the other place to the same view, so be it: that will be its view, and we must accept the view of the elected Chamber. However, I intend to abide by whatever decision is made by it after what I hope may be a fuller consideration of the merits or demerits of the arguments both ways—much fuller than it was, given the somewhat peremptory way in which this entire Bill was dealt with.

We have become habituated—have we not?—to the steady, apparently unstoppable accumulation of power in No. 10 Downing Street, and we have done so while simultaneously the authority and weight of Parliament itself, and the House of Commons in particular, have been diminishing. It is astonishing to think that we are now proposing to resurrect the medieval concept of the prerogative, the concept on which the divine right of kings was based. King James, and King Charles just across the road, will be laughing as they turn in their graves. The king lost his head in part because he kept dissolving Parliament.

I wonder whether any noble Lords heard Oliver Cromwell thinking of stepping off his plinth outside; I thought I heard a movement or two, but he has gone back. Cromwell, having been a great parliamentarian, decided that Parliament was not doing what he wanted, so Parliament was "purged"—an interesting thought and an interesting use of words. At that stage in our history, Parliament had obtained, through the Long Parliament, the right to dissolve Parliament. Cromwell did not dissolve it because he did not have the power to do so; he simply purged it. What are we doing resurrecting an ancient power in the 21st century?

11.45 am

My concern is this. This amendment is about the ultimate source of power in our constitution, today and probably for the next 50 years. Where does it rest, is the question we were asking? But the real question is where should it rest? We are enacting a statute, and whether the prerogative is being revived or not, the statute will govern whatever it is that governs our processes. I ask the question again: where should this ultimate power of dissolution rest? Before the prerogative is revived, surely we must take time just to be certain that reviving the old way is the best way.

There are understandable arguments about the Fixed-term Parliaments Act, which made Parliament indissoluble—I hope that is the right word—or not subject to Dissolution, without a two-thirds majority. This amendment proposes that it be a bare majority of those Members of the House who vote. The Act itself was tested to destruction during the Brexit shambles. I understand the argument that there should be an Executive control and that it is necessary for efficient government, but is this really the best we can do in 2022?

Whatever the position was in 1950, the idea that the sovereign can, in response to the Prime Minister who advises or requests—what a wonderful argument that has been—a Dissolution, refuse it, is completely inconceivable; it is beyond the fairies. We cannot have the monarch turning down the elected Prime Minister's request for Dissolution without becoming utterly enmeshed in party politics.

As to the courts, I strongly believe, as a former judge, that this has nothing to do with the courts. The courts should not and do not have any jurisdiction to interfere with proceedings in Parliament. Article 9 remains firmly in its place and is surely an encouragement to us to allow the issue to be resolved by the other place.

There is something more profound. Should not the voice of the elected Chamber be heard? We live in a modern democracy: why should it not be heard? Why should it be compelled into silence on the very issue of its own existence? Why should not a simple majority of those Members of the other place who choose to vote be regarded as worth having as some curb on a Dissolution power that would otherwise be put in the hands of a single individual who happens, for the time being, to be our Prime Minister? Why should so much power be restored to our Prime Minister, whoever he or she may be? He or she, whether for political advantage or otherwise—and largely, of course, it will be for political advantage—but in truth on a whim, would be vested with the constitutional authority to override, or threaten to override, a point to which I will come back, every single vote cast in the last general election by a single vote of their own. For a modern democracy, that does not sound very wise, does it?

I repeat that the modest purpose of this proposal is merely to send this fundamental constitutional issue back to the other place for time to be given there for a further and mature reflection on the merits or the demerits of the amendment. That is all I am asking. I should have pursued this amendment anyway, but since the other place finished its discussion, I want to raise it as a somewhat alarming event.

I made it clear in Committee that this was not about the current Prime Minister and his troubles. I raised the issue in the debate on the Queen's Speech, when he was riding pretty comfortably high in the polls. But a few days ago, after members of his own party expressed dismay at current events, the then Leader of the House threatened them with a general election to bring them into line.

I have based what I regard as a very distasteful suggestion to have to make on the words actually spoken by the leader, and the careful and, as far as I have been able to ascertain, unchallenged analysis of the noble Lord, Lord Finkelstein, in the *Times* last week. He refers to the Leader of the House's actual language, when he said:

"my view is the change of leader requires a general election"—

we all know what that is about. The noble Lord's observation was:

> "The motive for this statement was transparent … The motive was to frighten rebellious MPs with the prospect of losing their seats in an ill-timed election."

That is a threat—to use the power that it is hoped and assumed by the leader that we would let through at great speed.

For today's purposes, I urge that the other place be allowed to decide what it made of the merits and demerits of the argument and of that astonishing threat—that an uncurbed Dissolution power might indeed be open to such unexpected misuse. The threat itself was a misuse, and this unconstrained power should not be restored to the Executive. I beg to move.

Lord Lansley (Con): My Lords, I have signed once more on Report this amendment, along with the noble and learned Lord, Lord Judge, and I entirely agree with what he just said to the House. That is partly in the light of the debate in Committee, which compellingly reinforced the need to send this issue back to the other place to be reconsidered, and for it to make the final decision, as the noble and learned Lord says.

I say to colleagues, not least on this side of the House, that the Conservative Party's manifesto in 2019, which we are implementing, said:

"We will get rid of the Fixed Term Parliaments Act."

This legislation, including Amendment 1, will do that. So the Conservative manifesto commitment will be met. The question, of course, is what we put in its place.

My noble friend on the Front Bench will have his chance to say so, but he has said that the purpose of the Bill is to restore the prerogative power, or the status quo ante. I have to say that it still feels like generals fighting the last war—they are fixed on the events of the autumn of 2019, and, as the noble and learned Lord, Lord Judge, has amply illustrated, we are not in the situation of the end of 2019 and we may never be again. If one looks at the events of the autumn of 2019, one sees that three times the Prime Minister sought a general election and failed to secure a two-thirds majority but in each case secured a simple majority. The proposition, which seems to be at the heart of the Government's approach, is that this Bill prevents gridlock, but in my view a simple majority of the House of Commons would, in almost all circumstances, also prevent such gridlock.

More to the point, as the noble and learned Lord, Lord Judge, said, is the question that the other place has to answer: should this once again be an executive decision of the Prime Minister of the day, regardless of the view of the House of Commons? I will not go on at length, but I repeat my view that the Prime Minister exercises the responsibility to request a Dissolution by virtue of the fact that he or she commands a majority in the House of Commons. If a Prime Minister loses the confidence of the House of Commons, by what right do they go to the palace and seek a Dissolution? In the circumstances in which a Prime Minister loses the confidence of his or her own party, and of the House of Commons by extension, there may be, and often has been in the past, an opportunity for a new Administration to be formed who enjoy the command of a majority in the House of Commons. Under those circumstances, it seems to me that it would not be right to seek a Dissolution.

The noble and learned Lord referred to what Mr Rees-Mogg said. I am a former Leader of the House of Commons and I believe that the job of the Leader of the House of Commons is to explain the Government's thinking to the House and explain the House's thinking to the Government. On this occasion, the latter did not happen. The House was not in a mind to have a Dissolution and an election and I do not think that the Leader of the House was reflecting any view in the House of Commons to that effect. It was, therefore, a threat—an unconstitutional threat, since the Fixed-term Parliaments Act currently applies and such a threat could not be given effect unless and until this legislation passes into law.

My point is that we should give an opportunity not to restore the prerogative in the form in which it existed in the past but to qualify it by reference to what is the reality of our constitution—that sovereignty rests in the sovereign in Parliament, that that must be reflected by a majority in the House of Commons and that therefore a request for an election should be backed by a simple majority in the House of Commons. Anything other than those circumstances would be an illegitimate request and contrary to the view of Parliament.

Lord Grocott (Lab): My Lords, I mentioned in Committee and I mention again to the House now that I have always been a strong critic of the Fixed-term Parliaments Act and I was pleased when the Government decided to do away with it. But I find myself in a strange position now of being pleased that they have introduced the Bill but disappointed with it, because it is a messy and—for the reasons that the noble and learned Lord, Lord Judge, said—counterintuitive solution, in that it is moving power back to the monarch. It is a messy solution to a problem that was particular, in most respects, to the 2017-19 Parliament and which, as the noble Lord, Lord Lansley, said, we are now trying to repair or prevent from happening again.

My message is simply that the shenanigans of the 2017-19 Parliament were a result, more than anything else, of the 2011 Fixed-term Parliaments Act, which this Bill will repeal. We need not worry about that kind of problem again because it is incredibly unlikely—impossible, I would say—that we will see those sets of circumstances recurring. Of course, the main reason why the Government could not get a majority for a general election—a facility that I strongly believe should be available to a Government—was the requirement for a two-thirds majority. On each occasion when Boris Johnson went to Parliament and asked for a majority, it gave him one, but not a two-thirds majority.

The solution being offered by the noble and learned Lord, Lord Judge, is beautiful in its simplicity. It solves all the problems with one mighty bound. The main problems of this Bill—or rather, the problems that it does not resolve—are the possible interference by the judiciary, the possible politicisation of the role of the monarch and the argument that we can all have about what the Dissolution principles should be, which a lot of the debate in the Joint Committee was about. With one mighty bound we are free, if we say that you need a majority in the House of Commons. It prevents—for ever—any possibility of the monarch again being involved in this most political of decisions and of saying to a democratically elected Prime Minister, "No, sorry, I'm the monarch; you think you should go to the people, but I'm telling you that you can't." It is inconceivable that that could happen and, if it did, it would be a constitutional crisis of a magnitude that we have not so far seen. You get rid of all that area of debate and problem. You also get rid of this ugly ouster clause, to which we will come in a moment. The courts are kept out of it because no court is going to challenge a majority verdict of the House of Commons. With a simple majority in the House of Commons, it is job done. The courts and the monarch are out of it.

Noon

There is also the saga about the Dissolution principles. I understand them, but they are messy. Do we imagine that a Prime Minister could go to a monarch and there would be circumstances in which the monarch would say no? As I said, that is inconceivable; they are the most contrived set of circumstances. The best argument that I have heard—I might as well give my opponents the best argument—is that it would be outrageous if a Prime Minister, immediately after he or she had lost a general election, were to go to the monarch and say, "I want another election immediately". I suppose that anything is conceivable; it is conceivable that we will be hit by a meteorite during the general election. None the less, the chances are slim of a Prime Minister losing a general election and many colleagues, including Cabinet members—while other Members of the House of Commons have only held on by a slim majority and just made it back to Parliament—and then saying to them all, "Right, folks, we've done it once, let's let them hit us again." It is inconceivable that a Prime Minister, under those circumstances, would call for a general election.

In any case, in an unwritten constitution, of which I am so fond, you simply cannot pretend to cross the t's and dot the i's right the way through. I am trying to be helpful to the Government. There is a simple solution to this messy Bill, which is ugly in terms of the detail but not, as I said, on the fundamental principle. If you require a simple majority, you do away with the Dissolution principles, a politicised monarch and the interference of the judiciary. That is game, set, match and tournament.

Lord Howard of Lympne (Con): My Lords, I apologise that I was not present during the Committee stage. The noble and learned Lord, Lord Judge, knows that I have great respect for him. We enjoyed working together in opposition to the Government's Internal Market Bill. He was courteous enough to ask me my opinion of his amendment before he put it down. I told him that I would be unable to support it. The reason is the answer to the question that he posed during his remarks, to which my noble friend Lord Lansley purported, but failed, to give an answer, which is: what happens if there is, as there could be—and no one in your Lordships' House can suggest that there could never be—a revival of the circumstances in the House of Commons between 2017 and 2019? The position was that the Government could not properly govern because they did not have a majority for many of the things that they wanted to do. The House of Commons did not want them to govern and so was content with that stalemate position and that hobbled Government, which did no good whatever to Parliament or the country.

I do not understand why this is referred to as a messy Bill. It is a perfectly straightforward Bill, which seeks to restore the position as it was before the Fixed-term Parliaments Act. The Act was necessary for the course of the coalition Government, but it should never have been made permanent. I very much regret that I did not vote for an amendment in your Lordships' House that would have made it temporary.

Baroness Taylor of Bolton (Lab): Would the noble Lord acknowledge, as my noble friend has proved, that, in the circumstances about which he is talking, the Government had a majority for an election? Therefore, this amendment would not have created the difficulties that he is suggesting.

Lord Howard of Lympne: The noble Baroness and her friends cannot possibly give an assurance that a circumstance will not arise not precisely the same as that which occurred between 2017 and 2019 but in which a simple majority could not be obtained for an election, because a majority of the House of Commons was content to stymie and hobble the Government and keep them in place in that paralysed state, which was what we saw in that unhappy time.

Lord Reid of Cardowan (Lab): The noble Lord seems to be missing the fundamental fact that the problems to which he referred took place under the Fixed-term Parliaments Act, which required a two-thirds majority. This Bill gets rid of the Fixed-term Parliaments Act. The circumstances that occurred in 2017-19, as the noble Lord, Lord Lansley, pointed out, cannot recur in absence of the Fixed-term Parliaments Act.

Lord Howard of Lympne (Con): With respect to the noble Lord—he knows I have great respect for him—I do not think that he was listening to what I have just said in answer to his noble friend. All this Bill does is to replace the bar of the two-thirds majority which the Fixed-term Parliaments Act provided with a slightly lower bar, but there is still a bar and it is perfectly conceivable that we could have a House of Commons in which the Government did not have a majority.

Baroness Smith of Basildon (Lab): I am listening to the noble Lord with care and I think that there is a fundamental flaw in his argument. On that basis, does he not accept that a simple majority is used for every piece of legislation in the House of Commons? Why should calling a general election be any different? A simple majority is a sensible bar and a sensible test of whether the country should have an election.

Lord Howard of Lympne (Con): The answer to the noble Baroness is this: if legislation is put before the House of Commons and it fails because there is no simple majority for it, there is a simple answer—the legislation fails. You do not have a situation that could go on for years in which a Government remain in office in a state of paralysis because that is what a majority of the House of Commons wants. That is the mischief that would arise in relation to this Bill.

Lord Marks of Henley-on-Thames (LD): But why should a Prime Minister who cannot get a majority of the House of Commons for an election be entitled to a Dissolution?

Lord Howard of Lympne (Con): Because our Government need decision. If you have a situation in which you have paralysis in the House of Commons, it is in the national interest that this should be resolved. The way in which it has traditionally been resolved and would now be resolved again if this Bill were passed would be by the Prime Minister asking Her

Majesty, the monarch, to exercise the prerogative to provide a general election, which would resolve that paralysis.

I will say one more thing on Clause 3, because I do not want to trouble your Lordships again. The noble Lord, Lord Grocott, said that the ouster clause was completely unnecessary because no court would ever challenge the decision of a majority of the House of Commons. Had the noble Lord been present on Monday, he would have heard your Lordships' House debate a number of occasions in which the courts had challenged legislation passed by a majority of the House of Commons. I am afraid that the noble Lord's reliance on the reticence of the courts in these matters is considerably misplaced, particularly having regard to their decision on Prorogation. For that reason, Clause 3 is absolutely essential.

Lord Grocott (Lab): We are talking about a resolution of the House of Commons. Can he give any circumstance —we are not talking about legislation; we are talking about resolution—where a resolution of the Commons was overturned by the courts or was even regarded as being justiciable by the courts?

Lord Howard of Lympne (Con): The noble Lord talks about a resolution, but what he previously said was that the courts could not be imagined challenging any decision that obtained a majority in the House of Commons. It was to that observation that I replied. There are many examples and I refer him to the *Hansard* of Monday's debate.

Lord Butler of Brockwell (CB): My Lords, I rise briefly to support my noble friend's amendment, but with reservations. My reservation is that which has been put forward by the noble Lord, Lord Howard. It is not inconceivable that a Government could be hamstrung by failing to get a majority in the House of Commons and could not get their programme through. I believe that there should be restraints on the improper use of the power to dissolve. We are all agreed that it should not be the sovereign and there are dangers in it being a resolution of the House of Commons. That is why I will argue for the removal of Clause 3 so that in the last resort there can be resort to the courts.

Lord Cormack (Con): My Lords, the removal of Clause 3 would be the second-best option. The noble Lord, Lord Butler, knows that I was sympathetic when he raised this point at Second Reading. Like my noble friend Lord Howard, with whom I frequently agree but not today, I apologise for not being here in Committee. I was attending a farewell dinner for a friend who had given some 20 years' service in his post and I felt that, as I had spoken at Second Reading, I could reserve what I wanted to say for Report. I strongly support what the noble and learned Lord, Lord Judge, said, in his balanced, measured and eminently sensible speech.

To give unfettered power to any individual is a very serious thing indeed. I believe that it is important that this House today gives the other place an opportunity—an opportunity that it did not take when the Bill was with it. It is important because things have moved along quite a lot, not least with the intemperate, frankly bullying and certainly unconstitutional threat of Mr Rees-Mogg, which was one of the worst utterances that I have heard in my 50 years in Parliament from any leader or indeed any senior Minister of the Crown.

We know—I know from personal experience—that you do not need a general election if there is a change of Prime Minister. Harold Wilson resigned in 1976 and was replaced by Jim Callaghan. The election in which Mrs Thatcher had her triumph came three years later. Mrs Thatcher retired—or left—and was replaced by John Major without a general election. David Cameron, contrary to his promise to carry on, a few hours after the referendum result indicated that he was going and was replaced by Mrs May without either a general election or a party election for a leader. Those are historic facts. I believe that it is very important that the House of Commons should have a say in this.

I agree very much with what the noble Lord, Lord Grocott, said about the Fixed-term Parliaments Act and I bid it farewell without any sadness. Although my noble friend Lord Howard is right in a theoretical sense that of course anything can happen—we can all think of extreme things happening—I honestly do not believe that it is at all likely that you would not get a majority in the House of Commons, perhaps a slender one, one way or the other.

12.15 pm

I do not think it is right that a Prime Minister, particularly a beleaguered one, should be able to threaten his parliamentary troops to plunge the country into uncertainty merely because he is in personal difficulties. Not one of us knows what is going to happen in the coming weeks and months—and even days—but what is important is that there should be a seemly transition that does not compromise the integrity of the sovereign, particularly in this year of all years, and a clear opportunity for the House of Commons to decide whether it wishes to plunge the country into a general election or not.

All this modest and sensible amendment does is give that chance to the other place. Because of the changed circumstances of very recent times, and because this was not properly debated in the other place at an earlier stage, I believe we have a duty to do this. We equally have a duty to accept whatever the Commons says when it votes on the equivalent of the Judge amendment, because the elected House is where the proper power in our constitution lies. We have a constitutional position and a duty that we exercise quite often to say "Please think again". I can think of nothing more important on which to ask the opinion of the House of Commons than the amendment that is now before us.

Lord Pannick (CB): My Lords, the noble Lord, Lord Howard, raised a concern that there might be a Prime Minister who is unable to govern and to secure a majority for a Dissolution. There is a constitutional solution to any such problem, should it occur—that such a Prime Minister should resign and let someone take over who is able to command a majority in the House of Commons.

Viscount Stansgate (Lab): My Lords, the House does not need or want a history lesson, but over hundreds of years power has been reclaimed from monarchs by

[Viscount Stansgate]
Parliament and the necessary transfer of power from Prime Ministers to Parliament. There is an imbalance in the balance of power between the legislature and the Executive, but it turns out that repealing the Fixed-term Parliaments Act 2011, which I think everyone in this House agrees should go, is more difficult than was imagined. We are an unelected House, but I can think of no better use of my vote today than to vote for Amendment 1 and allow the House of Commons to consider the matter properly and to reach its view, as the noble Lord, Lord Cormack, said. People disagree as to the nature of future constitutional circumstances but I am very proud of the fact that I have a vote that can send this amendment to the House of Commons and I, for one, will be content with whatever the House of Commons decides it wishes to do.

Lord Brown of Eaton-under-Heywood (CB): My Lords, I oppose this amendment. How beguilingly it is put. What could be more tempting than simply to say, "Vote in favour and all you are doing is giving the House of Commons another opportunity to discuss it"? We really ought to consider whether the case in favour is sufficiently powerful to take that unusual step, tempting as it may be. It is certainly not every day of the week that I find myself in agreement with the noble Lord, Lord Howard, and I agree, too, with my noble friend Lord Butler that this solution to the problems that have been identified today is not a good one.

I respectfully remind the House that although the matter took only a little time in the House of Commons, the Fixed-Term Parliaments Act Joint Committee pointed out in paragraph 86 of its careful and thorough report that there was only a minority in favour of giving the House of Commons by Motion a veto over a proposed Dissolution, as this amendment would do. It ended:

> "The majority considers it a change which would only have a practical effect in a gridlocked Parliament, which could mean denying an election to a Government which was unable to function effectively, and which might therefore be counter to the public interest."

Of course I recognise that, under this proposed amendment, a two-thirds majority would drop to 51%. However, as the noble Lords, Lord Howard and Lord Butler, pointed out, a hung Parliament could well reproduce the sort of stasis and chaos at which we arrived back in the summer of 2019.

I do not pretend to agree with the noble Lord, Lord Butler, on the next amendment, but this is a different point entirely. Given that, there should be a guardian against the sort of abuse that the noble Lord, Lord Grocott, suggested could occur in the way of the prime ministerial prerogative of Dissolution; I suggest Brenda of Bristol.

Lord Newby (LD): My Lords, I am not quite sure I know how to follow that last remark. I have put my name to this amendment for the reasons so eloquently given by the noble and learned Lord, Lord Judge. Like him, I carefully read the considered and lengthy response of the noble Lord, Lord True, to the equivalent debate in Committee. The noble Lord set out to make our flesh creep about the consequences of this amendment. I shall deal with three of his arguments, one of which has already been dealt with today.

First, the noble Lord said that, if this amendment were passed, the chance of zombie Parliaments would remain high. As we have already heard, the last Parliament was a zombie Parliament to the extent that the Fixed-Term Parliament Act requires a two-thirds majority. Without that, it would not have been. The noble Lord, Lord Howard, said, "Ah yes, but there will be other circumstances in which such a zombie Parliament could obtain". The noble Lord, Lord Pannick, has explained the first next step if a Prime Minister were unable to win a majority. I think that the noble Lord, Lord Howard, is asking us to entertain as plausible the possibility that, if nobody could form a Government, Parliament would decide that it wished to continue in existence without there being a credible Government. This is completely implausible to me. I cannot foresee circumstances in which such a situation would obtain for more than a very short period—a day or two at most. The noble Lord did not set such circumstances out. I do not believe that this amendment makes zombie Parliaments more likely.

Secondly, the noble Lord, Lord True, said that the amendment is "dangerously silent" on the status and practice of the conventions associated with confidence. Of course it is silent on the convention because conventions are not law. In the case of a Motion of no confidence having been passed, it seems blindingly obvious that, at that very minute, there would be a vote under the Act, as it would then be, to call an election. I cannot see circumstances in which that would not happen. The fact that conventions are not mentioned in this Bill is impossible and largely irrelevant.

Thirdly—and most extraordinarily—the noble Lord, Lord True, argued that this amendment, if passed, would deny or "overturn" the votes of millions. What on earth does that possibly mean? When millions vote, they do so in the expectation that there will be a full term of Parliament. During the course of a Parliament, they may or may not at any particular time wish that there were another election. As it happens, today, I suspect that most people would be rather glad to have an election, but that is not the way the constitution works. Parliament is elected for a period. If that period is to be truncated, the authority for truncating it rests with Parliament. The people have no say in whether to have an early election under our constitution, and the Government are certainly not proposing that, so the argument that, somehow, the amendment would frustrate the votes of millions is completely misplaced.

It comes down to a simple question: where should the ultimate source of power in our constitution rest? This was the question which the noble and learned Lord, Lord Judge, posed. We contend that it should be with Parliament and not the Executive. We contend that the steady accretion of power to No. 10—which, to a limited extent, has been further added to by the decision of the Prime Minister to set up a prime ministerial department— is not good for democracy. The amendment is one small way of reversing that trend.

Lord Sentamu (CB): My Lords, I apologise that I was not present during Committee.

When I was a student, a young person doing A-levels in Uganda, there was a question: "How are the people of the United Kingdom governed?" The book said, "The people of the United Kingdom are governed by

the Queen in Parliament under God", and went on, "and the sovereign is Parliament." If Parliament is the ultimate authority, to deny it the possibility of agreeing to the Dissolution of Parliament seems bizarre. If it is not, who has the ultimate authority? The noble Lord, Lord Howard, said that the Government could be paralysed and could not govern, but governance can happen only if those in the Executive are accountable and transparent to Parliament. If they are not, we are creating a body of people who think they are not answerable for their decisions to Parliament—that they are the ones who give it legitimacy. They may find themselves paralysed because, for whatever reason, they cannot obtain a majority. We heard that lady in Bristol when the election was announced in 2017. She said, "Not another election!" People are fed up with ad hoc solutions that often do not help.

I support the noble Lord, the Convenor of my group, who has provided a simple solution. If the Government cannot obtain a simple majority for Parliament to be dissolved, so be it. As for the calling of elections regardless because you are not getting your legislation through, well, if Parliament is objecting and it is sovereign, it requires a bit of humility to say, "We did not get it this time; maybe next year." I plead for this simple amendment, which would resolve all the problems that the noble Lord, Lord Howard, talked about—of the power of the sovereign and the power of the courts. Of course, the courts will intervene if something illegal has been done. Do noble Lords remember the Brexit question, when there was a desire that it should be done through the royal prerogative, the old King Henry VIII powers? The court said, "No. The act to enter into these negotiations was an Act of Parliament, and if you want to do away with it, it is Parliament that must consent for that to be done." That was when the courts intervened, by the way.

I, for one, support this simple way to resolve the problem that the Fixed-term Parliaments Act created, but we surely cannot go back to the power of the Prime Minister as if Prime Ministers are not accountable to Parliament: they are.

Lord Bridges of Headley (Con): My Lords, first, I apologise that I was not able to speak in Committee. I did, however, read the very interesting debate, and I am extremely sorry to say that I find myself at odds with the noble and learned Lord, Lord Judge. I think he and I wholeheartedly share a concern about the creeping, stealthy growth in the size of the state and of the Executive. I have spoken on this before and I will always stand up with him to oppose it.

Also, I fear that I am taking on my former boss, my noble friend Lord Lansley, on this matter. Listening to them, I feel, as the noble and learned Lord, Lord Brown, said, that they are making some very beguiling arguments. As we have just heard, what is being suggested in the amendment sounds very simple. We could be in *The Jungle Book*, facing Kaa and his big eyes: it is a simple, big thought that we can just introduce this amendment and all will be well.

12.30 pm

I can sense the strength of feeling in the House, but I will tell noble Lords why I oppose the amendment. I oppose it for a very simple reason. I see the underlying principle of the Bill as "Trust the people". It is about ensuring that Parliament cannot stop people expressing their views. I want to return to a system in which a Prime Minister can call an election and the election happens—no ifs, no buts, no parliamentary votes and no court cases. I think the noble and learned Lord asked exactly the right question, supported by the noble Lord, Lord Newby: "Where does power lie?"

Under what I want, power would flow directly from the Executive to the ballot box. As the noble and learned Lord put it in Committee, it is indeed one person's decision to call an election, but that decision should automatically give power to millions of people who can pick up a stubby pencil and decide on the future of the country. Power rests with them and, if they want to punish the Government for calling an election early—as we saw to our cost—they can do so.

Flowing from that, I say with respect to the noble Lord, Lord Grocott, and others who have spoken, whose opinions I very much respect, that I do not buy the argument at all that Parliament should have a say—period. Let us just examine what that would mean. It would mean that Parliament would, as I understand it, last for five years, unless a majority of Members in the other place voted to end it. Now we can quibble—I will come on to this point—about whether that would be by a simple majority or a two-thirds majority, but there would be a fixed term. Saying that this amendment would still honour the Conservative Party manifesto pledge, which, let us remind ourselves, was that we would

"get rid of the Fixed Term Parliaments Act"

is in some ways technically true. But, in fact, that statement in the Conservative manifesto should have said, "We'll get rid of the Fixed-term Parliaments Act and replace it with another fixed-term Parliaments Act"—and I do not believe that is the intention of the Government.

Then there is the argument that a requirement for a simple majority, as opposed to a two-thirds majority, would not lead to parliamentary gridlock. This is the point that my noble friend Lord Howard made. I agree with my noble friend, and the noble and learned Lord, Lord Brown. I contend—although I know that the noble Baroness, Lady Taylor, would not agree, potentially—that there could be a case in which the Prime Minister, if he or she was leading the largest party in a coalition, might find that his or her coalition partners did not want a general election. My noble friend Lord Lansley might say that that is unlikely. I think his words were that "in almost all circumstances" the Prime Minister would get a majority. But that is not good enough for me; it is just not good enough. Who here foresaw, when the Fixed-term Parliaments Bill was going through Parliament in 2010-11, the tumult of 2019? When the original Act was passed in 2011, we were all sure that it was going to bring stability.

That brings me to my third and final point. The noble Baroness, Lady Smith, argued in Committee that, if Parliament blocked a Prime Minister's attempt to call an election, it would not be denying the people a say in a general election because

"there will be a general election within five years."—[*Official Report*, 25/1/22; col. 208.]

Let us stop and think for a moment: "within five years". We could be in a situation where, as my noble friend Lord Howard said, a Government were in office

[LORD BRIDGES OF HEADLEY]
but not in power. I am sure that the noble Baroness needs no reminding of what her manifesto said: it pledged that Labour would repeal—I use the word deliberately; "repeal", not "replace"—the Fixed-term Parliaments Act because it

"stifled democracy and propped up weak governments."

That is precisely the point. By the noble Baroness's own admission, this amendment risks doing precisely that, with years of twisting in the wind.

That is what we want to avoid. Trust the people—that is the entire point of the Bill, and that is why the amendment should be disagreed.

Lord Reid of Cardowan (Lab): My Lords, I apologise for not having attended previous debate on the Bill, but I want to make just two simple points. First, it is not true that the problems of the Fixed-term Parliaments Act were not foreseen. They were foreseen and explicitly raised by many Members on this side of the House. Secondly, however, the noble Lord, Lord Bridges, has encapsulated the difference between the two sides of this argument. In particular, I ask him to reflect seriously on his statement that we want power flowing from the ballot box to the Executive. That is completely contrary to the constitution of this country. Indeed, not only is it contrary to that, but it is enormously dangerous, because any system—

Lord Bridges of Headley (Con): What I want is a system where, if the Prime Minister wishes to call a general election, that election happens and we get to the situation in which we can trust the people. That is where I wish to see the power flowing.

Lord Reid of Cardowan (Lab): Out of courtesy to the noble Lord, I will check the record, but my distinct recollection was that he said that we want a system where power flows from the ballot box to the Executive. Not only is that contrary to everything we believe, by omitting Parliament in the middle of it, but it is the basis of every bad dictatorship that Europe has produced—referendums and power flowing from the ballot box to the Executive. That is the extreme case or course, but it is, in essence, precisely the difference between the arguments on the two sides today, in which we believe that on major issues, which now in the British Parliament include the declaration of war, the people who should make the decision at the end of the day are those in Parliament, not the Executive. All the power that the Executive receives is because they can control or, rather, call on a majority in Parliament. Should the Executive cease to have the confidence of Parliament, whether on policy, war, peace or the Dissolution of Parliament, the Executive cannot proceed unless they can change the mind of Parliament. That is a simple argument that applies to the most important things that Parliament can decide. I would argue that the Dissolution of Parliament is one of those issues.

Baroness Smith of Basildon (Lab): My Lords, this is the third time in your Lordships' House that we have had a debate focused on this issue. At Second Reading, it was a key issue, as it was in Committee. It comes down to a fundamental point.

In the other place and, indeed, in your Lordships' House, Ministers asserted from the beginning that bringing in this piece of legislation takes us back in some kind of parliamentary TARDIS to the status quo ante whereby we return to exactly the position that we were in before the Fixed-term Parliaments Act. However, in Clause 3, that argument is completely undermined by saying, "But just in case we haven't got it right, we are going to have a clause that avoids any legal action", and the so-called ouster clausem Clause 3. So the Government are not confident that the Bill without the ouster clause returns us to the position that we were in before.

The fundamental point, also made by the noble and learned Lord, Lord Judge, and the noble Lord, Lord Lansley, is that there is a choice. Do we accept on the calling of an election executive authority or parliamentary democracy? The huge flaw in the argument of the noble Lord, Lord Howard, is that he seems prepared to trust Parliament on every issue—matters of life and death, legislation and whether we go to war—but not on whether there can be a general election.

I heard the comments of the noble Lord, Lord Bridges, in exactly the same way as my noble friend Lord Reid. I wrote them down. He seemed to want to make a major constitutional change where power flowed from the ballot box to the Executive. The fundamental basis of our democracy is that power flows from the ballot box to the elected Chamber of Parliament, the House of Commons, and that the Government derive their authority from that House and are responsible to it.

On the point made by the noble Lord about denying the people a vote—that somehow, if the House of Commons were to vote not to have an election, we would be denying the public an opportunity to have their say—he is not correct, but is right on one point. In effect, there is a fixed or maximum term, in which it is not open to the House of Commons, the Prime Minister, or anyone else to never have an election. There is an end term to any Parliament, by which time an election must be held. It is not simply fixed in time. The argument is that previously the Prime Minister would be expected to go to the monarch. I doubt any of us wish to return to the situation where one puts the monarch in such controversy. We are all scarred by the unlawful Prorogation and how the Government behaved on that. It comes back to this point: do we have executive authority or parliamentary democracy in calling an election? There is nothing more basic for the House of Commons than that objective. Offering the other place an opportunity to vote on this issue avoids the need for Clause 3. The idea that the courts would involve themselves in a decision of Parliament to hold a general election is fanciful. This is an elegant and correct solution of this issue.

The noble and learned Lord, Lord Judge, referred to the issue of the former Leader of the House of Commons, Jacob Rees-Mogg, threatening MPs that if they failed to support the Prime Minister, the Prime Minister could call an election. If we are talking about hypothetical circumstances or crises that could occur again, that is certainly one, and should be guarded against at all costs, by not placing the power in the hands of just one person. We should not be surprised by such threats; noble Lords may recall that the current

Leader of the House, early on in his parliamentary life, threatened your Lordships' House with 1,000 extra peers if we failed to pass a piece of legislation he supported. Perhaps threats come quite easily to him.

We had a lengthy debate on this, which the noble and learned Lord, Lord Judge, summed up well at the beginning. When this was debated in the House of Commons, there was no lengthy debate, and there is an opportunity for them to reconsider this. When we debated it in Committee previously, my noble friend Lady Taylor said that she was surprised that the House of Commons gave away that power so easily. It may be because it did not discuss it in any great depth or with consideration. As the noble and learned Lord, Lord Brown of Eaton-under-Heywood, said, the Joint Committee was divided on the issue of whether it was appropriate or not. It is entirely appropriate that the House of Commons is given the opportunity to consider this again.

I come to one final point, which is that the noble Lord, Lord True, said at both Second Reading and in Committee that the Commons had not amended the Bill, so your Lordships' House should not do so either. Last night, this House sat beyond 3 am, which is unusual. Today, to facilitate business, we are sitting at 11 am, on a much longer day. If it is not the duty of this House to pass amendments that the other end can consider, then what is the point? The amendment has our full support and I urge noble Lords to vote for it.

Lord True (Con): My Lords, the request for a dissolution is perhaps the ultimate act of humility by an Executive. It is placing all that has been lent, first by the electorate, and then by Parliament, in the hands of the British people. That is the underlying thought behind what my noble friend Lord Bridges of Headley said, in what was a significant and important speech, as was the speech of my noble friend Lord Howard of Lympne.

12.45 pm

I have listened carefully to the debate. I am not going to repeat at length the arguments that I put in Committee; they lie there in *Hansard* and I stand by them. One novel argument was put forward today; the noble Baroness who has just finished, and indeed the noble and learned Lord, Lord Judge, referred to remarks made by my right honourable friend Mr Rees-Mogg. Let me put it beyond peradventure: the established constitutional position is and remains that a general election is not required following a change in leadership. I think all of us agree with that, and it is and will remain the position.

The noble and learned Lord, Lord Judge, said he wanted the other place to think again, and other noble Lords made the same point. It is of course the right of noble Lords, when they wish, to ask the House of Commons to think again—but the House of Commons has thought about this and sent us a Bill with no such provision as your Lordships propose to insert in it. The Bill has also been considered by the Joint Committee, which has reflected on it.

Lord Wallace of Saltaire (LD): I am sure the Minister is aware that the House of Commons spent less than two hours in Committee, on Report and on the final stages of this Bill—so to say that it gave it considerable attention would I think be a slight exaggeration.

Lord True (Con): My Lords, your Lordships are required to deal with the Bills that are sent to us by the other place, and the other place has sent us a Bill with no such provision. Members of your Lordships' House under the chairmanship of my noble friend Lord McLoughlin on the Joint Committee, which reflected at length on these matters, did not propose such an amendment. None of those who have scrutinised the legislation formally have proposed what the noble and learned Lord has suggested.

The noble and learned Lord said that we could not return to an ancient system. There is perhaps a faint irony in advancing that argument in an unelected House with a tradition that dates back centuries. He said that we had to be 21st century. Well, we tried "21st century" in 2011 and, frankly, I rather prefer the experience of many decades in the long past which I believe served us well, and the proposition before your Lordships, supported by my party and the party opposite at the general election, was that we should do away with the failed 21st-century experiment.

We do not have to talk the talk about the problems that a Commons vote might cause. There has been a lot of speculation, to and fro, on this, but we lived it in 2017 to 2019; that Parliament refused three times to be dissolved and to meet the verdict of the people.

The repeal of the Fixed-term Parliaments Act was in our manifesto and that of the party opposite. I found it fascinating to hear the throaty roar of approval from the Benches opposite when any noble Lord, starting with the noble and learned Lord, Lord Judge, said that we must not go back to the situation before the Act was passed. I remind the party opposite, as did my noble friend, of the Labour Party's promise to the people:

> "A Labour government will repeal the Fixed-term Parliaments Act 2011, which has stifled democracy and propped up weak governments".

They wish to maintain an essential part of that Act in the form of a Commons vote.

Lord Reid of Cardowan (Lab): Can the Minister give one example of a spokesman from this side saying that we wish to retain the Fixed-term Parliaments Act?

Lord True (Con): I fear I must say to the noble Lord, who I greatly respect and admire, that I simply stated a feature of the Fixed-term Parliaments Act that the party opposite wishes to retain: that there should be a Commons veto on Dissolution. That is what I said, and that is a fact. If the party opposite votes for this amendment, it will be voting for a House of Commons veto potentially on its own Dissolution—it is written there in the book.

Lord Grocott (Lab): If the Minister is going to give us a history lesson on how people have acted and voted, could he remind us how he and his colleagues voted on the Fixed-term Parliaments Act?

Lord True (Con): My Lords, I promised I would look up my personal record on that Bill. I have not done so, but I would be surprised if my name featured very heavily. Anyway, it is being done away with now, and I think the noble Lord and I agree that it should be done away with, whatever follows.

A vote in the House of Commons has created paralysis in a number of contexts and could create paralysis in many contexts. Some noble Lords have spoken on this, including my noble friends Lord Bridges and Lord Howard of Lympne, and the noble and learned Lord, Lord Brown. There could be minority Governments or situations where parties, Parliament or the nation have divided.

The kernel of the argument put forward by the noble Lord, Lord Grocott, and others is that their approach offers simplicity. In fact, it adds a complication to a Bill which is simple. Without going over the same ground, we saw that painfully in 2019, when the Labour Party was three times presented with the opportunity to force an election, and Mr Corbyn thrice denied the election to the Prime Minister and the British people by sitting on his hands. So do not tell me that there cannot be circumstances in which an Opposition would seek to prevent a general election. We have lived that system and I believe that my noble friend Lord Howard of Lympne, and indeed the noble Lord, Lord Butler of Brockwell, were absolutely right to warn that these circumstances could recur.

In Committee, I set out the negative consequences for the fundamental conventions on confidence. Simply put, the privilege to request that the sovereign exercise the Dissolution prerogative is an executive function enjoyed by virtue of the ability of the Government to command the confidence of the Commons. Our contention is that this simple process should not be unduly constrained by the type of process that the noble and learned Lord puts before us; it could be disruptive and unhelpful at times when expediency is essential.

Baroness Taylor of Bolton (Lab): I am grateful to the Minister for giving way. He is talking about the use of executive powers. Is he concerned—I assume he is, because of Clause 3—that the courts might get involved in this and that that could cause serious constitutional conflict? Surely if the amendment proposed by the noble and learned Lord, Lord Judge, was accepted, that would reduce the need for the ouster clause in Clause 3?

Lord True (Con): My Lords, I do not think it is an either/or question. If I may use a phrase that was once popular on the Benches opposite, there is third way, which is to have neither of those amendments and to return to the simple and proven practice of the past.

When we send an amendment to the other place, we are always adjured to be careful what we send and to show how we reflect and are thoughtful. I would like to consider some of the practical working of the proposition that the noble and learned Lord puts before us. There is little about that, despite its immense significance potentially for our constitution, and indeed its reversal of the Government's manifesto commitment to repeal the Fixed-term Parliaments Act.

For example, the noble and learned Lord proposes that there should be a Motion that

"this present Parliament will be dissolved."

How would this parliamentary process be sequenced and when would it apply? How would it relate to confidence? Would it also apply following a loss of confidence? Would a Prime Minister have to go for a further Motion? Could anyone put before the House of Commons the Motion proposed by the noble and learned Lord, or would it be only the Prime Minister and the Treasury Bench? If the Motion is passed, is the Prime Minister bound to seek a Dissolution—for example, a sudden tactical alliance could trigger a general election—or could he seek to retain the confidence of the House of Commons? Even if there were such a Motion as the noble and learned Lord has proposed, when would the Prime Minister have to dissolve Parliament?

In even more extraordinary circumstances, given such an amendment, could a Government procure such a Motion on the first day after the end of the debate on the gracious Speech? Could they pass such a Motion

"that this present Parliament will be dissolved",

and then wait for the rest of the Parliament? After all, it says "will"; it does not say "when".

These questions are practical and unanswered. I submit that it is not a responsible role for a revising Chamber to send this amendment down to the elected Chamber with none of those issues worked through. They were carefully considered by the Joint Committee, which arrived at a conclusion. This is constitution-making on the hoof.

Noble Lords: Oh!

Lord True (Con): It is the launching of a ship of uncertainty in which many questions are unanswered.

Baroness Smith of Basildon (Lab): I find the noble Lord's comments quite offensive. He is suggesting that it is inappropriate for your Lordships' House, having debated this issue for significantly longer than the other place, to suggest an alternative. That is perfectly reasonable and normal. The arrangements that he says should be in place are in the Bill. They are also untested, because it does not return us to the situation as before. I ask him to be a bit more careful in his choice of words and his attitude to the House discussing such issues.

Lord True (Con): My Lords, I reject those remarks—in a friendly manner, of course. I do not think it is in any way offensive for a Minister at the Dispatch Box, or any other Member of your Lordships' House, to put to noble Lords that there may be practical difficulties and things that are lacking in amendments proposed before the House.

We are often told that we should proceed with the utmost care in constitutional change; I agree profoundly. "Further and mature reflection" was the phrase I noted from the noble and learned Lord, Lord Judge; I agree. The Bill had extensive pre-legislative scrutiny. This option was not recommended. The majority of the Joint Committee, on which your Lordships are represented, considered that it would be, as was quoted

by the noble and learned Lord, Lord Brown, contrary to the public interest. With that advice, and with the utmost respect, I do not think that hasty ping-pong between the two Houses qualifies as utmost care for making a substantial constitutional provision, against what the Joint Committee recommended. I submit that that is not a prudent approach. For that reason, I hope that the noble and learned Lord, Lord Judge, and others will reflect on the wisdom and practicality of the amendment.

There is a final fundamental point. The creation of statutory constraints would cut against and undermine the flexibility that characterises the pre-FTPA arrangements that the Government want to reinstate, as they have promised. Generations of proven practice underlie those arrangements, but they were junked for what we all know was a short-term political expedient in 2011. I do not share the attitude of some to past experience—that we cannot return to the past and apply its wisdom again. Again, I submit that we can.

For all those reasons, I urge noble Lords not to press the amendment. It is defective in practice, leaves a host of very hard practical questions unanswered, and risks recreating the conditions of the very paralysis we all lived through so recently, about which we all told ourselves we would never want to see again. We should not risk returning to that. We should reflect on the wisdom of ages and take pride in our constitutional practice over generations before 2011, and reject the noble and learned Lord's amendment.

1 pm

Lord Judge (CB): My Lords, we have probably talked too long already, but I find it wonderful to think that my arguments have been described as "beguiling"—that was my old friend, the noble and learned Lord, Lord Brown of Eaton-under-Heywood. He has reminded me of the days—our boy days—when we used to go round the county courts. He would always do it, every time: he would get up and say to the judge, "Mr Judge has made a very powerful argument," or "a very remarkable piece of advocacy" or whatever it might be, and then he would punch me straight between the eyes and say, "But he is wrong". Beguiling arguments have their strengths. They are beguiling because they are soundly based.

And then, I have just heard the noble Lord the Minister create a whole series of fences. It is like Becher's Brook every time as we go around the course. The point of this amendment is for the issue to go to the other place and for the other place to consider it and decide whether those hurdles are ones that can be overcome or not—to decide which way it should go.

Lord True (Con): Does the noble and learned Lord set at naught the recommendation of the Joint Committee of your Lordships and the other place which considered this proposition, rejected it, and cited it as contrary to the public interest?

Lord Judge (CB): There was a majority in favour of the proposition that the noble Lord the Minister has put forward. I happen to think that the minority was right. I am inviting us to let the House of Commons have another look and make its own mind up. They will take into account the decisions, recommendations and all the papers that they are given, I hope, and come to their own conclusion.

What I did find slightly startling about the noble Lord the Minister's response was the idea that when a Prime Minister seeks a general election, that is an act of deep humility. It is not. It is an act by an individual in power who is seeking the best possible way of retaining power. Elections are not sought in the public interest; they are sought for the advantage of the party in government. Humility has nothing whatever to do with it.

Finally, I want to raise a serious point. I find the idea—it has been espoused by a number of noble Lords—that we should stop any risk of the elected House acting as zombies. What an insult that is being paid to the elected Chamber by this House. Of course, the House will get things wrong—every House, every institution, gets things wrong. But the idea that we are going to suddenly be frozen in a situation which is incapable of movement and the Government will be paralysed and things will not work and the electricity will be turned off, all because the Commons has decided to reject a Prime Minister's desire for a dissolution is, with great respect, bunkum. I do not propose to withdraw this amendment. I seek the opinion of the House.

1.04 pm

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Amendment 1 agreed.

Division No. 1

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1.15 pm

Clause 3: Non-justiciability of revived prerogative powers

Amendment 2

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

2: Clause 3, page 1, line 17, leave out "or purported exercise"

Member's explanatory statement

This amendment ensures that the ouster provision in clause 3 will not apply to the purported exercise of the powers to dissolve Parliament contained in clause 2.

Lord Norton of Louth (Con): My Lords, on the assumption that the Government invite the Commons to disagree with the amendment we have just passed, I move Amendment 2 and speak to my other two amendments in this group. I pursued these in Committee and believe their importance is such as to merit returning to them on Report.

As I argued in Committee, the provisions of Clause 3 that are covered by my amendments conflict with the Government's aim to restore the constitutional position to that which existed prior to the enactment of the Fixed-term Parliaments Act. They are also objectionable in principle. It is this point I wish to pursue.

In Committee, the Minister, my noble friend Lord True, sought to justify both the use of "purported" and the inclusion of paragraph (c). He advanced a "thin edge of the wedge" argument: the clause is necessary because

"the direction of travel in the case law makes a clear and explicit statement of non-justiciability necessary."—[*Official Report*, 25/1/22; col. 233.]

The courts are viewed by the Government as having encroached in certain cases on the exercise of the prerogative where vested in Ministers. Because the courts have gone beyond what the Executive wished, they wish to prevent them straying further in respect of the Dissolution of Parliament. As my noble friend emphasised, the use of "purported" is to make it plain that it is not for the courts to examine a Dissolution and calling of Parliament against our administrative law framework.

My contention is that the fear underpinning the provision is unfounded. The cases cited by my noble friend are not sufficient to show that the courts would ever go near the exercise of the prerogative where the Dissolution and calling of Parliament are concerned. As my noble friend reminded us in Committee, Lord Roskill said, in 1985 in the GCHQ case, that the Dissolution of Parliament was

"not susceptible to judicial review".

Indeed, Lord Roskill identified what he referred to as "excluded categories", comprising prerogative powers that by their "nature and subject matter" were

"such as not to be amenable to the judicial process."

These included

"the dissolution of Parliament and the appointment of ministers".

I regard the powers not exercised on advice as the ultimate excluded categories.

In Committee, I moved an amendment to put on the face of the Bill that the prerogative power to dissolve Parliament and call an election was a personal prerogative power of the monarch, not exercised on the advice of Ministers. There would therefore be no advice for the courts to consider. The prerogative powers not exercised on advice are such as to put them in a class of their own as there would be no purported exercise or purported decision. If the personal prerogative is revived, the use of "purported" has no relevance. This is not addressed in the letter from my noble friend Lord True to the noble Baroness, Lady Smith of Basildon.

If the argument is that the prerogative is now a statutory power and that is the route through which a challenge may be mounted, the problem with the use of "purported" is that it enables Ministers to go beyond their powers. Let us be clear as to the meaning of "purported": it means that something has been stated to be true or to have happened, even though that may not be the case. My noble friend Lord True argued that the use of the word would not constitute a precedent—we have seen evidence already this week of its use in another measure—but I am not persuaded that it is desirable in principle to embody such a provision in statute. As he said, it may be a bespoke solution, but it is a bespoke solution in plain sight. It is constitutionally objectionable, as potentially it conflicts with the rule of law. That should concern us all. It should certainly concern everyone on this side of the House. It is a fundamental tenet of Conservative belief that institutions are subject to the rule of law, which regulates definitively the relations between citizens and applies equally to the governors and the governed. A stable social order is dependent on the maintenance of the rule of law.

Furthermore, there is nothing to suggest that the courts would ever wish to entertain interfering in the process given the repercussions that my noble friend Lord True outlined in Committee. Those scenarios would be as unpalatable to the courts as they are to your Lordships. As he recognised in Committee, there are political checks and balances at work, and, where there are, the courts stay clear. That was apparent in respect of the so-called Sewel convention, when the Supreme Court declared that

"policing the scope and manner of its operation does not lie within the constitutional remit of the judiciary."

The provisions before us are unprecedented. As the noble and learned Lord, Lord Hope of Craighead, said in Committee, the objection is to the use of "purported" and the words in paragraph (c). As he made clear, there is no objection to say that the court or tribunal may not question the powers referred to in Clause 2.

As I said in responding to the debate in Committee, when my noble friend Lord Faulks argued that the clause was necessary to keep the courts out of politics, I take the view that the clause, or rather the words that I seek to delete, are designed to keep the courts out of the law. Take out "purported" and paragraph (c) and the problem is solved. One is then keeping within, and indeed promoting, the rule of law.

The provisions of the clause cover a situation that is so unlikely to ever occur for the reasons I have given—indeed, if it is a personal prerogative power of the monarch, it cannot occur—that it does not justify conferring powers that are so objectionable. The

[Lord Norton of Louth]
remoteness of it ever occurring is such that it would be better to wait and deal with it at the time. The doctrine of parliamentary sovereignty is not in doubt. As the late Lord Bingham argued, it is immanent in our constitution. As one of the measures being repealed by this Bill—the Early Parliamentary General Election Act 2019—demonstrates, Parliament can move with some speed to achieve the outcome it wishes. That is beyond doubt. There are precedents for Parliament enacting within 24 hours a Bill to overturn a court judgment.

Parliament by the very doctrine of parliamentary sovereignty is entitled to enact the provisions of this clause. What it can do is not necessarily what it should do. Retaining the purported exercise of powers and any purported decision within the clause, along with paragraph (c), is either redundant or it clashes with a basic tenet of the constitution. If the latter, it is objectionable in principle and unnecessary in practice. I would hope that a Conservative Government would take the high road and accept these amendments.

Lord Butler of Brockwell (CB): My Lords, I will speak to my Amendment 5, to exclude Clause 3 entirely from the Bill, which has been grouped with the amendments in the name of the noble Lord, Lord Norton. I do not need to take much of your Lordships' time. We have just passed an amendment that would provide a restraint on the Executive in calling an election, so for that reason Clause 3 becomes unnecessary. It may be thought, therefore, that I should not move to have it excluded, but I will, because I anticipate that the House of Commons may remove the clause that we have just inserted in the Bill, and at ping-pong I would still like the opportunity to come back to get rid of the ouster clause, which I regard as objectionable.

My first contention is that it is unnecessary. In Committee, the noble Baroness, Lady Noakes, who I am glad to see in her place, did not agree with me on all aspects of the matter, but she said that she could not imagine any circumstances in which the courts could be involved in a petition to dissolve Parliament. Her phrase was that this clause is

"legislating against shadows, against figments of the imagination."—[*Official Report*, 25/1/22; col. 227.]

I agree. So why is the clause there? We all know why: it is because of government pique that the courts were involved in the application to prorogue the last Parliament, and the courts ruled against the Government. That is why the Government have thought it necessary to put this clause in the Bill. This is a Government who do not like restraints on their freedom of action and, in that respect, I suppose they are like all Governments, but, in a democracy, restraints on executive power are necessary.

If, in real life, it is unthinkable that this clause could have any practical effect, does its inclusion in the Bill matter? I think it does, and I will explain why. My submission is that it is wrong in principle for the Government to take an important constitutional power and to say that they will not allow any challenge to its use. This was a point that we debated in a debate on the previous amendment.

We all recognise that there are three possible sources of restraint: the courts, the House of Commons and the Queen. We are all agreed that it is undesirable to put the sovereign in the position in which she has to make a highly political decision to refuse a Dissolution, so either Parliament or the courts must exercise control. We have just passed an amendment that gives Parliament the power to exercise that control, but at the same time we have recognised that there are some dangers in that. The danger is the situation in which the Government are hamstrung, unable to govern and unable to seek a fresh mandate. The amendment we have just passed is a solution, but it is a second-best solution, in my submission.

I anticipate that the Minister will say that there is one more source of restraint—the electorate, who will punish a Government who call for an improper or unjustified Dissolution. That may well be correct, but with great respect that is not the point. What we are discussing is the power to dissolve Parliament. By the time the electorate have a say, the power will have been used, so it amounts to trying to shut the stable door after the horse has bolted. It is like giving an irresponsible person a gun and saying that it does not matter because that person will be punished if the gun is used. The person needs to be restrained before that situation arises.

This is my case: in practice, this clause is unnecessary. To go back to the noble Baroness, Lady Noakes, it is legislation "against shadows", but, at the same time, it is wrong in principle, and it is a bad precedent. It should be omitted from the Bill.

1.30 pm

Lord Hope of Craighead (CB): My Lords, I supported these amendments in Committee and I should like to do so again today. I cannot help feeling that there is just a hint—as the noble Lord, Lord Lansley, put it earlier—of the generals fighting the last war, because it is very obvious why Clause 3 is there: it is to head off what was seen to be a trend at least in the decision in Miller 2.

I will make two points, if I may. First, following my noble friend Lord Butler of Brockwell, I agree that the clause is unnecessary. One of the things that was said by the Supreme Court at the beginning of Miller 2 was to distinguish the Prorogation issue with which it was concerned and Dissolution. It was made quite clear in a very few words at the start of that decision that decisions about Dissolution were nothing to do with the courts. The noble Lord, Lord Grocott, made that point very clearly when he said that this is the most political of decisions that could be taken. That is a very clear warning to the courts that it is nothing to do with them. It is unnecessary, because I cannot see the courts engaging with a Dissolution issue in addition to the points made by the noble Lord, Lord Norton.

The second point that I would like to say a little more about is the unwise precedent. The problem here is that the language of paragraph (c) in Clause 3 removes entirely from the courts the possibility of determining the limit or extent of the powers. The reverse of the coin is that it is the Executive who are the determination and who decide the limit or extent of their own powers. Earlier today, the noble Lord,

Lord Reid of Cardowan, said that this was the basis for a dictatorship. My noble friend Lord Butler referred in Committee to a number of examples not very far away from us in Europe, where there is perhaps a trend moving towards that. We have to be extremely careful not to give a signal to a Government that they can get away with an exclusion clause of this kind. The question is how far the clause should go, and it is paragraph (c) of Clause 3 that is completely objectionable, leaving it to the Executive to determine the extent and limits of their own powers.

The question of precedent is worth dwelling on. I admire greatly the skills of the parliamentary draftsmen. They have their own skills and traditions, one of which is that they are very determined to follow precedent in the way in which they engage with legislation. This has great value, because it means that there is constancy in the way in which issues are expressed in our legislation, which is of a very high standard. My concern is that, whatever may be said today about this not setting a precedent, it will nevertheless be there in the books, and the draftsmen will, some years ahead, say, "That is what was done in 2022. It is an example that we can follow." That is danger that I fear in this clause, which is unnecessary. It is unnecessary, so we should not risk the creation of a precedent that, in future years, we may deeply regret.

Lord Trevethin and Oaksey (CB): My Lords, I respectfully agree with much of what the noble and learned Lord said about the drafting of this clause and agree that it should not be treated as a precedent in the future for other ouster clauses. The drafting is unprecedented, because the decision of the Supreme Court in Miller 2 was itself unprecedented. I do not agree with the amendment of the noble Lord, Lord Butler, and I will briefly explain why.

I regard with horror, and I suggest that your Lordships should regard with horror, the prospect of what one might notionally call Miller 3: namely, a piece of litigation challenging the propriety or legal effectiveness of a Dissolution. In Miller 1, the noble and learned Lord, Lord Reed, now President of the Supreme Court, warned against the legalisation of political issues and observed that it was fraught with danger, not least for the judiciary. There is a danger that, because the Supreme Court in Miller 2 found itself able to determine that case against the Government without getting involved in the underlying political issues, one might suppose that a similar exercise could be undertaken in relation to litigation about Dissolution without the judges having to address political questions in an objectionable way. That reasoning would be fallacious.

It is necessary to bear in mind what happened in Miller 2 in relation to the evidence. The noble Lord, Lord Pannick, who is about to rise, will be able to help us with that if need be. The government evidence in Miller 2 could politely be described as sparse. It consisted of a handful of partially redacted memos and there was no witness statement, as far as I understand it, which dealt substantively with the reasons for—that is, the justification for—the Prorogation. Why that was, I have no idea. It might have been pressure of time. It might have been—though I doubt it—some kind of Machiavellian strategy on the part of the Government, who were unafraid to lose the case. It might have been because no one was prepared to make a witness statement. It might have been for the legitimate reason that the legal position was being argued for that justiciability had to be taken as a preliminary issue, as the Divisional Court held that it should be, prior to any consideration of evidence. Never mind; there was no good evidence from the Government.

That enabled the Supreme Court, when it came to apply its test as to reasonable justification, to say in robust terms that there was no evidence before the court that would begin to support the contention that there was reasonable justification for the Prorogation. In that way, the Supreme Court avoided the need to tackle a question that might have arisen if the Government had given their evidence in a different way. The Prime Minister might have said: "Look, Parliament has made Brexit very difficult. I am engaged in an immensely important negotiation with foreign counterparties, which is going to affect the future of this country for many years. I regard it as desirable to convey the message to my negotiating counterparties that I mean business. That is why I intend to prorogue for an unusually long period of time." The Prime Minister might have said that and that might have been true—I do not know. If that had been the evidence before the court, it is inconceivable that the Supreme Court justices would have felt able to enter on to that terrain, because it was nakedly political. That is the way that it might have gone.

That indicates that allowing even the faintest possibility of litigation about the legal effectiveness of a Dissolution is a grave error. It should be unthinkable that the judges should be forced to engage with that type of issue. I respectfully agree with what I think the noble and learned Lord, Lord Hope of Craighead, and others, have indicated—that it is very unlikely that the judges would entertain litigation of this nature. They would wisely be reluctant to do so.

But we should recognise the risk of litigation of this nature being initiated for collateral reasons. We are contemplating a period leading up to a general election. All the politicians will be on manoeuvres. There are potentially collateral advantages to litigating points of this nature, so Miller 3, or something like it, is conceivable. It should not happen. That is why, even though the drafting causes me concern, the ouster clause is good and this amendment should not be agreed to.

Lord Beith (LD): My Lords, this is a new threat. We have heard of the threat of an election being called to the detriment of Back-Bench Members whose support is being sought, but the threat of Miller 3 is not one that has been produced before. I found it an unpersuasive line of argument, particularly that the Prime Minister could go to the courts and say, "In order that I should have a stronger position in dealing with foreign counterparties, I must suspend Parliament to make sure that nobody can attend Parliament and say anything in the course of its proceedings while I am engaged in these negotiations." I cannot see any basis for that, as opposed to the contention that has come into the debate of a Prime Minister adducing in evidence, "I wish to have a Dissolution and I have a majority in Parliament supporting me in this desire", which would

[LORD BEITH]
be the case under the amendment that we passed previously. We would be in an absolutely clear position and the courts would have no basis for intervening.

In the preceding debate, the noble Lord, Lord True, said that the simple and proven practice of the past is what we should follow. But the simple and proven practice of the past did not include an ouster clause of this nature. The Representation of the People Acts do not contain ouster clauses of this nature, nor does most other legislation. That is a situation that might change, as the noble and learned Lord, Lord Hope, pointed out, if this is taken as a precedent. I will come back to that in a moment.

It is necessary to be clear, first, that in the event of the other place agreeing to the amendment that we passed a moment ago, this ouster clause is particularly unnecessary because no court would interfere with so clear a decision of Parliament. There are other reasons why the request to the monarch to dissolve would be protected from the actions of the courts. One is that it is, as the noble Lord, Lord Norton of Louth, pointed out in moving his amendment, a personal prerogative power. It is not a matter of advice which might be challenged, as it was in the Prorogation case. It is a personal prerogative power, which results from a request from the Prime Minister. I do not believe that the courts would be in any way inclined to interfere with the exercise of that personal prerogative by the monarch.

I strongly assert that the comparison with Prorogation is quite wrong. The effect of Prorogation is that Parliament cannot meet; it cannot sit or discuss and it cannot challenge the Executive. That is quite different from the Dissolution of Parliament and the calling of an election. Indeed, it has been adduced from the quarters of those who support the Government's position that the calling of an election, referring the matter to the people, is so clearly the right outcome in so many circumstances that it should not be interrupted in any way. In my view, the courts would certainly not want to be seen to be preventing a general election from taking place. I find that inconceivable.

My primary worry about this ouster clause is not that it has some practical effect or that it changes what would be the clear reluctance of the courts to become involved in arguments about the calling of an election. It is that the Government have form on ouster clauses; we saw that earlier this week when debating the Judicial Review and Courts Bill, which has its own ouster clause. In that case, the Government have declared that it is their intention to use the wording in that Bill as a precedent for ouster clauses in other, unspecified Bills in future. That was clearly stated in a government press release.

The noble and learned Lord, Lord Hope, made the point that parliamentary draftsmen like to act on precedent. When they have found a form of words that suits their purpose in one case, they like to use it again in another, if possible. We are creating precedents for issues around, for example, purported powers that will be very unhelpful in future as we seek to defend the ability of the citizen to challenge abuse of power, which is what judicial review is about. We are doing so because of fears that are not justified and dangers that do not exist, because the likelihood of courts preventing a general election from taking place is clearly vanishingly small, to the point of non-existence, for the reasons that I and others in this debate have adduced. We would be better off without the ouster clause provision. We do not need it and therefore we support the amendments of the noble Lord, Lord Norton of Louth, and the amendment of the noble Lord, Lord Butler of Brockwell.

Lord Faulks (Non-Afl): My Lords, the noble Lord, Lord Butler, is right to pursue his amendment because it seems quite possible that the House of Commons will decline the invitation to accept the amendment that your Lordships' House so recently voted in favour of. I will address a number of questions briefly, because I did have the pleasure of being here in Committee.

First, is this really an ouster clause at all? I accept that it is not easy to imagine circumstances in which a Dissolution is challenged in the courts, but the noble Lord, Lord Butler, wants at least to keep open that possibility—apart from anything else, as I understand it, to save potential embarrassment to the sovereign. The noble and learned Lord, Lord Hope, does not want this ouster clause, if it is so described, to act as a precedent, and the noble Lord, Lord Norton of Louth, does not like the word "purported".

It is probably not, strictly speaking, an ouster clause at all. During the deliberations of the Independent Review of Administrative Law, which I had the privilege of chairing, we looked at this clause. We thought that there was a distinction between Parliament creating a power and, at the same time, including a provision that limits or absolutely prevents the courts' powers from challenging that.

1.45 pm

However, this is not really that sort of situation at all. It is not, truly speaking, an ouster clause; it is simply restoring the status quo. As the noble Lord, Lord Norton, pointed out—and Lord Roskill so long ago expressed the view—it is simply a no-go area for the courts, so that we are not ousting anything that they would normally consider but simply saying that this is the position.

If this is an ouster clause, and I doubt whether it is, is it justified here in order to preserve the status quo? Why leave open the possibility, however remote, of the courts challenging a Dissolution? Potential chaos would follow a challenge—campaigns might be halted and results might even be overturned; even a threat of a legal challenge or an unsuccessful challenge could cause some serious temporary chaos. We all know that the courts are astute at identifying what has been described as politics by other means, but applications might be made, as the noble Lord pointed out, for collateral reasons. There are those who, quite frankly, say that they would be prepared to weaponise judicial review for political advantage.

Will this ouster clause be a precedent? The argument in Committee was that this will simply be followed by the parliamentary draftsmen and by a Government eager to restrain executive power. Of course, the Judicial Review and Courts Bill, which we were debating on Monday, contains a different ouster clause; it is a qualified ouster clause. Surely our job as Parliament is to look very carefully at any ouster clause in any Bill;

they need justification. I entirely accept an ouster clause but it is not appropriate for the Executive automatically to oust the jurisdiction of the courts. I have faith that Parliament will be vigilant about this. Parliament has a vital role to prevent the Government routinely using such clauses.

Dealing with the question of "purported", Boris Johnson plainly purported to prorogue Parliament. He went through all the customary processes and, as a matter of fact, Parliament was prorogued. Frankly, if you as a Government or parliamentary draftsman had read the decision in Anisminic or Privacy International, you would be negligent not to include the word "purported", otherwise you are simply inviting the courts in.

Finally, the House generally agrees that it is very unlikely that the courts would want anything to do with this, but that might well have been the view that the Government took in relation to Prorogation, and that might have been the advice that was given to the Prime Minister and the Government. After all, a divisional court declined to accept the beguiling submissions of the noble Lord, Lord Pannick, that this was justiciable and decided unanimously that it was not. It is not inconceivable that these situations may arise.

In my respectful submission, this has been very carefully considered. In Committee, the noble Lord, Lord Wallace, very kindly referred to some of the conclusions of the Independent Review of Administrative Law and said that Parliament should think "long and hard" before ousting the jurisdiction of the courts. That is what we thought, and I entirely adhere to what we said then. But the position is that there has been careful consideration by us—I hope—the Joint Committee, the House of Commons and your Lordships' House. We have looked long and hard at this ouster clause. In my respectful submission, it is one that stands the analysis we have given it and should remain in the Bill.

Lord Pannick (CB): My Lords, I suppose I should declare a professional interest in the possibility of Miller 3.

I support the amendments in the names of the noble Lords, Lord Norton and Lord Butler. I do not suggest that the courts would today never entertain a judicial review in relation to Dissolution. The noble Lord, Lord Norton, mentioned the words of Lord Roskill in the GCHQ case in 1984—the law has moved on a long way in the nearly 40 years since then. Like other noble Lords, I find it very difficult to envisage a case in which the courts would entertain a challenge to the Dissolution of Parliament and the calling of a general election. However, I support the amendments because I think it would be wise, in this context, to proceed on the basis of never say never.

One of the vices of a provision such as Clause 3 is that it seeks to remove the possibility of the court exercising jurisdiction, however exceptional the circumstances may be or however grave the abuse of power by a future Prime Minister. I would much prefer to leave it to the judgment of a future Supreme Court whether the circumstances then existing justify exceptional judicial involvement and whether there is an abuse of power, rather than confirm a blanket immunity from legal challenge whatever the circumstances.

I also agree with the noble Lords, Lord Butler and Lord Norton, that there is a point of principle here: the Prime Minister would be exercising a very important power. It is wrong in principle that there should be an immunity from the rule of law—it is a very basic principle. That principle does not depend on whether the noble Lord, Lord Faulks, is correct in saying that, as a matter of description, this is or is not an ouster clause. What it purports to do is prevent the court saying, "What you have done is unlawful". We should not be allowing the exercise of public powers to enjoy such immunity as a matter of principle.

We then have the argument the noble Lord, Lord Faulks, deployed, and which was raised in Committee, that the mere existence of this possible jurisdiction to entertain a judicial review may cause delay, expense or inconvenience. That seems to me to be entirely unrealistic. I looked to see whether there have been any cases analogous to the possible cases we are talking about. There is one. The Press Association reported on 8 April 1992, the day before the 1992 general election—won by John Major—that on 7 April, the day before, Mr Justice Macpherson had considered and rejected a judicial review application which was made by a Mr George Barnes, who was seeking to stop the 1992 general election going ahead. Mr Barnes was aggrieved by the manner, as he put it, in which the main political parties had chosen their candidates.

Lord Faulks (Non-Afl): I am sorry to interrupt the noble Lord in the middle of his flow, but I think his point was that the law has moved on greatly since Lord Roskill. So does not citing a decision from 1992 rather defeat his own argument?

Lord Pannick (CB): No, because my point is that hopeless or frivolous applications will be dealt with speedily by the courts. This was plainly an application with no merit whatever, and my noble friend's point, as I understood him, was that the mere existence of the jurisdiction could cause delay. I am giving an example of how the courts then, and today, would deal with a frivolous application.

The judge decided, unsurprisingly, that this was not a matter for the courts and that there was no basis for the application. The general election went ahead and it was entirely untroubled by the litigation. There was no delay, expense or inconvenience. The court dismissed a hopeless application speedily and effectively, as it usually does. For all these reasons, if my noble friend Lord Butler wishes to test the opinion of the House, he will have my support.

Lord Brown of Eaton-under-Heywood (CB): My Lords, I too attempted to darn this Bill in Committee and, indeed, spoke at Second Reading, and I too am opposed to this group of amendments. My core concern here is to safeguard my successors on the Bench and to avoid the risk of constitutional crisis, which would arise were there to be some future attempted legal challenge not as frivolous as that just indicated by the noble Lord, Lord Pannick, but something dressed up as an altogether more coherent attack on a Dissolution, such as the noble Lord, Lord Pannick, himself would be adept at managing.

[Lord Brown of Eaton-under-Heywood]

Unlike the noble Lord, Lord Howard, but in common with the noble and learned Lord, Lord Hope of Craighead, and the noble Lord, Lord Beith, I do not think for an instant that the courts would ever actually reach the point of upholding such a challenge, even though, as the noble Lord, Lord Pannick, also says, things have undoubtedly moved on since the CCSU case. That, as it happens, was my very last case at the Bar, decades ago. Although it is very unlikely that such a challenge would succeed, it is very important to put in the Bill a provision that would provide the greatest possible discouragement to any mischievous person, instructing whosoever it may be, contemplating a challenge.

Clause 3 seems to me to be admirable for that purpose; it enables the courts to say, as Mr Justice Macpherson—a very old friend of mine, with whom I shared a room in chambers for decades—said in that case, "Chuck it out without more ado." That is really the point made by the noble Lord, Lord Trevethin and Oaksey. That is the practical effect of Clause 3. It is not there, I would suggest, as revenge for Miller 2; nor does it—and this is the point made by the noble Lord, Lord Faulks—create a risk that this will be a template or precedent for the future. Its relevance here is purely in the context and to underline the fact that Dissolution is essentially a prerogative act, preserved even since CCSU. We should leave it there, discourage prospective litigants and reinforce the courts in a robust rejection of any attempt that would delay and disrupt, to some degree, a Dissolution process. Leave it there.

Baroness Noakes (Con): My Lords, the noble Lord, Lord Butler of Brockwell, was kind enough to quote me from when I spoke in Committee on this. I want to underline that what I said was:

> "I cannot conceive of any circumstances in which the involvement of the courts could ever be justified".—[*Official Report*, 25/1/22; col. 227.]

That is the important point. What Clause 3 is trying to do is to put this question beyond doubt.

Without Clause 3, we potentially do not rule out the courts trying to get themselves involved in challenging the use of the royal prerogative, doubtless with the help of very clever lawyers such as the noble Lord, Lord Pannick. Indeed, in the noble Lord's remarks just now, he rather wanted to keep the door open for noble Lords such as himself to encourage the courts to get involved in cases such as the use of the royal prerogative.

Our understanding before the introduction of the Fixed-term Parliaments Act was that the courts would not get involved in the use of the royal prerogative. Since then, there have been some surprising judgments—perhaps not surprising to the noble Lord, Lord Pannick—such as Miller 2, which have made many people doubtful about whether or not the settled understanding of where the courts would go was indeed that settled. That is what the noble Lord, Lord Pannick, has underlined for us today.

2 pm

I believe Clause 3 is necessary to put this issue beyond question. Judges must not get involved in politics, and there is no more political decision than when to hold an election. I do not think that judges should ever stand between the people and the ballot box.

I wish to underline what other noble Lords have said about whether or not this is a precedent. If this ended up on the statute book, it would, in a technical sense, be a precedent for a future parliamentary draftsman to put into a draft Bill. But that is all parliamentary draftsmen do: they draft something into a Bill, they do not make it law. Parliament makes laws, and it will be for Parliament to ensure that there was not an inappropriate use of ouster clauses. I do not think that it has ever been asserted that ouster clauses are unconstitutional; they are certainly permitted in specific circumstances where justified and should be justified on their merits in each case. In this case, Clause 3 is there to ensure that we can go back to the prior understanding in relation to this one specific example of the royal prerogative.

Lord Grocott (Lab): My Lords, as a layman and an unashamed politician, I want to make a couple of layman's/politician's observations in what has been a largely legal argument.

Much of this discussion—in fact, the whole of this Report stage—has been considered with the ghost of the 2017-19 Parliament at its back; the cloud over us, one could say. It was a very unfortunate Parliament—in the past I have called it poisonous—and we need to be careful about drawing all sorts of long-term constitutional conclusions from that period. This relates to my observation on the debate about the ouster clause: it is, as others have said, trying to solve the problem of Miller 2.

To me, as a layman, Miller 2 did present some problems. One is unarguable—and I am cautious about saying that—in that it did massively involve the courts in an intensely political situation. I know it tried to give disclaimers in its judgment, and all the rest of it, but I can tell you, as a politician, it is hard to imagine a more intense, political, biting debate than the one that existed in relation to Britain's membership of the European Union, and the courts went slam dunk right into the middle of that debate. In my view this is not a good precedent.

I would also say—and I am sure I will be stopped if I trespass here—that it involved the courts in arguments which I know are legal arguments, doubtless very good legal arguments, but they do not make much sense to the layman. Part of the Miller 2 judgment was to say that the Prorogation had not happened. Although I understand the lawyers' argument for saying so, it does not make much common sense to an observer. It is like saying that the sun comes up in the morning, and it is up there now, but the law says that the sun has not risen. I say, "Look, it is up there now," but the law says it is still where it was before. That kind of ugly language and reasoning is—at least to me—something that we do not want to see employed too often. It is employed in the Bill itself; it is as though the Fixed-term Parliaments Act 2011 had never happened, but both those things—the Act and, unfortunately, the Prorogation—had happened.

I simply make the following observation. If I am right that we want to make things intelligible to both lawyers and non-lawyers, if I am right that 2017-19 was a really bad patch, and if I am right in saying that we really do not want the courts—however exceptional

it might be—telling the people when they can and cannot have a general election, then I have offered a solution. I am sorry I keep coming back—actually I am not going to apologise at all, because it is right—to the amendment by the noble and learned Lord, Lord Judge. If only the House of Commons would apply its mind to the arguments that have been deployed in this House during the consideration of previous amendments, that would solve all the problems. If there were a resolution of Parliament then the courts would not intervene, the monarch would not have decisions to make and there would be no need for the ouster clause.

Let us lift up our eyes and hope that the Commons weighs the merits of the amendment that we have sent back to them, recognises those merits, votes not on a purely partisan basis but on the basis of the strength of the arguments, and retains the change that we have already made to the Bill.

Lord Howard of Rising (Con): My Lords, I must also apologise for not being here in Committee, although I have followed your Lordships' arguments with great interest.

One point is abundantly clear to me: the idea of not using the royal prerogative to call for an election is, at its very best, curious. The concept that a Government should limp on without the confidence of the Commons, when that Government no longer have the wish, or possibly the ability, to conduct the affairs of the nation, can do only harm to the well-being of this country. I have listened to a lot of erudite and hypothetical—indeed very hypothetical—arguments today. We cannot get away from the fact that, if a Government feel that they no longer wish to govern, then it is not only pointless to keep them in place but potentially very damaging.

In line with what my noble friend Lord Bridges said, restricting people from voting is anti-democratic. There should be no impediment to the freedom to allow the electorate to express their opinion at any time at the ballot box. Allowing the courts to interfere with that and to have a say may have unknown effects and cause serious harm, as the noble Lord, Lord Trevethin and Oaksey, and others have pointed out. After all, the courts can produce some very weird results.

My only other thought, standing here among so many noble and learned Lords, is that I wonder what the collective noun for lawyers is. Do your Lordships think it is "a bear pit" of lawyers?

Lord Sentamu (CB): My Lords, the noble Lord, Lord Grocott, asks whether the sun has risen. Yes, it is still up there, but for those who lived in the Mexican desert during the testing of the atomic bomb, the sky was so full of light that nearby farmers woke up and started working, but three hours later the light had gone. Of course, at the usual time of 6 am, the sun rose. They said, "We saw the sun rise twice", but it had not. Physical things may help us, but also they may not.

For myself, I find phrases such as

"A court or tribunal may not question"

very difficult. Putting that in statute sets a bad precedent. The courts are restrained in the way that they approach many things; they would never simply say out of hand, "We are not going to look at this". That is why my friend Sir William MacPherson, when someone did not want the election to take place in 1992, looked at that and then dismissed it. Now there is the idea that he should not have done so. I have always had great admiration for the British Parliament and for the Civil Service and the way that it works, which is just really lovely—some of your Lordships who were born here and live here may not appreciate it, but I do—but this measure worries me.

I was in the judiciary when we questioned Mr Amin for expelling Uganda citizens who happened to be Asian. There were two kinds: those who were Ugandan Asian citizens and Asians living in Uganda who were British. We questioned whether he had the right to do this. He did not like it. What did he do? He passed a decree that no court in the land could question the expulsion of Asians. That caused me a lot of problems. This measure sounds almost like that.

There should be no Act of any sort which is not subject to the possibility of challenge in the courts, because they are the custodians of the rule of law. We cannot say by statute, "You should not challenge this particular prerogative"; if it is not done according to the rule of law, they should be able to look at it. I have a lot of confidence in judges, lawyers and the people, because they are the guardians of the rule of law. If they do not guard that, the likes of Mr Amin will have a field day. I support the intention the noble Lord, Lord Butler, that the clause should be deleted.

Lord Fairfax of Cameron (Con): My Lords, very briefly, I would like to respectfully adopt the arguments of the noble and learned Lord, Lord Brown, and others, including the noble Lord, Lord Trevethin and Oaksey, and my noble friend Lord Faulks, in this matter.

The noble and learned Lord, Lord Hope, said, I think, that he could not see the courts getting involved in a Dissolution case, and I think the noble Lord, Lord Pannick, said similarly. But, as my noble friend Lord Faulks has said, very many people, including many lawyers, could not see the courts getting involved in a Prorogation matter because, until the Supreme Court and Miller, that was considered to have been unarguably a political matter. But in a paradigm example of judicial activism, the Supreme Court in Miller did get involved, despite the unanimous decision—which some people find curious—of a strong divisional court below. The noble Lord, Lord Pannick, referred later to the rule of law. My point is that, until the Supreme Court and Miller, as held by the divisional court, Prorogation was considered to be a political matter.

Lord Pannick (CB): Does the noble Lord allow for the possibility that the reason why there was no precedent prior to Miller 2 was because no Prime Minister prior to that had abused, in the view of the court, the power to prorogue Parliament in order to frustrate his views in relation to Brexit?

Lord Fairfax of Cameron (Con): The use of the word "abuse" is somewhat tendentious. As I was saying on the question of the rule of law, and as held by the divisional court, until the Supreme Court decision on Miller, Prorogation was thought to be an entirely

[Lord Fairfax of Cameron]
political matter and therefore not subject to the jurisdiction of the courts. I suggest that the risk remains, and pray in aid the noble Lord, Lord Pannick, in this regard, because he jokingly referred to his possible involvement in Miller 3.

I rest my case. The Government are entitled for these reasons to insist on Clause 3.

Baroness Smith of Basildon (Lab): My Lords, I will start where I started in the previous debate, with the parliamentary TARDIS: the Government say that we can set things back to where they were before. Ministers in the other House and in your Lordships House said that this Bill brings clarity, but it is clear that it does not bring clarity. That is why the Government have insisted on Clause 3.

The elephant in the room, as has been mentioned, is Prorogation, but Prorogation is different from Dissolution. The unlawful Prorogation has had an impact on many people—I still think of it. I agree with the assessment of the noble Lord, Lord Pannick, that that was an abuse of power, but I would not extend that in the same way to a Dissolution.

2.15 pm

As we listened to the debate, many noble Lords who are lawyers—the Minister recognised that he and I made the pages of *Private Eye* for not being lawyers and trying to make sense of the legislation—spoke on the premise that this would never go to the courts anyway and they would not intervene. I can think of no worse situation for the courts to intervene in than the calling of a general election. While one noble Lord called Clause 3 admirable, I cannot go as far as that. The Government may think it necessary; I would say that it is possibly understandable but a neater, more acceptable and more democratic way of dealing with this issue is the amendment that we have just agreed, whereby the House of Commons, the other place, should have a say in whether a general election is called. That would put the matter beyond legal action.

I should say two more things. I am grateful to the Minister because, as he and I know but others who were not in the Committee do not realise, we had a non-lawyerly debate about the meaning of the word "purported", along with the noble Lord, Lord Norton. I am grateful to the Minister for his letter to me. It seems that the Government are looking for a belt-and-braces approach. On the one hand they say that the legislation is clear, but on the other they make it clear that it is not clear because Clause 3 is there. However, involving the courts rather than the House of Commons is not the right way to proceed. As I have informed the noble Lord, Lord Butler, we would be unable to support his amendment.

Lord True (Con): My Lords, I thank noble Lords again for an interesting debate and their many contributions. Like others who have never been called to the high profession of the law, I bow to the expertise of so many of your Lordships in this matter. However, as a lay man, I notice the diverse opinions put forward by those eminent enough to have the title of noble and learned, and other learned speakers versed in the law.

The underlying point here is what a pleasure it is for me, after the previous debate, to agree with the noble Lord, Lord Grocott, and others who said a similar thing. There is an underlying political point here, and a point, which I will come to, regarding the degree to which the public would simply not understand what would happen if there were interventions by the courts—a point made by the noble and learned Lord, Lord Brown. It could not redound in any way to the credit of the courts for there to be an intervention.

I submit to your Lordships that the concerns of those who have them are misplaced. We believe that this clause is proportionate and required, considering the direction of case law—a point underlined by the noble Lord, Lord Pannick, when he talked of the way in which the law had moved on. That is a matter that people in another place will want to notice when they consider the amendment of the noble Lord, Lord Butler, should your Lordships, to my regret, approve it. The Government are seeking to confirm the long-standing position that the Dissolution of Parliament should remain non-justiciable.

I explained the Government's rationale behind the drafting of the clause in detail in a lengthy speech in Committee, which I promise not to repeat at length. However, I said to the Committee that I wanted to put the legal position on the record. I commented further in a letter, and I thank the noble Baroness, Lady Smith of Basildon, opposite for her interest in and reference to that. The letter has been laid in the Library and I hope it will be of assistance to your Lordships. I shall not repeat all the arguments but in the Government's view, which I hope most noble Lords will agree with, it would be highly undesirable for the courts to be permitted to intervene in the Dissolution and calling of Parliament. The noble and learned Lord, Lord Brown of Eaton-under-Heywood, and my noble friend Lord Faulks made devastating interventions on this in Committee. We heard similar arguments repeated today.

Just imagine the scenario. A Prime Minister requests a Dissolution, which is granted. The BBC news starts—"dong, dong, dong"; I do not know what music it has these days, but it fades away to a dramatic headline: "There will be a general election on 7 July". Up in Telford, workers in the Labour constituency office start the printing presses. The orange tabards come out wherever the Lib Dems are congregating. The poster sites are booked, the canvassers are out, the expenses begin to accumulate and the statutory election clock begins to run. Then the news flashes across social media. Two days later, the BBC headline is "The general election on 7 July may not now go ahead because of an application to the courts."

Such a situation would be absolutely incredible to 70 million people in this country, even if it might be understandable to a couple of people trying to get a court case going. We really must avoid any risk of this happening in the interests of the country, of politics and of the courts. It would be inappropriate for them to become embroiled in what many have said is the inherently political matter of when an election is called. We must avoid the practical risk of the uncertainty concerning the general election that would follow.

Even the possibility of such a court case would be disruptive, drag our judges into the political fray and frustrate the democratic process.

There are checks and balances, to which I referred in Committee. Ultimately, as the noble and learned Lord, Lord Brown of Eaton-under-Heywood, has said more than once, the check on any alleged abuse—whatever that might be—of calling an election is the decision of the people. The noble and learned Lord referred again today to Brenda from Bristol.

Lord Lea of Crondall (Non-Afl): I understand everything that the noble Lord has said, but is there not a contradiction there? One wants to say that the matter should not be taken to court but, in that case, where is the confidence that something could not go badly wrong with the process? Scenarios ought to be spelled out. Is there not a scenario in which this could go badly wrong? People would say, "Well, it was not conducted in the right way."

Lord True (Con): Once the general election genie is out of the bottle, it should stay out of the bottle. The decision lies with the electorate. There is no question of a dodgy scenario. It is then down to the electorate. The ultimate political reprimand is available to them, as my party discovered in 2017. You can go backwards, as well as forward.

I cannot accept the amendments of by my noble friend Lord Norton of Louth for the reasons I explained at length in Committee. He argued that this clause conflicted with the rule of law. The Independent Review of Administrative Law, chaired by my noble friend Lord Faulks, said that it was ultimately for Parliament to decide what the law on non-justiciability should be and for the courts to interpret what Parliament has said. The majority of the Joint Committee agreed that a non-justiciability clause was compatible with the rule of law in a case such as this, where the power is to enable the electorate to make a decision. As my noble friend Lord Faulks said in Committee, unless you reject the doctrine of parliamentary sovereignty, there is nothing constitutionally objectionable to the clause.

The Government see a strong argument for its principled and pragmatic case that the courts do not have a role to play in the issue of dissolution. That our sovereign Parliament should be able to make provision for this is entirely consistent with the rule of law. For the reasons I gave at length in Committee—and will not repeat here—we believe that the entire wording of Clause 3 is necessary to secure against the risk of an intervention by the courts.

On precedent, I am happy to repeat the reassurance I gave in Committee that we do not see this as setting a wider precedent. Speaking at this Dispatch Box, I repeat that this clause is very specific and has been drafted with a particular purpose in mind, namely, to confirm a widely shared view of the nature of the prerogative powers to dissolve and call Parliament. In this case, it is seeking to ensure the non-justiciability of the prerogative powers for the Dissolution and calling of Parliament, which traditionally the courts have had no role in reviewing—nothing more. It is a bespoke exclusion to address this precise task. I stress again that we are asking Parliament to consider these arguments and endorse this clause in this Bill—nothing more.

In conclusion, I say to the noble Lord, Lord Butler of Brockwell, whom I consider my noble friend, that he cannot have his cake and eat it. He tells us that there is no chance that the courts would intervene, but then puts before us an amendment that would enable them to do so. I am not sure which is his argument. My noble friend Lord Norton of Louth made the same argument: that it is unlikely that the courts would intervene. In that case, why are we having this argument, with this point put forward?

The noble Lord, Lord Pannick, told us explicitly that such a challenge might come. So the purported, or in fact actual, intention of this amendment, were it to be passed, would be to procure the circumstances that the noble Lord, Lord Pannick, envisaged: namely, that the courts might one day intervene on a Dissolution. That is what I assume the noble Lord, Lord Butler, is wanting: that the courts should have that opportunity—although at the start he said he did not really envisage or like the idea.

I agree very much with the speech of the noble Lord, Lord Trevethin and Oaksey: it is vital that we maintain this clause. Deleting or altering it, as proposed by my noble friend Lord Norton of Louth, would be, in my submission, like building a fence around a field only to leave the gate open—or having an umbrella with holes in it. It would not be completely effective in the light of past judgments by the courts. Desiring to avoid the involvement of the courts and to secure absolute certainty on this point, and on the basis that this does not provide a precedent for the future, I sincerely hope that noble Lords will withdraw or not move their amendments and join with the other place in supporting this clause.

Lord Norton of Louth (Con): My Lords, I am grateful to all those who have spoken. This has been a very valuable debate which indeed shows the value of the House of Lords. I am especially grateful to the noble and learned Lord, Lord Hope of Craighead, as well as the noble Lords, Lord Beith and Lord Pannick, and the noble and right reverend Lord, Lord Sentamu, for their comments.

My noble friend Lord True will not be surprised to hear that he has not persuaded me. For the reasons I have given, I regard the amendment as necessary to remove the words that are either redundant or constitutionally objectionable. This is not about keeping the courts out but about the use of certain constitutionally objectionable words within the clause. My noble friend did not address adequately—indeed, did not address at all—the point that, if we are dealing with a personal prerogative power of the monarch, there is no advice to challenge. I notice that the noble Lord, Lord Faulks, and my noble friend Lady Noakes did not pick up on the distinction between the prerogative powers that are exercised on advice and those that are exercised not on advice. That is the fundamental distinction that has not been recognised or addressed.

I normally agree with the noble and learned Lord, Lord Brown of Eaton-under-Heywood, but on this occasion I think he is totally wrong. He argued that he was seeking to protect future members of the Supreme Court. I regard it the other way round and consider that we would be protecting future members by removing

[Lord Norton of Louth]
the provisions in this clause because, although my noble friend Lord True said that this was not intended to set a precedent, the point is that it will be on the statute book. It will be available to parliamentary draftsmen in the future when other measures come along and they will think, "Oh, let's keep the courts out. There's a remote chance they might get involved". Therefore, there are dangers in this.

2.30 pm

We have had a very good debate, but my view is that it would have been better if this clause had not seen the light of day in the first place. We need to avoid constitutional tension within our system of government. As Professors Mark Elliott and David Feldman have written, the possibility of such tension

"demands a form of institutional comity that requires legislative respect for fundamental constitutional values as well as judicial respect for Parliament's legislative authority."

Clause 3 does not facilitate such comity.

I do not intend to press the matter. I have made my points and have got them on the record, which is what I sought to achieve. I leave it to the Government, even at this late stage, to reflect on what has been said and to adopt a mature and informed approach to constitutional issues, and especially the relationships at the heart of our constitution. I beg leave to withdraw the amendment.

Amendment 2 withdrawn.

Amendments 3 and 4 not moved.

Amendment 5

Moved by ***Lord Butler of Brockwell***

5: Clause 3, leave out Clause 3

Lord Butler of Brockwell (CB): My Lords, I too am very grateful to those who have taken part in this debate.

This for me is a matter of principle. It is wrong, as the noble Lord, Lord Pannick, the noble and right reverend Lord and the noble and learned Lord, Lord Hope, said, that there can be no protection from the courts against the improper use of executive power. My hackles rise when I hear the Minister use the phrase "The courts are not permitted"—"This legislation is to ensure that the courts are not permitted to look at this matter". In response to the noble Lord, Lord Grocott, this is not an issue of the courts preventing the people having a say in an election. It is about the courts preventing the illegitimate or illegal use of executive power. That is what the issue is.

I believe it is vanishingly unlikely that the courts would become involved in this matter—I am now just answering the point made by the noble Lord, Lord True. I would be prepared to have a lifelong bet with him that this situation will not arise in his or my lifetime. However, the courts can look after themselves. They do not need the protection of legislation in this matter; it is indeed for the courts to decide the merits of issues and not for the Government to legislate in advance to prevent them doing so.

Therefore, because this for me is a matter of principle, and because I would like, in case the amendment we previously passed is overturned by the House of Commons, the opportunity to return to this on ping-pong, I beg leave to test the opinion of the House.

2.33 pm

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Berkeley, L.
Berridge, B.
Blackstone, B.
Blackwood of North Oxford, B.
Blake of Leeds, B.
Blencathra, L.
Bloomfield of Hinton Waldrist, B.
Boateng, L.
Borwick, L.
Boycott, B.
Brady, B.
Bridges of Headley, L.
Brooke of Alverthorpe, L.
Brougham and Vaux, L.
Brown of Eaton-under-Heywood, L.
Browne of Belmont, L.
Brownlow of Shurlock Row, L.
Buscombe, B.
Caine, L.
Callanan, L.
Cameron of Dillington, L.
Campbell-Savours, L.
Carter of Coles, L.
Cathcart, E.
Chapman of Darlington, B.
Clark of Windermere, L.
Coaker, L.
Colgrain, L.
Collins of Highbury, L.
Corston, B.
Courtown, E.
Crathorne, L.
Crawley, B.
Cruddas, L.
Cumberlege, B.
Cunningham of Felling, L.
Davidson of Lundin Links, B.
Davies of Brixton, L.
Davies of Gower, L.
Dobbs, L.
Dodds of Duncairn, L.
Drake, B.
Dubs, L.
Duncan of Springbank, L.
Dundee, E.
Dunlop, L.
Eaton, B.
Elder, L.
Evans of Bowes Park, B.
Fairfax of Cameron, L.
Fall, B.
Farmer, L.
Faulkner of Worcester, L.
Faulks, L.
Finkelstein, L.
Fookes, B.
Forsyth of Drumlean, L.
Foster of Oxton, B.
Foulkes of Cumnock, L.
Framlingham, L.
Fraser of Craigmaddie, B.
Frost, L.
Gale, B.
Geddes, L.
Gilbert of Panteg, L.
Goldie, B.
Golding, B.
Goodlad, L.
Goudie, B.
Grade of Yarmouth, L.
Grantchester, L.
Greenhalgh, L.
Griffiths of Burry Port, L.
Grimstone of Boscobel, L.
Grocott, L.
Hacking, L.
Hain, L.
Hamilton of Epsom, L.
Hannan of Kingsclere, L.
Hanworth, V.
Harlech, L.
Harris of Haringey, L.
Haselhurst, L.
Hayward, L.
Healy of Primrose Hill, B.
Henley, L.
Herbert of South Downs, L.
Hodgson of Abinger, B.
Hodgson of Astley Abbotts, L.
Holmes of Richmond, L.
Hooper, B.
Horam, L.
Howard of Lympne, L.
Howard of Rising, L.
Howarth of Newport, L.
Howe, E.
Howell of Guildford, L.
Hunt of Kings Heath, L.
Hunt of Wirral, L.
Johnson of Marylebone, L.
Jones of Moulsecoomb, B.
Jones of Whitchurch, B.
Jopling, L.
Kamall, L.
Keen of Elie, L.
Kennedy of Southwark, L.
Kilclooney, L.
Kirkhope of Harrogate, L.
Knight of Weymouth, L.
Lancaster of Kimbolton, L.
Lang of Monkton, L.
Lansley, L.
Lawrence of Clarendon, B.
Leigh of Hurley, L.
Lilley, L.
Lindsay, E.
Lingfield, L.
Lister of Burtersett, B.
Livingston of Parkhead, L.
Low of Dalston, L.
Lucas, L.
Mackenzie of Framwellgate, L.
Mancroft, L.
Mann, L.
Manzoor, B.
Maxton, L.
McCrea of Magherafelt and Cookstown, L.
McLoughlin, L.
McNicol of West Kilbride, L.
Merron, B.
Meyer, B.
Montrose, D.
Morgan, L.
Morris of Aberavon, L.
Morris of Yardley, B.
Morrissey, B.
Morrow, L.
Moylan, L.
Murphy of Torfaen, L.
Neville-Jones, B.
Neville-Rolfe, B.
Nicholson of Winterbourne, B.
Noakes, B.
Offord of Garvel, L.
Parkinson of Whitley Bay, L.
Pendry, L.
Penn, B.
Pidding, B.
Pitkeathley, B.
Polak, L.
Porter of Spalding, L.
Price, L.
Prosser, B.
Ravensdale, L.
Rawlings, B.
Reay, L.
Redfern, B.
Risby, L.
Ritchie of Downpatrick, B.
Robathan, L.
Robertson of Port Ellen, L.
Rock, B.
Rosser, L.
Sanderson of Welton, B.
Sandhurst, L.
Sarfraz, L.
Sassoon, L.
Sater, B.
Scott of Bybrook, B.
Seccombe, B.
Selkirk of Douglas, L.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Sheikh, L.
Shephard of Northwold, B.
Sherbourne of Didsbury, L.
Sherlock, B.
Shinkwin, L.
Sikka, L.
Smith of Basildon, B.
Smith of Hindhead, L.
Stedman-Scott, B.
Sterling of Plaistow, L.
Stewart of Dirleton, L.
Stowell of Beeston, B.
Strathclyde, L.
Sugg, B.
Suri, L.
Symons of Vernham Dean, B.
Taylor of Bolton, B.
Taylor of Holbeach, L.
Trefgarne, L.
Trevethin and Oaksey, L.
True, L.
Tugendhat, L.
Tunnicliffe, L.
Tyrie, L.
Vaux of Harrowden, L.
Vere of Norbiton, B.
Verma, B.
Wakeham, L.
Walney, L.
Warwick of Undercliffe, B.
Watts, L.
West of Spithead, L.
Wharton of Yarm, L.
Wheeler, B.
Whitby, L.
Wilcox of Newport, B.
Williams of Trafford, B.
Wolfson of Tredegar, L.
Wyld, B.
Young of Cookham, L.
Young of Old Scone, B.
Younger of Leckie, V.

2.45 pm

Clause 6: Extent, commencement and short title

Amendment 6

Moved by ***Lord Wallace of Saltaire***

6: Clause 6, page 2, line 13, leave out subsection (3) and insert—

"(3) This Act comes into force when a Cabinet Manual revised in relation to the dissolution and calling of Parliament has been laid before Parliament.

(3A) Prior to revising the Cabinet Manual the Minister must consult the relevant select committees in the House of Commons and the House of Lords."

Member's explanatory statement

The current Cabinet Manual references the Fixed-term Parliaments Act and has not been revised for 10 years. As a consequence of the repeal of that Act under this Bill, the Cabinet Manual should be revised in relation to the dissolution and calling of Parliament.

Lord Wallace of Saltaire (LD): My Lords, I tabled this amendment last week and received a letter on Monday evening from the Minister that answers a

[Lord Wallace of Saltaire]
number of my points. Therefore, I mainly wish to stress the usefulness of the *Cabinet Manual* and to encourage the Minister to repeat what he said in my letter on the Floor of the House.

Paragraph 227 of the Joint Committee report points out that:

"legislation—by definition—does not create or restore conventions … If the old conventions on dissolving and summoning Parliaments are to be restored, or indeed if they are to be replaced by new ones, there needs to be a political process to identify, and to articulate, what those conventions are."

I have heard the noble Lord, Lord Hannan, make two speeches in different debates over the last two weeks about the importance of due process and the political process and of not just rushing things through or allowing Prime Ministers to decide them. The Constitution Committee report on the revision of the *Cabinet Manual* stresses not only the importance and usefulness of that manual, but the need for there to be consultation with Parliament about the revision of the manual, because it relates to the relationship between the Executive and Parliament.

The Minister's letter, which I thank him for, stresses that conventions

"can only operate effectively when they are commonly understood and where there is tacit agreement that they should be respected, irrespective of the particular political challenges and circumstances of the day".

This has not been entirely true of our current Prime Minister over the last two years. We need to get back to that. I look forward to the Minister's response.

Baroness Smith of Basildon (Lab): My Lords, I remind the Minister that there was a Constitution Committee report on the *Cabinet Manual* and I think the Government have yet to respond. Could he give an update on when a response is likely to be? As it would cover these issues, it would be helpful when we have the opportunity for a longer debate in your Lordships' House, given that we do not have the time today.

Lord True (Con): My Lords, I thank the noble Lord, Lord Wallace, for his thoughts on the *Cabinet Manual*. It is important. I am pleased to say that, of course, the Government agree on the fundamental importance of the *Cabinet Manual*, and I can confirm to the House, as I have indicated privately to the noble Lord, that the Government intend to publish an updated version of the *Cabinet Manual* within this Parliament. In response to the noble Baroness opposite, I can also add that I have written to the newly appointed chair of the Constitution Committee, the noble Baroness, Lady Drake, to set out the Government's intentions on this topic.

There have been a number of developments that render the current version out of date, not least—if we ever get to the end of it—this legislation going through now, which will have to be taken into account. As a result, this amendment, which would prevent the Bill coming into force until after a revised version of the *Cabinet Manual* has been published, is not needed and would be unhelpful. It would delay the commencement of legislation, which, one would infer, our Parliament will pass shortly, and we would be left carrying on under the terms of the Fixed-term Parliaments Act. I hope, for that technical reason, but also on the basis of the assurance that I have given the House, that the noble Lord will feel able to withdraw his amendment.

Lord Wallace of Saltaire (LD): I thank the Minister for repeating that statement. I stress that the revision of the manual should ideally come well before the timing of the next election, and I strongly support the opposition suggestion that there should be a debate, ideally in both Houses, on the conventions that will have been restated. On that basis, I am happy to beg leave to withdraw my amendment.

Amendment 6 withdrawn.

2.51 pm

Sitting suspended.

Introduction: The Lord Bishop of Guildford

3.01 pm

Andrew John, Lord Bishop of Guildford, was introduced and took the oath, supported by the Bishop of Birmingham and the Bishop of Carlisle, and signed an undertaking to abide by the Code of Conduct.

Knife Crime

Question

3.05 pm

Asked by ***Lord Laming***

To ask Her Majesty's Government what steps they are taking to reduce the incidence of knife crime involving young people.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, we have made £130.5 million available this year to tackle serious violence. This includes funding for violence reduction units, which draw key partners together to address the root causes of violence, and targeted police action to deter and disrupt knife crime. We are also investing £20 million in prevention and early intervention to prevent young people being drawn into violence in the first place.

Lord Laming (CB): My Lords, I am grateful to the Minister for that reply. I know she shares the House's concern about these young people who have died on the streets of this country. Last year was the worst year on record. It is a terrible waste of young lives. Is the Minister willing to look at a scheme initiated by the police in Hertfordshire, where they have established a specialist team of officers to link with the other key services to identify those young people who are in danger of being drawn into criminality, so that they can prevent, I hope, terrible things from happening to them and other young people? This scheme, though in its infancy, seems to be producing very encouraging results.

Baroness Williams of Trafford (Con): I was pleased to be able to read about the scheme and to see the multiagency approach it is taking, trying to intervene before young people get involved in criminality. I am always pleased to hear examples and share good practice with other agencies.

Lord Morris of Aberavon (Lab): My Lords, the Prime Minister and Home Secretary have been rebuked by the statistics watchdog for using misleading figures, claiming a falling crime rate under their leadership. Who is right: the Government or the statistics authority? Some communities suffer much more than others from knife crime. Could we have a zero-tolerance policy and, in order to tackle the problem, a breakdown of the figures for the age, sex and race of the offenders?

Baroness Williams of Trafford (Con): My Lords, the Home Secretary did state, in her evidence to HASC on 2 February, that while some aspects of crime are going down, not all aspects are. The Home Office press release on 27 January stated that the figure used to show the reduction in crime excludes fraud and computer misuse. Of course, data is crucial when we are thinking about interventions in whatever crime it is.

Lord Cormack (Con): My Lords, can my noble friend tell me how many knife crimes are drug related?

Baroness Williams of Trafford (Con): As my noble friend will know, the picture of knife crime is not a simple one. Many factors drive the use of knives, both as regards victims and perpetrators, but there is no doubt that county lines drug-running does increase their usage.

Baroness Butler-Sloss (CB): My Lords, I ask the Minister whether the Government are helping youth clubs.

Baroness Williams of Trafford (Con): I am sure that the noble and learned Baroness knows about some of the youth interventions we are putting in place, including in youth opportunities. We are investing £200 million in a youth endowment fund to ensure that those most at risk are given the opportunity to turn their lives away from violence and lead positive lives.

Baroness Jones of Moulsecoomb (GP): My lords, two police forces so far, South Yorkshire and Thames Valley, have decided to stop showing images of knives that they have found. My colleague at the London Assembly, Caroline Russell, has asked the Mayor of London whether he will encourage the Met to stop sharing those images, because it probably encourages knife crime rather than diminishes it. Is that something the Home Office might support?

Baroness Williams of Trafford (Con): If police forces decide to do such things as stop showing pictures of knives, that is entirely a matter for them. Of course, we support whatever works—sometimes showing pictures of knives increases the fear factor in getting involved in things such as knife crime—but it is down to local police forces.

Lord Rosser (Lab): We share the concerns of the noble Lord, Lord Laming, about knife crime and the devastating effects it can have on young people in particular. The Minister mentioned violence reduction units, which bring together local partners to tackle violent crime by understanding its underlying causes, and by bringing additional funding. Violence reduction units have been introduced in 18 police force areas. When are they going to be extended to the remaining 25 police areas to support local multiagency work to tackle youth crime?

Baroness Williams of Trafford (Con): I agree with the noble Lord that VRUs are a very valuable tool in early intervention. We have provided £35.5 million this year to fund them. They are commissioning a range of youth interventions, and I will keep the House updated as they become more widespread.

Lord Macdonald of River Glaven (CB): My Lords, will the Minister say something about interventions in schools to discourage young people from becoming involved in gangs, which seem to be a very rich source of knife crime on our streets?

Baroness Williams of Trafford (Con): The noble Lord is absolutely right in what he says, and we know that engaging in education is one of the strongest protective factors against violence. That is why we have invested over £45 million in both mainstream and alternative provision schools in serious violence hotspots, to support young people at risk of involvement in serious violence to re-engage in education. Since November last year, in 22 areas across England alternative provision specialist task forces have been working directly with young people.

Lord Harlech (Con): My Lords, many troubled young people find themselves excluded from education and drawn into violent crime through financial incentives. What are the Government doing to promote work and apprenticeships to young people excluded from school?

Baroness Williams of Trafford (Con): Apprenticeships are a very good way of diverting people away from violence and into meaningful activity, and on to a working life. I have just answered the previous question about what we are doing in terms of education. Moving on from that, our £3.3 million Creating Opportunities Forum is providing meaningful employment-related opportunities to and raising the aspirations of young people at risk of serious violence over the next two years. More widely, we have invested £237 million to provide extra traineeship places between September 2020 and July this year, with further investment through to the end of the 2024-25 academic year. Traineeships are a short and flexible combination of learning and work experience, and they give young people who lack them the knowledge and skills to get an apprenticeship or a job.

Lord Brooke of Alverthorpe (Lab): My Lords, does the Minister recall the meetings which I have had with her about the use of data and focusing on data to identify the locations in neighbourhoods which need extra resources in trying to prevent crime? In particular, does she recall the conversation she had with Professor Shepherd from the University of Cardiff, and the work he has done there, which has been spread to other parts of the country? Could she update the House on how that is being used?

Baroness Williams of Trafford (Con): I very much remember that meeting and the professor's very forensic detailing of exactly where crime hotspots were occurring. Of course, local forces will determine the risks in their local areas and the correct interventions to be put in place. Although I support what the professor is doing, it is, as I said to the noble Baroness, Lady Jones, up to local forces to decide.

Baroness Watkins of Tavistock (CB): Will the Minister explain what is being done for people who have not returned to school, who are not excluded from school, but, following Covid, have decided to self-exclude, who I believe are very severely at risk?

Baroness Williams of Trafford (Con): That should be a worry for us all, not only in terms of the risk of getting involved in knife crime, but also the risk to their education getting far behind—perhaps safeguarding risks too. The noble Baroness raises a multifactorial and worrying trend that the Home Office has been concerned about right through the pandemic.

Gambling Act 2005

Question

3.15 pm

Asked by ***Lord Foster of Bath***

To ask Her Majesty's Government when they will publish their response to the Review of the Gambling Act 2005.

Lord Foster of Bath (LD): My Lords, I beg leave to ask the Question standing in my name on the Order Paper and draw attention to my interest as the chairman of Peers for Gambling Reform.

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Parkinson of Whitley Bay) (Con): My Lords, as the Gambling Minister made clear in his speech at the GambleAware annual conference in December, our review is looking at a very wide range of issues and our call for evidence received 16,000 submissions, which we are considering carefully. We will publish a White Paper setting out our vision for the sector in the coming months.

Lord Foster of Bath (LD): I thank the Minister for that reply, but with more than one gambling-relating suicide every day, delaying reforming our outdated gambling regulations is putting lives at risk. We do not have to wait for the White Paper to make changes, as we have seen, for example, in banning the use of credit cards for gambling. Given that strict stake and prize limits apply to land-based gambling but bizarrely not to online gambling, will the Government fix this harmful omission now and commit to a regular review of limits in years to come? Frankly, chaos in Downing Street should not be an excuse for delay in protecting lives.

Lord Parkinson of Whitley Bay (Con): As the noble Lord rightly notes, we have made significant progress in recent years to make online gambling safer, including a ban on gambling with credit cards as well as new rules to reduce the intensity of online slot games. But we recognise that more can be done to protect people who gamble online. Our review is looking closely at the case for greater protections for online gamblers, including protections on products and for individuals. We called for evidence on protections including the pros and cons of stake limits as part of our review, and of course, we are considering all the evidence carefully.

Lord Watts (Lab): My Lords, the Government have had the House of Lords report, which is an excellent report, led by the noble Lord, Lord Grade, that made strong recommendations on a system that would protect the vulnerable as well as give some certainty to the industry. Given that unlicensed sites have now grown, according to PricewaterhouseCoopers, from £1.4 billion to £2.8 billion, when are the Government going to do something to safeguard the vulnerable and give some certainty to the racing and sporting industries?

Lord Parkinson of Whitley Bay (Con): The noble Lord is right; it is an excellent report. I had the pleasure of serving on that committee before joining Her Majesty's Government. The recommendations and evidence contained in it, as well as the 16,000 submissions we have had to our call for evidence, are all forming part of our careful review of the Gambling Act. We will come back with our proposals in due course.

Lord Flight (Con): My Lords, I must ask—

Lord Grade of Yarmouth (Con): My Lords—

Noble Lords: Grade!

Lord Grade of Yarmouth (Con): I have never been so popular.

Lord West of Spithead (Lab): It could all change.

Lord Grade of Yarmouth (Con): More ships!

I thank my noble friend the Minister for that response. One of the lessons of the implications of the outdated nature of the 2005 Gambling Act, which the Government are addressing, is that there was a serious lack of accountability on the Gambling Commission. It had many powers to stop many of the abuses that have led to such tragedies as we have heard and as we read about in the newspapers almost every day. We are very interested to know what the Government can do to increase the accountability of the regulator in this sector.

Lord Parkinson of Whitley Bay (Con): The Gambling Act review is looking at the Gambling Commission's powers and resources, and how it uses them. The Commission has a new chairman and chief executive, who will be working closely with DCMS as they implement their vision for the organisation, but between April 2020 and March 2021 the commission imposed more than £30 million in financial penalties for breaches of its licensing conditions.

The Lord Bishop of St Albans: My Lords, I declare my interests as a member of Peers for Gambling Reform. The *British Medical Journal* said:

"We do not allow tobacco companies to design tobacco control policies, yet the gambling industry, through the organisations it funds, shapes our responses to … harms".

Does the Minister agree that the system of voluntary levies is part of the problem, because the industry is controlling the messaging, and that what we need are statutory, smart levies to give total independence to research, treatment and education if we are really to tackle gambling-related harms?

Lord Parkinson of Whitley Bay (Con): The Government have always been clear that they will look at the case for alternative funding mechanisms if there is a funding gap. All options remain on the table, including a statutory levy such as the right reverend Prelate suggests. The Department for Health and Social Care is working to improve care and treatment pathways to support the 15 clinics that were committed to in the NHS long-term plan. NHS England has also worked with GambleAware to design effective treatment.

Baroness Merron (Lab): My Lords, I welcome the campaign by GambleAware, which highlights that up to 1 million women are at risk of harm through gambling, while stigma and shame prevents two in five women experiencing such harm seeking help. What help is being given to spot the early warning signs of harmful gambling, focusing on women aged 25 to 55 who gamble online? Can the Minister confirm that the review and the ensuing White Paper will consider and refer to the impact of gambling on women, as well as those who are close to them?

Lord Parkinson of Whitley Bay (Con): The noble Baroness makes an important point. We have seen already, through the evidence gathered by Public Health England, the way that there are differential impacts on certain groups of people, whether by geography, sex or age. We want to improve the evidence base in the research so that we can ensure our policies are based on good and concrete evidence. That is part of the review of the Act that we are undertaking.

Lord Butler of Brockwell (CB): My Lords, in the speech to the GambleAware conference to which the Minister referred, the Gambling Minister recognised that affordability checks were key to reducing gambling harm. Are the Government aware of the research by the Social Market Foundation showing that £100 spent per month was the right threshold above which gambling operators should be obliged to make affordability checks?

Lord Parkinson of Whitley Bay (Con): That research by the Social Market Foundation was, I know, noted in the letter sent to my honourable friend the Gambling Minister. We see a clear role for considering an individual's financial circumstances to help stop devastating losses, but to be workable and to prevent harm, checks need to be proportionate and done in a way that is acceptable to customers, too. We continue to work with the Gambling Commission on this issue in the run-up to our White Paper.

Baroness Bakewell of Hardington Mandeville (LD): My Lords, further to the answer the Minister gave to the right reverend Prelate, can he give a categoric undertaking that the gambling industry will have no influence whatever in how the levy is allocated to research, harm prevention, education and the treatment of those affected by gambling addiction?

Lord Parkinson of Whitley Bay (Con): The Government have always been clear, as I said, that we will look at the case for alternative funding mechanisms and all options remain on the table. Of course, we are taking views from industry, as we are from everybody with an interest in this area. We will take all those views into account as we prepare the White Paper.

Baroness Bennett of Manor Castle (GP): My Lords, I declare my position as a member of Peers for Gambling Reform. In Washwood Heath Road in Ward End, Birmingham, there are three bookmakers next to each other and another a few metres away. It is known to the locals as the bookie belt. We know from studies last year that bookmakers are 10 times more likely to be in the poorest areas of the country than the richest. This takes away choice in food and other essential shops. Should not the Government's levelling-up White Paper have dealt with this issue of place-based gambling dominance?

Lord Parkinson of Whitley Bay (Con): My Lords, it is also important to remember that a great number of people gamble legally and enjoy doing so without harm. We want to strike the right balance to make sure that people can conduct this legal activity, while addressing questions of regional disparities. That is why we have put out our call for evidence. We are glad to have received so many submissions and are considering them carefully.

Lord Flight (Con): My Lords, when does the Minister expect the Government to respond to the review of the Gambling Act 2005? We all dislike the involvement of children in gambling, and bringing that to an end is well overdue.

Lord Parkinson of Whitley Bay (Con): As my honourable friend the Minister with responsibility for gambling has made clear, we will respond to the review in the coming months. My noble friend makes an important point about the role of children. We have looked at the impact of gambling on children as part of our review, and protections are already in place—for instance, to limit children's exposure to advertising—so we are not waiting for the review to take action where it is needed.

Lord Browne of Belmont (DUP): My Lords, gambling addiction can lead to poverty and homelessness. Does the Minister agree that local councils should ensure that front-line staff are provided with training on harmful gambling so that they can recognise potential cases and are given the opportunity to help those in the greatest need?

Lord Parkinson of Whitley Bay (Con): Yes, there is an important part for local authorities to play, just as there is for the NHS. It is right that the industry

[Lord Parkinson of Whitley Bay]
contributes to treatment costs, and the largest operators have committed to provide £100 million for treatment over four years. As I say, these are all areas that we are considering as part of the review of the Act.

Parliamentary Estate: Electric Vehicle Charging Points

Question

3.26 pm

Asked by ***Lord Forsyth of Drumlean***

To ask the Senior Deputy Speaker what progress has been made with enabling electric vehicles to be charged on the Parliamentary Estate; and how many electric vehicle charging points are available to members of the House of Lords.

Lord Touhig (Lab): My Lords, despite what the Order Paper says, clearly, I am not the Senior Deputy Speaker. The noble Lord, Lord Gardiner, has asked me to reply as chair of the Services Committee—lucky me.

The Services Committee has considered proposals for electric vehicle charging points to be installed in the House of Lords' part of the estate. Unfortunately, the scheme we considered did not offer value for money and, regrettably, there are currently no charging points for Members in the House of Lords' part of the estate. However, we are totally committed to finding a solution and will continue to look at how to provide Members with access to charging facilities.

Lord Forsyth of Drumlean (Con): My Lords, I sympathise with the noble Lord, Lord Touhig, who has the unfortunate task of answering for a bureaucracy straight out of "Yes Minister". I may have the answer: many of us in this House have been arguing for this for four years, during which time the costs have risen by 700%. Noble Lords can imagine how surprised I was to discover that, at Christmas, eight charging points were put in Speaker's Court for ministerial cars. I was even more surprised to find that the government car service will not allow them to use them, as of yet. Would it not be possible for your Lordships' House to use these, and for the ban on our using the underground car park to be lifted, which I understand is in force to allow equipment for restoration of the House to be stored on two floors?

Lord Touhig (Lab): I think the noble Lord is ready to organise a raiding party. He raises an important point. The director of facilities contacted the Speaker's Office about the charging points in Speaker's Court, and it responded by saying, "There are four charging posts providing charging for eight cars. Access to the points is currently managed by Mr Speaker's Office. The points are intended for use by Mr Speaker, ministerial cars and visiting dignitaries." I say to the noble Lord that I intend to raise this more formally and seek a full dialogue with the Speaker's Office. If we can find a way forward to help noble Lords in this House to access that facility, we will certainly do so.

Lord Cunningham of Felling (Lab): My Lords, is it not a poor example to the country as a whole that here at Westminster we do not have the facility to charge electric vehicles? We are encouraging the whole country to buy electric vehicles and setting targets for the reduction of carbon, yet here at Westminster we have no facilities, other than for those my noble friend mentioned. I apologise for asking him a difficult question, since he is a good colleague and friend—which I cannot say about many Ministers—but, here of all places, where we should be setting an example, we are signally failing to do so.

Lord Touhig (Lab): I could not agree more with the noble Lord. We passed the legislation; we should be setting an example. However, in this case of the scheme we recently looked at, we must consider value for money. We could not justify going ahead with the scheme at that time because we could not justify the cost of it to this House or to the wider public whose money we are spending. That was the scheme we recently turned down. We will continue to look at opportunities and ways of finding provision for your Lordships to charge their cars on this site. It is a priority. We have to be seen to be doing what we are asking others to do.

Baroness Randerson (LD): My Lords, the noble Lord, Lord Forsyth, referred to the two EV charging points in the underground car park. I must declare an interest as I have used them on several occasions. We can no longer use them. Can the noble Lord explain whether he has had any conversations with the authorities of the other House about us being allowed to use those in future in the same way that Members of that House are able to?

Lord Touhig (Lab): Following discussions with Black Rod, representations were made to the Serjeant at Arms about the facilities at the other end, which the noble Baroness mentions. This has been given active consideration and we were given to understand that this would be looked at on a case-by-case basis. I say to the noble Baroness that I am hopeful that we might see some progress on that matter before too long but, as it stands, we are not able to use those chargers.

Lord Geddes (Con): My Lords, I have intervened on this subject on previous occasions. May I ask the noble Lord to enlarge slightly on "value for money"? I totally support the noble Lord, Lord Cunningham. Surely, we must set an example in the House and have these charging points so that we can use all-electric cars?

Lord Touhig (Lab): My Lords, it is difficult because the Services Committee agreed that it wished to proceed with a plan for EVCs. In April last year, it was decided that a business case had to be made. That is the proper way to consider these matters. In July last year, the design authority revised the scheme it was submitting for the business case, having identified, hitherto, construction problems when it put in the EVCs in Speaker's Court. By September, the committee was advised that the original estimate of £53,000 had increased by 700% and was now £370,000. For that

reason, it was decided in November that we could not go ahead. Those are the reasons that the last plan was scrapped but we continue to try to find an option now to progress. I know that the noble Lord, Lord Geddes, who just asked this question, is on the edge of getting an all-electric car and I hope that by the time he gets it we will have somewhere for him to charge it.

Lord Berkeley (Lab): May I invite the noble Lord to come down to Chancellor's Court with me? He will find four 13-amp charging points similar to what one might have on the side of one's house, but they are weatherproof. Who can use those and could not a similar design be used for other courts? They may not look that good but an electric power lead outside the office next door and an external socket would surely be a very good start.

Lord Touhig (Lab): I thank the noble Lord, Lord Berkeley, for his earlier comments about these matters and the discussions we have had. Yes, we have looked at Chancellor's Court. The standard office electrical circuits like the one in Chancellor's Court are not designed to provide the level of power continually that we need for EVCs. Chancellor's Court is also used, of course, for building projects and storing project cabins and machinery. I can tell the noble Lord that in the continuing review we are not going to look at Chancellor's Court as a long-term alternative; rather we will look at the Peers' car park and Royal Court.

Baroness Kramer (LD): My Lords, the noble Lords, Lord Touhig and Lord Borwick, and two of the staff were kind enough to take a walk around with me to look at various options that had not been considered. I am saddened that, for example, Chancellor's Court has been excluded, apparently because it would be inconvenient for contractors who might need to reconfigure some future plans they have for some temporary cabins. We found many a location where this could be done appropriately and cheaply to bring in the facility in that £50,000 range. May I just say that the contractors do not run this House? The issues of net zero are far more significant and I wonder whether the noble Lord, Lord Touhig, could take that back to the staff and ask them to approach the problem as a way to enable us to have the facility and not to think through what every obstruction might be, even if hypothetical.

Lord Touhig (Lab): At the outset, I thank the noble Baroness and the noble Lord, Lord Borwick, for walking the estate with me and our technical people, looking at their ideas and trying to find solutions. I am pleased that one of the solutions that we had been discounting, about plugging into lamp posts, now has proper, active consideration as a result of their efforts. Chancellor's Court concerns me, because it is the access through which school parties come to visit. It is not the best access for vehicles. Royal Court, on the other hand, has sufficient electricity supply; it is easy to access and it has plenty of parking space. I will not discount what the noble Baroness says. I will have another look at it, but I think that we perhaps have better options and I hope that the Committee will consider them as well.

Lord Borwick (Con): My Lords, does the Minister agree that the recent discovery of an electrical duct directly in the middle of the Peers' car park actually gives great hope that this problem can be solved quickly and easily?

Lord Touhig (Lab): I thank the noble Lord, Lord Borwick, as I said, and the noble Baroness, for coming round with me and coming up with these ideas. I have seen the exchange of emails that the noble Lord has had with the principal electrical engineer. I do not want to raise hopes too high at this stage, but while there is no doubt that the ducts in their current state could not be used, I can tell the noble Lord that the complete survey that we are carrying out now will be presented to the Services Committee as a possible option, depending on the results. That is down to his efforts. I pay tribute to him, as a former member of the Services Committee, as hugely hard-working and diligent, and for the refreshing ideas that he and the noble Baroness, Lady Kramer, have managed to give to this whole enterprise.

Covid-19: Lockdowns

Question

3.36 pm

Asked by ***Lord Robathan***

To ask Her Majesty's Government what assessment they have made of the paper *A Literature Review and Meta-Analysis of the Effects of Lockdowns on COVID-19 Mortality*, published in January; and in particular, the conclusions that (1) lockdown measures during the pandemic reduced COVID-19 mortality by 0.2 per cent on average, and (2) the public health benefits of such measures were outweighed by their economic and social costs.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord Kamall) (Con): The paper has yet to be peer-reviewed and there are important methodological issues that we would expect the reviewers to address. For example, the figure of 0.2% reduction in Covid-19 mortality from lockdown comes mainly from one of the 34 studies reviewed, while other studies report a reduction in mortality of up to 35%. To examine the trade-off between the public health benefits of lockdown and the economic and social costs requires a wider examination of the evidence.

Lord Robathan (Con): My Lords, I am grateful to my noble friend for that reasoned Answer. I have absolutely no idea whether these conclusions are correct, but does my noble friend think that the formulation of government medical policy should be influenced by a wider range of scientific advice, such as that from the authors of this paper, rather than by the narrow focus of SAGE? This is epitomised by the discredited Neil Ferguson. Is he an ex-member? I cannot quite remember. He is still dragged out by the BBC to spread inaccurate gloom and doom. Can my noble friend also confirm that the Chief Medical Officer, at the Cabinet meeting on 8 December, predicted that without further lockdown by new year London would be like Lombardy was in March 2020?

Lord Kamall (Con): Before I answer any further questions, I should draw Members' attention to my registered interests and more specifically to the fact that, when I was the academic research director of a think tank, I invited one of the authors of the paper to speak at an academic webinar. In fact, he did not speak on this issue; he spoke on Lebanese currency—quite different issues, as noble Lords can imagine.

I say in response to my noble friend that what is important is that we look not only at the epidemiological evidence and the medical evidence but, in considering government policy, at the wider range of social, economic and other factors. For example, even within clinical decisions, there were some asking for lockdown in order to prevent hospitals from being overwhelmed, but that was counterbalanced by mental health experts who were very concerned about the impact on mental health. As my noble friend will know, there are also trade-offs with the economy and other issues.

Lord Patel (CB): Would the Minister agree that smoking causes cancer, that the earth is round and that, in a pandemic caused by a respiratory virus, asking people to stay at home at the height of the pandemic reduces transmission of infection? Furthermore, would he agree that meta-analysis is the right way to look at randomised control trials and how they perform but not the ideal method to look at observational studies, as referred to in the Question?

Lord Kamall (Con): The noble Lord makes important points. If we look at the history of the debate about the world being round, at one time scientists believed that the world was flat. Because of scepticism and contestability in science, we have been able to come to the conclusion that the world is round. That shows the importance of science being contestable and of having an open debate.

Lord Rooker (Lab): On the issue of Covid and mortality, does the Minister have a view about the allegations made in the BBC2 documentary last night that there were hundreds of thousands of excess deaths because of the business and political attacks on the AstraZeneca vaccine in the early days? The fact is that its non-profit system did not suit the drug industry's business plan. The massive allegation that, because of this failure, hundreds of thousands of extra people died, clearly ought to be investigated.

Lord Kamall (Con): I apologise to the noble Lord. I did not see the programme last night. I was swatting up for the Health and Social Care Bill debate today and for this Question. The noble Lord refers to an important point. We should not forget not only the contribution that the research community made towards those vaccines, but also that AstraZeneca was prepared to supply, commercialise and distribute them on a not-for-profit basis. Sadly, it was attacked for doing so, not just for commercial reasons, but also by other countries that engaged in vaccine nationalism and disparaged the efficacy of the vaccine. Unfortunately, people in other countries have lost out. I hope that we do not see this in future.

Earl Howe (Con): My Lords, the noble Baroness, Lady Brinton, has indicated her wish to speak. This may be a convenient moment.

Baroness Brinton (LD) [V]: My Lords, this paper's economist authors admit that it reflects their opinions. Extraordinarily, they chose to exclude the most recognised epidemiological research on excess deaths. It is not even peer-reviewed. The conclusions are contradictory to the established annual excess death protocols, published for years by the ONS and other national statistical agencies around the world. Which data should scientists advising the Government and Ministers rely on when making decisions about lockdown?

Lord Kamall (Con): The noble Baroness makes some important points about the meta-analysis in the paper. Undue attention has been given to one paper out of 34 studies. While I am answering the noble Baroness, I will refer to an earlier question. In academia there is a huge debate about meta-analysis in all sorts of fields. The question is what other research should be analysed with meta-analysis. This continues to be an issue of debate among academics in many disciplines.

Baroness Wheeler (Lab): My Lords, I want to follow on from what the noble Lord, Lord Patel, said. The World Health Organization's authoritative and in-depth research shows the effectiveness of large-scale social distancing measures and movement restrictions—ie lockdown—in slowing down Covid-19 transmissions because they limit contacts between people. Is it not far better to work on the basis of this evidence, as well as our own much-respected evidence from the CMO and his team, rather than a non-peer-reviewed paper from an American think tank?

Lord Kamall (Con): Once again, the noble Baroness makes the point that this paper has not been peer-reviewed. That is an important consideration. The Government were quite clear that they introduced measures including lockdown—in the face of some opposition, but with the support of the Benches opposite—because, on the balance of epidemiological and other evidence, it was important to prevent and reduce the risk of transmission of the disease.

Baroness Foster of Oxton (Con): My Lords, many decisions taken during this pandemic led to unintended consequences across the board. Apart from the devastating economic impact on business and industry, the children of the United Kingdom were most badly affected. Mental health problems escalated, particularly due to lockdowns. I hope that I never live to see another lockdown in this country. Can the Minister tell the House exactly what the NHS is doing to address this particular issue?

Lord Kamall (Con): My noble friend raises an important issue about the trade-offs that had to be considered when the Government announced the lockdown and plan A measures. They also announced measures to restrict the transmission of the disease. Costs and benefits had to be weighed up. It was often a nuanced

decision. We are clear about the backlog in tackling mental health issues. In debates on the Health and Social Care Bill, many noble Lords across the House have expressed the importance of tackling mental health issues in this country. We hope to put that at the forefront of future health policy.

Lord Scriven (LD): My Lords, all papers with modelled counterfactuals are excluded from the report mentioned in the noble Lord's Question. As this is the most common method used in infectious disease assessments, does the Minister agree that this has the practical effect of excluding most epidemiological research from the review?

Lord Kamall (Con): Had I still been in academia and was asked to referee this paper for a journal, I would have pointed out a number of issues, including the focus and bias on one particular study, for example, and the studies that were excluded without justifying why.

Lord Davies of Brixton (Lab): My Lords, I understand that the rules on replying to Questions mean that there is not enough time for the Minister to explain everything which is wrong with this particular paper. Does he agree that it would be useful to draw your Lordships' attention to the work of the Science Media Centre, which has provided a comprehensive explanation of its deficiencies?

Lord Kamall (Con): If the noble Lord would like to write to me with details of that paper, I would be happy to share it with other noble Lords.

Lord Farmer (Con): My Lords, 54 health professionals have urged the Commons Public Administration Committee to conduct an inquiry into government use of covert psychological strategies, particularly in Covid messaging, which raise significant ethical issues, including the need to obtain consent. What is the Government's response to growing evidence of fear inflation and social division due to the equating of compliance with virtue and use of peer pressure to ensure conformity with lockdown and other Covid restrictions?

Lord Kamall (Con): I thank my noble friend for giving me advance warning of his question. The British Psychological Society's ethics committee has been approached on this topic and has provided a response that has been published in online articles by the authors of the recent letter. Overall, the BPS concludes that it believes that the contribution of psychologists in response to the pandemic was entirely consistent with the BPS code of ethics and conduct, demonstrating social responsibility and the competent and responsible employment of psychological experience.

Hereditary Peers By-election

Announcement

3.48 pm

The Clerk of the Parliaments announced the result of the by-election to elect a Conservative hereditary Peer, in place of Viscount Ridley. Thirty-six noble Lords submitted valid ballots and a notice detailing the results is in the Printed Paper Office and online. The successful candidate was Lord Strathcarron.

Lord Grocott (Lab): My Lords, I wonder if I might say a word.

Noble Lords: Oh!

Lord Grocott (Lab): I thank the returning officer for announcing the result of another exciting by-election. It was a minimalist announcement; over the years I have tried to get more detail into the formal announcement. It is available in the Printed Paper Office, but members of the public who may be watching and interested in this subject—I assume there are one or two somewhere—cannot go to the Printed Paper Office.

I note, by the way, that the only reference to this on today's Order Paper is in the smallest possible type, so that hopefully we will not notice. Well, I did notice. The Clerk, of course, was quite right to say that a Conservative won the election. There may be people watching who take an interest in these things who will be pleased about that, because Governments go through sticky patches and this Government are having one. A Conservative victory is terrific in a by-election.

I have to give the facts. The winning candidate was a Conservative, the second candidate was a Conservative, the third on the list was a Conservative, and the fourth, fifth, sixth, seventh, eighth, ninth and 10th were Conservatives—there were 10 candidates and they were all Conservatives. It was pretty locked down in terms of what might happen. Added to that is the fact that you needed to be a Conservative in order to vote—I know when I am beaten; that is game, set, match and tournament.

On the question of the electorate—again, this perhaps needs explaining to people outside—it consisted of 45 people. I noticed that only 36 voted, so the turnout is slipping. Forty-five people could have voted, and they are a very privileged group. Since these by-elections resumed last June, there have been eight of them—we have by-elections more frequently than they do in the Commons—and these 45 electors have elected three Peers in June last year, and another one now. So 45 people have elected four Members of Parliament. I am fairly confident in saying that, in the history of parliamentary democracy, never have so many been elected by so few.

My final comment is that it is traditional in by-elections in this country—there is one pending in Birmingham Erdington—as has been the case for over 100 years, that women play a full part, both as candidates and as voters. As the House knows, in the case of by-elections for hereditary Peers, we do not operate that system, and all the candidates were men. Indeed, all the candidates in all the by-elections held since last June have been men, and in this case all the electorate are men. Again, it is something of a slam dunk.

I would like to end on a bit of good news for the House: I understand that there is another by-election pending, following the retirement of Lord Rotherwick. It will be similar to the present one. I am wary of making political predictions, but my guess is that it

[Lord Grocott]
will be won by a Conservative, it will be a hereditary Peer, and it will be a man—there is a tip if any of you are going to the bookmaker's.

Dormant Assets Bill [HL]

Commons Amendments

3.53 pm

Motion on Amendments 1 to 4

Moved by ***Lord Parkinson of Whitley Bay***

That the House do agree with the Commons in their Amendments 1 to 4.

1: Clause 12, page 12, line 6, at end insert—

"(4A) The reference in subsection (4)(b) to money that could be transferred as mentioned in section 8(1)(a) includes money held by an investment institution that is not within the definition in section 8(3) which—

(a) is proceeds of the conversion by the investment institution of a collective scheme investment into a right to payment of an amount, and

(b) could, if it were held by an investment institution falling within section 8(3), be transferred as mentioned in section 8(1)(a)."

2: Clause 29, page 22, line 12, leave out subsections (2) to (4),

3: Clause 29, page 22, line 38, at end insert—

"(6A) In carrying out the first public consultation under subsection (3)(a) the Secretary of State must invite views as to whether the permitted distributions should be, or include, any one or more of the following—

(a) distributions for the purpose of the provision of services, facilities or opportunities to meet the needs of young people;

(b) distributions for the purpose of the development of individuals' ability to manage their finances or the improvement of access to personal financial services;

(c) distributions to social investment wholesalers (within the meaning of section 18);

(d) distributions to community wealth funds.

(6B) For the purposes of subsection (3A) "community wealth fund" means a fund which gives long term financial support (whether directly or indirectly) for the provision of local amenities or other social infrastructure."

4: Clause 34, page 26, line 3, leave out subsection (8)

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Parkinson of Whitley Bay) (Con): My Lords, with the leave of the House, I will move that the House do agree with the Commons in their Amendments 1 to 4. In doing so, I will briefly summarise the changes which have been made to the Bill since last it was before your Lordships' House. All of the amendments which have been made were brought forward by Her Majesty's Government and garnered support across all parties in another place. Commons Amendment 1 is minor and technical, responding to a drafting issue that was helpfully highlighted by the Investment Association in its written evidence to the Public Bill Committee. Amendments 2 and 3 respond to the lengthy debates on how dormant assets money should best be spent, and specifically the calls to establish a community wealth fund. Amendment 4 is wholly procedural and removes the privilege amendment made in your Lordships' House, as is the procedure in these cases.

First, I will speak to Amendment 1. This is a minor and technical government amendment which is required to uphold the key principle of full restitution: to ensure that people can reclaim the amount owed had the transfer to the scheme not happened. This amendment clarifies that money derived from collective scheme investments cannot be transferred into the scheme as client money. This is in response to feedback we received from the Investment Association during the passage of the Bill, and we thank it for its helpful feedback on this issue.

Without this amendment, there would be an unintended loophole where ISA fund managers and investment platforms that hold collective scheme investments, and are able to convert them to cash, would be able to transfer this money into the dormant assets scheme under client money clauses. The investment and wealth management clauses of the Bill recognise the fluctuating market value of investments by entitling owners of dormant collective scheme investments to reclaim the value of the share or unit at the point of reclaim. In contrast, the right to reclaim under client money clauses does not account for the market value, as the asset is already held in cash. We believe that this applies to a small number of cases. However, if relevant institutions have the contractual cover to sell the asset on behalf of its owner and transfer the funds to the scheme as client money, this would mean that the owner would be treated differently from if their dormant asset had been transferred under the investment and wealth management clauses. Remedying this discrepancy protects the vital principle of the scheme: full restitution. It ensures that the collective scheme investments are excluded from the client money clauses, so that the owners of these dormant assets will not be treated differently depending on which type of investment institution happened to hold it for them. Unfortunately, this will have the effect of excluding collective scheme investments held by investment platforms and ISA fund managers from the scheme at this time. Bringing them into scope would require complex technical work, and we are working with the industry to understand if and how this can be accomplished in future under the power to extend the scheme through regulations. We thank our industry partners again for their thoughtful and very helpful feedback on this issue.

I now turn to Amendments 2 and 3. As noble Lords know, a key topic of debate throughout the passage of the Bill has been the proposal to use dormant assets funding to establish community wealth funds in England. We have heard, both here and in the other place, the merits of considering this model, not least from the former Bishop of Newcastle before she left your Lordships' House. This is a model whereby left-behind communities are empowered to make their own decisions on how best to develop vital social infrastructure in their local areas. This kind of devolved and very local decision-making is, of course, a key tenet of the Government's levelling-up White Paper, which was published last week. We agree that this important proposal warrants careful consideration—not only by the Government, but by the public and voluntary industry participants that underpin the scheme's success. In Committee in the other place, the Government made a formal commitment to include community wealth funds as an explicit option in the first consultation launched on the purposes of the English portion.

My honourable friend the Minister for Sport, Tourism, Heritage and Civil Society met Her Majesty's Opposition and the co-chair of the All-Party Parliamentary Group for "Left Behind" Neighbourhoods to discuss this commitment. With their support, the Government brought forward Amendment 3 to place this commitment in legislation. This responds to calls heard in both Houses to refer to community wealth funds on the face of the Bill—making a clear statement that the Government are considering this model and are supportive of its underlying principles, while protecting the integrity of the consultation process. We maintain that an open and fair consultation, without predetermining its outcomes, is essential to securing the expanded scheme's impact.

The Government are clear that Amendment 3 is the furthest that the legislation is able to go in this area, and that is why Amendment 2 removes community wealth funds from being pre-emptively named as a possible option in a future order, in favour of Amendment 3.

I thank noble Lords on all sides of the House for the constructive debate that we have had on this issue. I am very grateful for the spirit of positive collaboration shown throughout the passage of the Bill. It is in this spirit that the Government brought forward their amendments. I am also grateful for the scrutiny it has received in the other place, and I believe that this has presented your Lordships' House with a strengthened Bill. I hope that noble Lords will, therefore, support the Government in these amendments, as was the case in the other place. Sending this Bill on its way to the statute book will enable the Government to shift our focus more swiftly to the implementation of the scheme expansion, including launching the consultation and unlocking hundreds of millions of pounds more across the UK. I beg to move.

Baroness Barker (LD): My Lords, I thank the Minister for his explanation of these amendments. It was most helpful, particularly about Amendment 1, which is very technical. Since it has come from the industry and the whole thrust behind the Bill came from the financial sector, which wishes to see many more assets unlocked in this way, we should accept his explanation and stand behind that.

4 pm

On Amendments 2 and 3, I confess that I am slightly disappointed; it seems a slight watering-down of the decision made in this House to include community wealth funds as specific beneficiaries of these funds. I found it particularly regrettable that it removes the guarantee that was in the amendment passed in this House to establish at least one community wealth fund within the next decade, which did not seem particularly onerous. Given that there has been a general consensus, even in some parts of government, that community wealth funds are something that we should aim to establish, particularly in communities that experience severe deprivation, it would have been good to see that commitment remain. However, I take what the Minister says—that we have probably got as far as we can go in this Bill—and, given that community wealth funds are going to be in the Bill and there is a hook on which to hang their establishment in future, we should agree to the amendments at this stage.

Lord Bassam of Brighton (Lab): My Lords, I express the gratitude of the Labour Benches to the Government for the progress made on the Bill and the valuable update that the Minister has given us this afternoon. I am particularly pleased that the Government have brought back an amendment covering the dormant assets scheme, although I rather agree with the noble Baroness, Lady Barker, that it is a shame that it was watered down, particularly regarding community wealth funds.

When the Bill was in your Lordships' House we were able to reach agreement over periodic reviews of the dormant assets scheme and subsequent reporting to Parliament, which will keep us abreast of how much has been raised and how those funds have been put to good use, which is valuable information for us. During its passage through the Commons, the Government outlined some of the options to be explored in the forthcoming consultation that the Minister referred to, including making a specific reference to community wealth funds. Like the noble Baroness, Lady Barker, I would have liked to have seen work beginning on that, but at least we have got it into the consultative framework.

For our part, we continue to believe that community wealth funds should have significant value in communities across the country, particularly in those areas underserved by other government schemes and/or third-sector organisations. I remain grateful to the noble Baronesses, Lady Kramer and Lady Barker, the noble Lord, Lord Hodgson, and the right reverend Prelate the Bishop of Ely, who spoke in favour of the community wealth fund amendment on Report, as well as to the former Bishop of Newcastle, who I hope is now enjoying the first fruits of the early stages of her retirement.

Lord Blunkett (Lab): Is this an appropriate moment to reflect on the roots of where we are today on dormant assets, and to put on record again the part played by Frank Field—the noble Lord, Lord Field—all those years ago in pressing to get this off the ground and to get the original legislation that we are now updating?

Lord Bassam of Brighton (Lab): I am grateful to my noble friend for his support on that point.

We on our Benches look forward to the consultation in due course and hope that the department will continue to engage with proponents of community wealth funds. Such funds could play an interesting and, we think, valuable role in levelling up and empowering local communities seeking their own solutions to local problems, a feature of the White Paper that we very much endorse.

May I use this occasion to ask the Minister what the Government intend to do to ensure that we continue to widen the potential scope for unlocking other dormant assets? Here I am thinking of Oyster cards, proceeds from crime funds, unclaimed pensions and unused insurance. It is worth reminding ourselves that the independent commission report identified some £715 million from investments and wealth management, £550 million from the pensions and insurance sectors, £150 million from securities, and £140 million from banks and building societies. Unlocking that sort of

[Lord Bassam of Brighton]
wealth unlocks a lot of power and gives great potential for social benefit. These are not inconsiderable sums of money, and if put in the right place and adapted, used and adopted for levelling up, they could leverage in bigger sums still for the hard-pressed communities that we want to see levelled up in the next few years.

We are again grateful to the Government for what they have done in improving the Bill. Your Lordships' House played a valuable and valid part in that process. We are slightly underwhelmed by what has come back, but we are extremely grateful.

Lord Parkinson of Whitley Bay (Con): My Lords, I thank the noble Lord and the noble Baroness for their remarks, which reflect the cross-party work that has improved this Bill throughout its passage and the interest that it has garnered from all corners for the benefits that it will bring. I am grateful to the noble Lord, Lord Blunkett, for reminding the House of the contribution of the noble Lord, Lord Field of Birkenhead, and indeed many others who have played close attention to this issue for a long time.

To respond to the questions and points raised by the noble Baroness, Lady Barker, we recognise that the provisions that were inserted on Report in your Lordships' House were permissive, but the Government contend that Amendment 3 is preferable in three main ways. First and foremost, it fulfils our commitment to consult openly; we have emphasised throughout the passage of the Bill that the consultation must be fair and transparent, and we remain mindful of the need to bring industry along with us alongside civil society and the general public. We cannot therefore agree to any amendment that would suggest that the process would be undercut.

Secondly, it recognises the widespread support and positive impact that the current causes of youth, financial inclusion and social investment have had. I am sure that noble Lords did not intend to imply that those would be disregarded, but the provisions that were inserted on Report in your Lordships' House were silent on those and thereby afforded community wealth funds more legislative attention than those initiatives.

Lord Flight (Con): My Lords, who is intended to select the investment managers for these funds?

Lord Parkinson of Whitley Bay (Con): My noble friend asks a good question, on which I will have to write to give him the answer and the full list, if he will forgive me for doing so.

I was just coming to the third reason why Amendment 3 is our preferred way of proceeding. The provisions inserted in this House would not achieve their objective of speeding up the pace of delivery. We must reiterate that releasing this money will not be immediate; indeed, we anticipate it taking several years for the £880 million to be released, and we do not expect any funds to be available for some time. Undercutting the consultation process would not materially affect the pace of that funding release. The Government have committed to launching the first public consultation on the purposes of the expanded English portion as soon as possible after Royal Assent. We anticipate that it could be live as soon as this summer and will be open for at least 12 weeks.

I repeat my commitment to write to my noble friend with the answer to his question, and I beg to move.

Lord Moylan (Con): My Lords, before my noble friend sits down, does he agree that, especially in current circumstances, it would be wholly inappropriate to transfer funds from the TfL balance sheet by way of seizing what are alleged to be surplus Oyster assets, many of which are there because people, often from abroad, choose to leave assets on their Oyster card for when they visit London, which may be only once every few years?

Lord Parkinson of Whitley Bay (Con): My noble friend raises an interesting point that has not been made hitherto during the passage of the Bill, but I know that he speaks with considerable experience from his time working with TfL. If he allows me, I will write to him with further information about the implications for Oyster cards, which is a matter that has not been covered. It may have been covered in another place, but I have not seen whether that is the case.

Lord Bassam of Brighton (Lab): I remind the noble Lord that he did not answer my last question regarding reviewing the future of other dormant assets. If he is unable to do so at this point, I am happy to receive correspondence on the topic.

Lord Parkinson of Whitley Bay (Con): I apologise to the noble Lord, Lord Bassam, for not responding to his question. We share the view that it is important to consider how dormant assets funding can be used most effectively. We are keen to get a wide range of views to help shape our position from Parliament through the Select Committees in both Houses. I will certainly write to him with further details if I am able to provide them.

I can tell my noble friend Lord Moylan that Oyster cards are not in scope of the Bill, which is why the point has not been raised hitherto. I will, however, take it back, and if there is any further information to furnish him with, I will do so. I repeat my thanks to noble Lords for the cross-party working on the Bill.

Motion agreed.

Health and Care Bill

Committee (9th Day)

4.11 pm

Relevant documents: 15th, 16th and 19th Reports from the Delegated Powers Committee, 9th Report from the Constitution Committee

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord Kamall) (Con): My Lords, I should like to update the House on a matter that has generated significant concern. I have noted the strength of feeling in the House on the issue of, and

draft guidance on, elected councillors being appointed to integrated care boards. I discussed this matter with NHS England and can confirm that it will revise its draft guidance to remove the proposed blanket exclusion of local authority members sitting on integrated care boards. I am informed that, although ICB members from local authorities are normally likely to be officials, local councillors will not be disqualified for selection and appointment to an integrated care board.

I welcome this development and hope that it demonstrates that the department and NHS England are actively listening and responding to scrutiny and debate in this House. I have also informed the noble Baroness, Lady Thornton, and asked for a meeting between the Labour Front Bench and NHS England on its preparations.

Lord Kennedy of Southwark (Lab Co-op): I thank the noble Lord for that information. Before we continue with the Committee on the Bill, I wanted to raise my concerns on the Floor of the House as to the importance of always treating each other with respect and courtesy. It is not the fault of anyone in this House that despite a majority of 80 in the other place, the Government have taken longer than expected to present several Bills to this House for our consideration. Although backed by the other place—I fully accept that—the Bills are very controversial in nature and quite properly attract considerable attention.

On a few occasions when considering the Nationality and Borders Bill last night and into the early hours of the morning, our standards slipped. We have another long day ahead of us today and another tomorrow before we all have a well-deserved break in the Recess. I hope that Members on all sides of the House, no matter what position they hold, will respect and pay proper attention to the advice and guidance as set out in the *Companion*. Committee is a conversation, different from both Question Time and Report. Shouting "question, question, question" from a sedentary position is unacceptable in Committee. Chapter 4 on the conduct of the House and Chapter 8 on Public Bills in the *Companion* are helpful and informative. I respectfully suggest that all Members regard it as essential reading.

Baroness Walmsley (LD): My Lords, I add the voice of these Benches to the protest by the Opposition Chief Whip in the strongest possible terms. I regret that the Government Chief Whip and the Leader of the House were not here to hear it. I hope that they will read *Hansard*, because I have some questions to put.

Do the Chief Whip and the Leader of the House accept that Members of this House have a right to be treated with courtesy and not bullied by members of the Government, that they are able to speak when they have a right to do so under Standing Orders, and that they have a right to have their health and welfare considered appropriately? None of that was respected last night when the House sat until 3.20 am.

I emphasise that my comments are not aimed at the noble Lord, Lord Kamall, who has always been most courteous. I ask the Leader and the Government Chief Whip: do they agree that this is a self-governing House; that the Government, like all Governments, are temporary and cannot override the rights of noble Lords appointed independently of this Government; and that opposition parties have no duty to help the Government get controversial legislation through this House? On the contrary, we have a duty to scrutinise it. This House has built its reputation on intelligent, careful and courteous consideration of issues laid before it. Long may that continue.

4.15 pm

Baroness Jones of Moulsecoomb (GP): My Lords, the Green group would like to throw its considerable weight behind the two noble Lords who have just spoken. What we saw last night was disgraceful, and I hope we never see it again.

Earl Howe (Con): My Lords, in the absence of my noble friends the Leader of the House and the Chief Whip, I will respond very briefly to the noble Lords who have spoken by saying that I shall ensure that the comments and questions do reach the Leader, and are treated with appropriate seriousness. We have all heard propositions from both noble Lords on the Front Benches opposite with which there would be wide agreement in the House as to the way we should conduct ourselves. In a spirit of sympathy with many of the comments made, I hope noble Lords will agree that it is appropriate that we discuss this in the usual channels.

Amendment 284

Moved by ***Baroness Cumberlege***

284: After Clause 148, insert the following new Clause—

"Industry reporting

Companies involved in the production, buying or selling of pharmaceutical products or medical devices must publish any payments made to—

(a) teaching hospitals,

(b) research institutions, or

(c) individual clinicians."

Member's explanatory statement

This amendment requires companies involved in the production, buying or selling of pharmaceutical products or medical devices to publish any payments made to teaching hospitals, research institutions, or individual clinicians.

Baroness Cumberlege (Con): My Lords, Amendment 284 would implement one of the major recommendations of the Independent Medicines and Medical Devices Safety Review. I will say from the start that I so welcome the government amendments. I thank the Minister and the civil servants for crafting them in such a thorough way.

There is one glitch, however, about which I have given the Minister forewarning. All the government amendments say that the Secretary of State "may"—and of course that is a very sneaky word. What we want to see is a more robust word: the Secretary of State "shall."

However, I do not want to detract in any way from the burden of my amendment, which is that relationships between the pharmaceutical and the medical device industries on the one hand, and the hospitals, medical

[Baroness Cumberlege]
research institutes and individual clinicians on the other, can be a huge force for good. Industry collaborating with doctors, researchers and scientists working in the NHS, academia or elsewhere has led to great breakthroughs and great treatments that we have been able to introduce. No one should want to stop that happening—but we do have a right to see where the money goes. Despite all the undoubted good that collaboration between industry and the rest of healthcare brings, we know that there are long-standing concerns about undue influence.

We need transparency so that trust can be rebuilt where it has been undermined in the past. Voluntary arrangements are all well and good, but they have a drawback: they are voluntary; they are not a requirement; they carry no teeth. So I am encouraged to see that the ABPI, which represents many pharmaceutical companies in the UK, agrees. It is supportive of moving to mandatory disclosure.

Amendment 284 would make it a requirement for payment by the industry to teaching hospitals, research bodies and individual clinicians to be published by the companies themselves. Such legislation exists and works very effectively in the United States. It is called the Physician Payments Sunshine Act, and it has been in existence since 2010. All the information is held on a public website. Americans can see at a glance which pharmaceutical or device companies have made payments to physicians or others: when, why and how much. It is not just the US which benefits from this level of transparency; various European countries have similar legislation in place, and we should not be the poorer cousin.

I of course welcome the Government's own amendments that are grouped with mine and very much look forward to what the Minister has to say about them. I hope we can all agree that transparency, trust and good, safe care go hand in hand. That is why the amendments are so important.

The Deputy Chairman of Committees (Lord Brougham and Vaux) (Con): My Lords, I invite the noble Baroness, Lady Brinton, to speak remotely now.

Baroness Brinton (LD) [V]: My Lords, this amendment is a companion piece to the previous amendment on declarations of interest that we believe should be made by doctors and other regulated healthcare staff, and ensures that any companies involved in the production, buying or selling of pharmaceutical products or medical devices must publish any payments made to teaching hospitals, research institutions or individual clinicians. Whether someone wants to know about a doctor working with a pharma company, or the other way around, we need a system that provides a golden thread of transparency and accountability.

Reporting payments or benefits in kind by the relevant organisations and individuals receiving them ensures that the links between donors, recipients and their respective interests are always visible. Although it is, we hope, rare, this is more than just transparency. As in any walk of life, occasionally there is malpractice and fraud, which needs to be prevented. A register such as this helps to remind all those concerned of the rules.

I echo the comments made by the noble Baroness, Lady Cumberlege, that "may" is not strong enough: "shall" is important here. The noble Baroness also referred to the USA Sunshine register; and, as I said on the last group of amendments, we definitely need the disinfection of sunlight. Can the Minister say whether any such regulations on industry reporting might be published and brought into force?

The Deputy Chairman of Committees (Lord Brougham and Vaux) (Con): My Lords, I invite the noble Lord, Lord Howarth of Newport, to speak remotely now.

Lord Howarth of Newport (Lab) [V]: My Lords, I thank the noble Baroness, Lady Cumberlege, for tabling Amendment 284. If we are to avoid the risk of corruption and maintain full public confidence, it is vital that there should be full disclosure of payments by commercial interests to hospitals—I would have thought to all hospitals, not just teaching hospitals—research institutions and clinicians. It is a good maxim to follow the money and to be able to do so.

In regard to research, there has long been public concern about business interests suborning researchers whose judgments and pronouncements influence public understanding, sometimes with important implications for public health. Corrupt scientists certified that DDT and pesticides used in agriculture were not harmful to public health. Exposure of that by Rachel Carson in her book *Silent Spring* did not end the mischief. Bogus research evidence was paid for for decades by the tobacco industry in a rearguard action to persuade Governments and the public that tobacco was not harmful to human health.

Today, firms in the food industry deploy spurious evidence and arguments about the damage certain foods do to human health. They have lobbied Government with considerable success to the terrible detriment of human health—it is good that the Bill limits the advertising of unhealthy foods. Scientists, paid by energy firms, have abetted those who deny that climate change is manmade.

Disclosure payments in regard to research will help, but more is needed. The noble Baroness might have considered—and may yet consider—tabling another amendment needed to underpin research ethics. The data on which research conclusions are based should be held independently. The Engineering and Physical Sciences Research Council rightly now requires researchers to deposit data connected to the research they have funded.

There is huge pressure, in a competitive environment, on scientists to publish research, and there have been notorious instances of fake science—scientific discoveries announced that were made up and whose results could not be replicated by other researchers. A paper entitled *Fake Science and the Knowledge Crisis* published by the Royal Society said,

"it is especially important that the scientific world as a whole upholds the highest standards of ethical behaviour, honesty and transparency, aiming to sustain the gold standards of research integrity and validated information."

However, the authors go on:

"Sadly, a range of forces are working counter to this aspiration."

It is good that the pharmaceutical industry in the United Kingdom supports the transparency that the amendment calls for. We should certainly match the best standards and practice in the USA and Europe.

The NHS holds huge budgets for drugs, medical equipment and hospital building; big commercial interests are at stake. There is scope for corruption if the system is weakly regulated. The scandal of PPE contracts has led to widespread anxieties about the integrity of procurement. The public want to believe that the NHS is free of corruption, and I am sure it mainly is, but reassurance is needed. As the noble Baroness, Lady Brinton, reminded us. in the old saying, sunlight is the best disinfectant. We need the transparency that the amendment would secure.

The government amendments are, certainly at first blush, welcome. But, as the noble Baroness, Lady Cumberlege, noted there is a conspicuous difference in language between her amendment, which says that companies "must" publish payments, and the Minister's amendments, which say that the Secretary of State "may" require or regulate. That slide of language is liable to weaken public confidence. I hope the Minister will explain why he has used the word "may" and not "shall" or "must".

The government amendments are as elaborate as the noble Baroness's is simple, and they prompt some questions. In the Government's Amendment 312B, subsection (6)(b) states:

"The regulations may … create exceptions from requirements to publish or provide information."

What would those exceptions be? Subsection (8) states that the Secretary of State may,

"grant an exception … in a particular case."

What sort of case? Earlier in Amendment 312B, subsection (1)(a) refers to "payments or other benefits". I ask the Minister whether the disclosure requirements he envisages cover benefits in kind, including donations to political parties. whether made by big pharma or small local donors.

I do not want to be cynical. How can the Minister reassure those who are?

4.30 pm

Lord Patel (CB): My Lords, I shall try to be brief, otherwise we will be here until 3 am, and I am sure none of us want that. I join the noble Baroness, Lady Cumberlege, in the comments she has made, and I support her amendment and the government amendments. I also agree that the system should be mandatory—not "may" but "shall"—and aligned with the similar system in the United States which I was used to many years ago.

To try to explore this further with the industry, I have been in correspondence with the ABPI to test how committed it is to agreeing to this being mandatory and that they "shall report" in all aspects. I will read what it sent me:

"ABPI are supportive of the intention to move to a mandatory model of disclosure for payments made between industry and relevant individuals including Health Professionals, and"

all healthcare organisations and research institutions. It continues:

"We believe proposals to introduce a legislative mandate are an opportunity to further strengthen the pharmaceutical sector's existing transparency mechanism for branded medicines"—

that was the point I made to it, that its system needs to be transparent, mandatory and easily accessible by patients and the public. It goes on:

"Our briefing outlines a number of considerations and learnings based on ABPI's experience running Disclosure UK, which since 2016 has supported transparency around transfers of value made by the innovative pharmaceutical industry to relevant individuals including Health Professionals … and Healthcare Organisations".

I asked for a similar comment from industries that market medical devices, and I understand that a similar commitment is made by those companies too.

I therefore support the noble Baroness, Lady Cumberlege, and support the Government's amendment. However, I hope that the Minister can confirm that the loose word "may" is not intentional and they intend to make this mandatory.

Baroness Bennett of Manor Castle (GP): My Lords, I rise very briefly, rather enjoying this reunion from our debates during the passage of the Medicines and Medical Devices Bill of a group of people who taught me a great deal about dealing with legislation. We also looked at an amendment that was very like this. There is a phrase I use often: "Campaigning works". I should make that "Campaigning by the noble Baroness, Lady Cumberlege, works particularly well". We are seeing real progress here, although, as many noble Lords have already said, we need to make sure that this is mandatory and not some kind of voluntary extra.

When I was working on the then Medicines and Medical Devices Bill, I spoke to a number of people from the industry. They were very much concerned about the fact that they wanted tight rules that apply to everybody, otherwise those who cut corners and push the envelope have a competitive advantage against people who doing the right thing, being absolutely open and not flinging money around. Many parts of the sector are keen on tight rules.

It is interesting that it has taken us so long to get to this point when the noble Baroness, Lady Cumberlege, presented ways of doing this back in the Medicines and Medical Devices Bill. We have not heard the Government using their favourite phrasing "world-leading" or "world-beating" very often in this area. As the noble Baroness, Lady Brinton, said, we are very much trailing behind other countries in our transparency here.

I will make one final comment. We have a huge problem with public trust—we see this on the street outside your Lordships' House quite often. Absolute transparency and openness is crucial and, as we heard in Oral Questions earlier, the fact that some companies have been able to profiteer hugely from the pandemic causes more damage to public trust. We need to tackle that with as much of the sunlight of transparency and openness as possible.

Lord Stevens of Birmingham (CB): Briefly, I also support these amendments, including the Government's comprehensive amendment, but I was spurred into action by the noble Baroness, Lady Bennett. It is worth saying that when it comes to public trust, a survey of 28 countries conducted at the end of last year found that British doctors were more trusted by people in this country than doctors in any of the

[Lord Stevens of Birmingham]
other 27, so we start from a well-founded position of high trust. However, trust in a profession is of course founded on the basis that people will act in a way that puts the interests of the person they are looking after first, and these amendments help to deliver that.

I want to use the opportunity to try to draw the Minister out slightly on a couple of questions supplementary to those which my noble friend Lord Patel raised. Sunlight may indeed be the best disinfectant. but we have two types of shade going on at the moment. The first is that, through the voluntary register which the ABPI established in 2017, we have just under a third of eligible doctors who are not reporting. Therefore, obviously to the extent that the Government commence these amendments on a mandatory basis, that will deal with that aspect of shade; the 68% will become 100%, which will be most welcome.

The second type of shade relates to the scope of the payments that have to be declared. Here, I think the Government's amendment is potentially very suitably broad. However, it would be wonderful to hear the Minister confirm that it will cover payments to all NHS bodies, not just to trusts or indeed teaching hospitals; that primary care will be in scope; that it will cover the independent sector as well as the NHS; that it will cover payments made to patients' organisations; and whether, in time, the Government will consider extending it to payments made to health professionals other than doctors. I conclude by simply reporting that when you ask people in this country which profession they most trust, the answer is actually not doctors; it is nurses.

Baroness Finlay of Llandaff (CB): My Lords, I have my name on this amendment. I will not repeat all the points made by other people so far, but I point out that using the words "shall" or "must" avoids any argument over threshold. The problem with having a word that is not definitive is that there would be arguments over what would and would not have to be declared.

To put a slightly positive note on the whole situation, I say from clinical experience that patients want to go into trials and to contribute to the level of knowledge. Very often, people who are seriously ill will say, "I know that I won't benefit from it, but I hope that other people will by me going into this trial". But they want to know that the trial is properly conducted, that everything is open, that nobody is profiteering from their generosity and that they are genuinely contributing to the body of knowledge across the country. When people who I know socially contact me because they have been given a potentially devastating diagnosis and have been referred to somebody, the question is always, "Are they the best in the field?", which is often followed up with, "Are they doing research in the field?" and "Are they completely up to date?" So often, when people realise that they are deteriorating, they will ask whether there is a trial that they can be entered into.

This goes much further than just being sunlight. This amendment would support future endeavours and innovation in the country and would encourage people to enter into studies.

Baroness Wheeler (Lab): My Lords, very briefly, we welcome the Government's proposals on mandatory disclosure of payments, a companion piece to the previous debate that we had, as has been pointed out.

As noble Lords have always stressed, greater transparency is highly desirable and a very good thing. I am grateful to the Minister for listening to the voices of stakeholders and parliamentarians on this. Indeed, nine out of 10 medical professional bodies think that patients have a right to know if their doctor has financial or other links with pharmaceutical or medical device companies and they support stronger reporting arrangements, as contained in the amendments. I am grateful for the briefing I have received from the ABPI, which, as we have heard, also supports mandatory disclosure.

I also note that Amendment 312D refers specifically to the consultation with the devolved Administrations in Scotland, Wales and Northern Ireland and to obtaining the

"consent of the Scottish Ministers, the Welsh Ministers or the Department of Health in Northern Ireland … before making provision within devolved legislative competence in regulations relating to information about payments etc to persons in the health care sector."

We would welcome the Minister reassuring us that full consultation is under way and setting out the timescales involved.

On Amendment 284, the non-government amendment leading this group, the intention of the amendment and the arguments put forward by noble Lords are extremely persuasive. The requirement for companies involved in the production, buying or selling of pharmaceutical products or medical devices to publish any payments made to teaching hospitals, research institutions or individual clinicians is a sensible measure that would complement the Government's package, and I await the Minister's thoughts on it, including on the one glitch underlined by the noble Baroness, Lady Cumberlege, on moving from "may" to "shall".

Lord Kamall (Con): My Lords, I thank all noble Lords who took part in this debate, especially my noble friend Lady Cumberlege for her work on the independent review of medicines and medical devices, and other noble Lords who were involved in that. I know that she worked tirelessly to make sure that patients and their families have been heard and I pay tribute to her and her team. I also thank her for her lobbying—or reminding—me of the pledge that I made when I first became a Minister on championing the patient.

I welcome my noble friend's amendment to increase transparency and promote public confidence in the healthcare system. The Government fully support the intention behind the amendment. That is why I will be moving Amendments 312B, 312C, 312D, 313B, 313C and 314ZB in my name. Before I do so, let me answer some of the questions.

All these amendments relate to the transparency of payments made to the healthcare sector. The Independent Medicines and Medical Devices Safety Review led by my noble friend Lady Cumberlege listened to the brave testimony of over 700 people to understand where improvements needed to be made to make the

healthcare system safer for all patients, especially women. The Government have given the review deep consideration and accepted the majority of its nine strategic recommendations and 50 actions for improvement.

To improve transparency, the review recommended that

"there should be mandatory reporting for pharmaceutical and medical device industries of payments made to teaching hospitals, research institutions and individual clinicians".

The amendments deliver on this recommendation by enabling the Secretary of State to make regulations requiring companies to publish or report information about their payments to the healthcare sector. The clause covers any person performing healthcare as part of their duties, benefiting patients and building on initiatives by regulators and industry. I hope that partly answers the questions raised by the noble Lord, Lord Stevens.

The amendment also allows for the Secretary of State to make regulations requiring that the information be made public and make further provision about when and how the information must be published. This could include requiring self-publication or publication in a central database. That ensures that we can adapt the system to improve reporting as necessary. To ensure that companies fulfil the obligation, requirements introduced by the regulations can be enforced using civil penalties.

There are benefits to this duty applying UK-wide, aligning with the approach taken by the pharmaceutical industry with its Disclosure UK system. As the noble Baroness, Lady Wheeler, referred to, the clause contains a statutory consent requirement, so we will work closely with the devolved Governments to develop regulations following the passage of the Bill. We will also work with patients, industry and healthcare providers to create a system that enhances patient confidence while maintaining a collaborative, world-leading UK life sciences sector.

A question was raised about the issue of "shall" versus "may". The Government have not tabled these amendments in bad faith; we would not have tabled these amendments if we did not intend to work with them. It is the intention of my right honourable friend the Secretary of State to bring forward regulations under the clause to make sure that there is transparency. If that is not reassuring enough, perhaps between this stage and Report there can be some conversations to make sure that noble Lords are assured. It is for these reasons that I ask your Lordships' Committee to support these amendments.

Lord Patel (CB): Can the Minister confirm what he just said: that it is the intention to bring regulations? How strong is that intention? The "may" creates a problem.

Baroness Bennett of Manor Castle (GP): My Lords, can I add a question about timeframes to that? When can we expect the regulations?

Lord Kamall (Con): I have two points to make to the noble Lord. First, I have been advised that this is standard wording. Secondly, I have made the assurance at the Dispatch Box. It is here; it is on public record that the Government intend to bring forward regulations. On the timeframe, I will either write to noble Lords or arrange a follow-up meeting. I will make sure that there is some communication to bridge that gap.

Baroness Cumberlege (Con): My Lords, I thank everybody who has taken part in this debate, particularly my noble friend the Minister for the work he and his officials have done to bring this into the Government's remit. That is so important, because I learned through the passage of the Medicines and Medical Devices Act that we could incorporate the patient safety commissioner and some of the other things we wanted to achieve only through government amendments. My heart leaped when I saw these amendments and I thank the Minister.

I still think these amendments could be improved and it is important that we get the word "shall" in, or "might" or whatever others have said, rather than "may". I was looking at the Oxford English Dictionary. My father-in-law was the publisher to the Oxford University Press, so the dictionary is very close to my heart. The dictionary says that the verb "shall" relates to the right or sensible thing to do, whereas the verb "may" is defined as a possibility.

4.45 pm

I have absolutely no doubt that the Minister will do all he can to ensure that the Secretary of State brings this into effect, but he will know, as all of us in this Chamber know, that Secretaries of State come and go. You are always starting from base again with a new Secretary of State, so there is an urgency about this.

Before I bring this to a close, I want to thank the noble Baroness, Lady Brinton. She is always so much on the ball and so concise and straight. The noble Lord, Lord Howarth, is so right that it is other, huge organisations that influence what is happening. There is the tobacco industry, which he mentioned, the food industry, and we saw the devices industry, which so influenced what is happening. I thank the other Members who took part, including the noble Lord, Lord Patel, with his second intervention, and the ABPI for its work.

I say to the noble Lord, Lord Stevens of Birmingham that of course he is right; we need to reach much more widely. But I have found throughout the Bill and previous Bills, where we have enacted them, that you have to start somewhere, and we felt that this was a credible way to start, and something to build on at least. But he is right; it should go wider.

I thank the noble Baroness, Lady Finlay, so much for supporting this amendment. She is absolutely right in what she has been saying. Research is so important, and that is all part of this. We are not trying to cut down research. We just want to see where the money is going, and we want patients to know how things are being influenced regarding the finances being poured into certain organisations. I mentioned the big hospitals, the teaching hospitals and so on. We have a right to know, us taxpayers and us patients, where the money is coming from. That is all I wish to say. I withdraw the amendment.

Amendment 284 withdrawn.

Amendments 285 not moved.

Amendment 286 had been withdrawn from the Marshalled List.

Amendment 287

Moved by ***Baroness Finlay of Llandaff***

287: After Clause 148, insert the following new Clause—

"Dispute resolution in children's palliative care

(1) This section applies where there is a difference of opinion between a parent of a child with a life-limiting illness and a doctor responsible for the child's treatment about—

(a) the nature (or extent) of specialist palliative care that should be made available for the child, or

(b) the extent to which palliative care provided to the child should be accompanied by one or more disease-modifying treatments.

(2) Where the authorities responsible for a health service hospital become aware of the difference of opinion they must take all reasonable steps—

(a) to ensure that the views of the parent, and of anyone else concerned with the welfare of the child, are listened to and taken into account;

(b) to make available to the parent any medical data relating to the child reasonably required to obtain evidence in support of the parent's proposals for the child's treatment (including obtaining an additional medical opinion); and

(c) where the authorities consider that the difference of opinion is unlikely to be resolved entirely informally, to provide for a mediation process, acceptable to both parties, between the parent and the doctor.

(3) In the application of subsection (2) the hospital authorities—

(a) must involve the child's specialist palliative care team so far as possible; and

(b) may refuse to make medical data available if the High Court grants an application to that effect on the grounds that disclosure might put the child's safety at risk having regard to special circumstances.

(4) Where the difference of opinion between the parent and the doctor arises in proceedings before a court—

(a) the child's parents are entitled to legal aid, within the meaning of section 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Lord Chancellor's functions) in respect of the proceedings; and the Lord Chancellor must make any necessary regulations under that Act to give effect to this paragraph; and

(b) the court may not make any order that would prevent or obstruct the parent from pursuing proposals for obtaining disease-modifying treatment for the child (whether in the UK or elsewhere) unless the court is satisfied that the proposals—

(i) involve a medical institution that is not generally regarded within the medical community as a responsible and reliable institution, or

(ii) pose a disproportionate risk of significant harm to the child.

(5) Nothing in subsection (4) requires, or may be relied upon so as to require, the provision of any specific treatment by a doctor or institution; in particular, nothing in subsection (4) —

(a) requires the provision of resources for any particular course of treatment; or

(b) requires a doctor to provide treatment that the doctor considers likely to be futile or harmful, or otherwise not in the best interests of the child.

(6) In this section—

"child" means an individual under the age of 18;

"health service hospital" has the meaning given by section 275 of the National Health Service Act 2006 (interpretation);

"parent" means a person with parental responsibility for a child within the meaning of the Children Act 1989.

(7) Nothing in this section affects the law about the appropriate clinical practice to be followed as to—

(a) having regard to the child's own views, where they can be expressed; and

(b) having regard to the views of anyone interested in the welfare of the child, whether or not a person concerned within the welfare of the child within the meaning of this section."

Baroness Finlay of Llandaff (CB): My Lords, this amendment has been several years in gestation. It dates back to the case of Charlie Gard in 2017. There have also been other cases that suggested we must do better than rush to the courts, with all the anguish that causes to parents and clinicians alike, let alone the expense to the NHS and others. That is why I am proposing that there should be independent mediation where there is a serious disagreement between loving parents and the clinical team caring for a child who is not Gillick-competent.

Difficulties arise when the child's prognosis seems hopeless to clinicians but the parents do not share that view and want to know that they have tried everything. The clinicians may feel that the best interests of the child would be for the child to be allowed to die, but the parents can perceive this as life being ended, even though the child would have already died without all the care and interventions that had been put in place. In other words, when death occurs, the child dies of their underlying condition. The clinicians have not euthanised the child. However, pressures in the media towards doctors administering lethal drugs and euthanasia have portrayed death as a solution, and there is a perception that our overwhelmed NHS is desperate to clear beds, save money and, sadly, even cover up shortcomings.

However, no one has interests when they are dead; they are a corpse. By contrast, the parents feel that any improvement is worth having, and that it is in the best interests of the child to continue to experience their love and affection and to try a novel therapy that seems, on balance, possibly to do more good than harm—that is, it does not cause significant harm to the child—and, if there is no improvement, it is easier for them to accept the natural death of their child.

In Charlie's case, a novel treatment seemed to offer hope, a nucleoside powder to be added to feeds of mitochondrial depletion syndrome. This did not involve invasive procedures and was estimated by New York-Presbyterian Hospital and Columbia University Irving Medical Center's Dr Hirano to have a 56% chance of success. That is important because it is over 50%. In 13 out of 18 children with TK2 mitochondrial depletion it had appeared to be beneficial but it had not been tried in RRM2B, the variant that Charlie had. This was not a distressing invasive treatment from a dubious medical centre, and the parents would gladly have had Charlie as part of an N of 1 trial, accepting failure but knowing that they had done everything.

The total cost of a three-month trial of nucleoside powder would have been about £3,000. Contrast that with the costs of over £250,000, made up of £205,225 costs to Great Ormond Street Hospital, almost £35,000 that his parents had to fundraise for, and £32,500 spent by Cafcass. That seems to be the norm. Cafcass also reported that in 2016 it was involved in 18 parent-doctor disputes that ended up in court. If these costs are indicative, that suggests around £4.5 million from the NHS each year.

No one should underestimate the intense emotional anguish of these parents in such cases, nor the stress and difficulty for the clinical team. The requirement that the parents can seek a second opinion means that they can do so swiftly, with full access to their child's clinical record. This recognises the speed with which children can deteriorate when very ill.

Currently a second opinion may be sought only by a clinician. This part of the amendment would put the parents on an equal footing to ensure that they could seek one too. If there is a dispute between those with parental responsibility then, as now, the court would have to be involved. It is for the courts to veto inappropriate demands, and no clinician would ever be forced to administer a treatment that they did not view as being in the best interests of the child.

Rather than clinicians and parents being pitted against each other, with press interest and the risk of campaigning groups further polarising views, the amendment proposes that independent mediation must be offered. It needs to be independent to remove the suspicion that the mediator is entering the discussion biased towards the clinical establishment and away from the parents. Mediation is different from arbitration; it must be voluntarily entered into, using mediation processes designed to avoid legal disputes. It may help the parents to realise that the clinicians' decisions are right after all and in the best interests of the child. Indeed, such realisation is evident in some of the very sensitive judgments given by the court.

The amendment would focus on the balance of probabilities. There is no absolute line because each case is different. If the dispute remained intractable, the case would proceed to the court, where the court would have to take into account all the evidence and consider whether the risk was significant. "Significant" is not a precise medical term; it would leave it to the court to decide whether the risk of harm involved in the parents' proposal was sufficiently significant to interject across their parental responsibility and prohibit the proposed treatment. It would create the legal test of "disproportionate risk of significant harm" to assess the balance of factors, replicating the legal test already used by social services under the Children Act 1989 to consider whether to remove the child from their parents' care. This legal test would sit before, rather than replace, the current "best interests" test, which is very broad and can be subject to different interpretations.

Contrary to the misleading briefing that some Peers may have received, the legal test in the amendment would not allow a person with parental responsibility to force any intervention. The court must always be, and would remain, free to objectively judge the issues. In the rare cases where disputes still reach litigation, access to legal aid would ensure families can access justice without being forced to rely on outside interest groups to fund the case.

The aim of this amendment is to solve some major problems for the Government. It would ensure resolution of some distressing prolonged disputes between loving parents and clinicians, disputes that benefit no one, and would reduce the likelihood of cases escalating to the courts and the millions of pounds in litigation costs. I beg to move.

The Deputy Chairman of Committees (Lord Geddes) (Con): I advise the Committee that the noble Baronesses, Lady Brinton and Lady Masham of Ilton, have indicated that they wish to take part remotely. I call the noble Baroness, Lady Brinton. I am sorry, I thought it was in alphabetical order. I shall therefore call first the noble Baroness, Lady Masham.

Baroness Masham of Ilton (CB) [V]: My Lords, in supporting Amendment 287 I cannot think of a better person to have moved it than my noble friend Lady Finlay of Llandaff, professor of palliative care. If there is a dispute, a difference of opinion, between a parent and a child with a life-limiting illness and a doctor responsible for the child's treatment, it can be heartbreaking. The stress and anxiety the parents can be put under can be unbearable if the doctor in charge is invincible. It is important to ensure that the views of the parents and anyone else concerned with the welfare of the child are listened to and considered.

The amendment would put mechanisms in place and highlight benefits that Charlie's law can provide for both parents and doctors when a major difference of opinion arises. Most parents will do anything for their children in a critical situation if there is a slight hope that the treatment might work and benefit their child. Sometimes the treatment is abroad and not available in the UK. This happened to Ashya King, a young boy who had extensive surgery for an aggressive brain tumour. His parents wanted to take him to the Proton Therapy Center in Prague for treatment, but there was a dispute with Southampton hospital. At that time, there was no proton treatment in the UK. His parents took him from the hospital to Spain via France, landing up in prison in Spain and making a court appearance. This traumatic struggle hit the headlines and, in the end, young Ashya did go to the Czech Republic for treatment. How much better it would have been if there had been an agreement to save a humiliating situation for everyone.

A great deal of work and care has gone into this amendment. I thank my noble friend for all she has done, and I hope the Government will accept the amendment.

5 pm

Baroness Brinton (LD) [V]: My Lords, I will be very brief, as the noble Baroness, Lady Finlay, has comprehensively explained why her amendment, Amendment 287, which seeks to create a dispute resolution mechanism in children's palliative care, is important. There is no doubt of the challenges experienced by parents who are facing the dreadful news of their child's deteriorating health and likely end of life, and

[Baroness Brinton]
who are trapped in a process that makes them feel as if their requests for new, different or more treatment are being refused by the hospital, not least if they feel that the hospital is acting as prosecutor, jury and judge against their wishes.

However, as the noble Baroness, Lady Finlay, has outlined, one must also sympathise with doctors and other healthcare professionals who believe that they are doing the best for the child in these distressing circumstances. For these cases to end up going through the courts is not a good dispute resolution process. The noble Baroness, Lady Finlay, has also outlined the extreme costs to the NHS and to the parents of the child. We now need a system, even if rarely used, which parents can feel is independent but medically expert to help to resolve and mediate the dispute when the relationship between them and the hospital has broken down.

Baroness Hollins (CB): My Lords, I added my name to Amendment 287, and I thank my noble friend for tabling Charlie's law. Charlie Gard's case was painful for all involved, including his parents and the doctors at the hospital where he was receiving treatment. Protracted disagreements can have far-reaching effects, particularly when they are played out in public, as has happened in a small number of cases. For the child, it can mean a delay in a decision about their care and treatment. For the parents and family of the child, there can be enormous distress, feelings of loss of control, and financial strain. Healthcare staff can also experience stress and anxiety, and they might be subjected to intimidation.

The parents of Charlie Gard, Alta Fixler, Alfie Evans, Tafida Raqeeb, and many others, wanted to do what any parent would do to try to improve their child's condition and alleviate their child's suffering. However, it is evident that the parents in such cases do not feel adequately heard and listen to when discussing options about their child's treatment. This results in the devastating conflicts that lead to litigation. With this amendment, parents would be given the chance to discuss their views openly with the clinicians and hear the views of those clinicians, too.

Too often in my career, I have heard distressed parents described as "difficult" and "impossible to work with—nobody can work with them". These are grieving parents who are looking for someone they can trust to help them. Mediation can sometimes help parents, and professionals to acknowledge that the consequence of conflict has been to shift focus away from the needs and welfare of the child. An independent mediation process can help to facilitate less confrontational conversation while supporting both parties. Thus, it provides support for both. Mediation across England is inconsistent. It needs to be available in every NHS hospital where conflict emerges, and at an early stage, so that the lives of very sick children such as Charlie are less likely to escalate to court.

In the rare event that a child's case escalates to court, the amendment seeks to provide access to legal aid to ensure that families are not burdened with the financial strain of legal representation. Currently, families in this position are effectively punished, both financially and emotionally, through litigation for simply doing what they strongly believe is in their child's best interest. Although this amendment makes provision for legal aid, the main purpose is to keep cases such as Charlie's out of court, rather than arming everyone to be prepared to enter into long-winded and expensive legal disputes. Parents would not automatically win the right for their children to be given novel treatment, but the amendment would rebalance the dialogue towards resolution, rather than towards costly and distressing legal battles that do nothing to help the parents' grief.

I also strongly support the introduction of the significant harm test. This legal test would focus on whether an alternative credible medical treatment could cause a child "disproportionate risk of significant harm" when deciding whether a parent can seek that treatment for their child. A key point here is that no medical professional would ever be required to give care or treatment that they did not view as in the best interests of the child. The legal test is already widely used under the Children Act 1989 and should be applied to cases such as Charlie's in the future. I am strongly in support of this amendment and commend it. It is a just and necessary package to support parents and doctors, and I hope the Minister will be in a position to welcome it.

Lord Moylan (Con): My Lords, I have also put my name to this amendment. I congratulate the noble Baroness, Lady Finlay of Llandaff, on bringing it forward.

We need a broad debate on the balance of responsibility for children as between parents and the various arms of the state. Sadly, these have come to include the medical profession. Today is not the day for that debate, but this amendment does something to give a voice to parents who find themselves in dispute with doctors, often unaided, unsupported and dependent on voluntary contributions, so that they have at least a voice and a status in decisions about their sick child. I very much hope that the Government will be able to support this.

Baroness Stowell of Beeston (Con): My Lords, I do not very often become involved in health matters, so I hope that your Lordships will indulge me on this occasion.

Five years ago, when Charlie Gard's parents were doing everything they could to fight for his life, I, like everyone else, was moved by their determination. Even so, my instincts were to accept what the Great Ormond Street hospital doctors were advising and what the judge decided was in Charlie's best interests. I fall into the camp which believes that, in such an unimaginable, heartbreaking situation, the objective and dispassionate professionals are best placed to make a decision that no parent would ever want to have to make for themselves. When Charlie sadly died, I was moved by his parents' dignity in coping with their heartbreak in the midst of a legal battle and in the full glare of publicity. Probably like many others who felt so sorry for their loss, I soon moved on and thought little more about this tragic case.

Then, just over a year ago, during the Christmas lockdown, when I was out on my daily walk, I heard an interview that Charlie's mother, Connie Yates, gave to Andy Coulson on his podcast, "Crisis What Crisis?" For well over an hour, I listened to Connie tell her story.

She spoke clearly, intelligently and reasonably about their experience as a family during the year in which Charlie lived, and about all that she and her partner, Chris, went through in their fight to be heard and taken seriously by doctors and lawyers. From listening to Connie, I learned that their expectations were well-informed and reasonable but that as the dispute continued, the situation became increasingly fraught and distressing —to the point where their efforts to be heard as parents made them feel that others believed they were guilty of not wanting the best for their baby. Even so, she was at pains to praise all the medical staff who had cared for Charlie at Great Ormond Street.

Towards the end of the interview, Connie told Andy Coulson that a Private Member's Bill was being sponsored by the noble Baroness, Lady Finlay, that would bring to life what she called "Charlie's law". The noble Baroness has described this law. When Connie talked about it, I was struck by how modest and reasonable it is to create a legal framework to allow for resolution, without the added stress and trauma that they had faced during the time when they were fighting for Charlie. It also struck me very powerfully that, in developing this framework, Connie had taken the time to contact and listen to the doctors who had opposed her, so that she could better understand them and their position. That is worth emphasising again: this young woman is so reasonable that she wanted to create a law that would work for the benefit of the medical profession, not just parents.

As I finished listening to Connie, I vowed that I would support that Bill whenever it appeared. But as we know, Amendment 287 is here in lieu of that Private Member's Bill, and arguably is a better way to introduce this measure, rather than having to battle with the usual procedural risks that are associated with private Members' legislation. I am delighted to lend my support to this amendment. I am sure there are technical matters within the amendment which might require discussion between the noble Baroness and the Minister, but I urge my noble friend to take this seriously.

Given the ordeal that Charlie's family faced a few years ago, when no one in authority listened to them, I am sure it would bring them a huge amount of comfort to know that they are being heard now. That is my main point and motivation today. Of all the things we must do if we are to level up this country, listening and taking seriously people who feel ignored or misunderstood is the most important aspect of that agenda, and in this context it costs us nothing.

I also say to Connie Yates, should she be listening today or read the record subsequently, that she is one impressive woman. When I heard her speak, and listened to what she had to say, she changed my mind and made me realise I had been wrong not to listen more carefully a few years ago.

Lord Balfe (Con): My Lords, I welcome the amendment put forward by the noble Baroness, Lady Finlay, and will make what have been described as technical points. While I think this is a very good base, there are some things that I think need looking at.

I trained as a commercial mediator some years ago, and practiced for a couple of years, before I was signed up by David Cameron to do a different job. The first point I make is that there is a difference between commercial and family mediation. It is important to realise that. I notice that the amendment says

"where the authorities consider that the difference of opinion is unlikely to be resolved entirely informally".

I suggest that it cannot be the authorities that decide; it has to be offered equally to both sides. That is why it will not be appropriate for the authorities to provide the mediation service. There are a couple of good, independent mediation services, including the Centre for Effective Dispute Resolution and the Alternative Dispute Resolution Services, but if it is to be a system which has the confidence of both sides, it must be independent of the authorities.

The next point I would like to make is this. There is a big difference between family and commercial mediation, and the difference is fundamental. Commercial mediation produces a legal, enforceable result; family mediation produces an agreement which has no legal force. One of the points which must be addressed if this is to be brought to fruition is what is to be the status of the mediation agreement. That is fundamental.

I was a commercial meditator and in East Anglia, where I was, we had a practice of commercial mediators going out also with family mediators to get an experience of the full area. One of the most distressing points about family mediation was the way in which families would bicker, eventually reach some sort of compromise, and, before you were through the door, decide they were not going through with it. If mediation is to work, it will have to have some sort of resolution at the end where the medical profession and the family can say, "This is settled"—not where one side can say, "Well, I don't really like the outcome". This could be the case, particularly in a complex medical situation, where you have a number of doctors involved and maybe two or three of them are part of the mediation but there is then someone further up the line who says, "No, I just don't accept this". There has to be a dispute resolution which has a legality about it.

5.15 pm

The next point I want to make is that the NHS, as we have heard in other debates on this Bill, is a terribly litigious place, and I am afraid that we need to take care that we are not opening up yet more cases for the Medical Defence Union and medical defence solicitors. I speak from very limited experience here, as I have a sister-in-law who is a retired medical negligence solicitor. As we all know, around the country there are companies of medical negligence solicitors. Their money is funded from the National Health Service through encouraging people to take legal action whenever possible. No general practitioner ever proceeds without his MDU cover, because it is just not safe to do so.

So we also need to look at the way in which the legal profession will get involved, and that, I am afraid—noble Lords will probably expect this from a Conservative—means that we have to look at the way in which the legal aid fund is able to be used. It cannot be an open fund; it will have to have some limitations on it. It is not for me to suggest what they are, but it is for me to suggest that they will be needed at some point.

[Lord Balfe]

The next point we have to consider is that when I was doing mediation it was much cooler, because commercial mediation is really about financial disputes between you and your builder. If you are doing this sort of mediation, you have to recognise that some people will go into it determined not to settle, and a mediator cannot force them to settle. There are not many such cases but, even in the area I worked in, in something like 15% of the cases you could tell within the first five minutes that they were there for an outing, not a settlement, often—this was the crucial thing—because emotional considerations had taken hold of the day. They were there because they did not like something or they wanted to get their own back, et cetera, and the mediation was never going to work.

So we need to look at the way in which people are referred to mediation, because it will not work if it is forced. If you say to a couple, "You've got to go to mediation", they may well say behind your back, "Oh well, I suppose we'd better go through with it, but we don't have to make it binding"—and they do not, of course, because the whole essence of mediation is agreement between two conflicting sides. We have to recognise that you cannot force people to mediation and that, just as the authorities can decide that it might be appropriate, it will not be appropriate unless both sides agree with it.

I say these things not to pour cold water on the amendment, because I think it is very worth while. This path could aid a lot of families, but my view of this clause is that it still needs quite a lot of work. I hope the Minister will be able to say, "We think this is probably a good way forward, but we need to look closely and further at it and discuss with the noble Baroness how we can make this system actually work". A number of technical problems will have to be looked at, and overcome, if it is to be anything other than a clause in a Bill that never gets off the ground.

Baroness Walmsley (LD): My Lords, there is considerable merit in an independent dispute resolution service. I will be very brief, because I believe that at the heart of this is the following: for over two decades, this country has been a signatory to the UN Convention on the Rights of the Child, which recognises that a child has its own rights, independent of its parents. So I was very pleased to hear the noble Baroness, Lady Finlay, refer to the best interests of the child, which will be based on their rights under the convention.

Baroness Wheeler (Lab): My Lords, I thank the noble Baroness, Lady Finlay, for this amendment and other noble Lords who have contributed to this highly emotional and compelling debate about the welfare, care and medical treatment of critically ill children. I also thank Emma Hardy MP for ensuring that this key issue was debated in the course of the Bill's passage through the Commons and the work that she, other MPs and noble Lords have undertaken with parents and medical staff to help build and develop the framework that is set out in the amendment where care and treatment are disputed: Charlie's law, in memory of Charlie Gard.

The amendment seeks to mitigate conflicts at the earliest stages, provide advice and support, and improve early access to independent mediation services to prevent the traumatic and bitter legal disputes that we have all seen all too often. Noble Lords have highlighted these, as well as the benefits that the step-by-step processes set out in the amendment would provide for parents and doctors, which are of course central to the consideration of the child's welfare and best interests. In particular, providing families with access to legal aid if court action takes place would, as the noble Baroness, Lady Finlay, pointed out, ensure that they do not have to rely on raising funds themselves, or on the financial support of outside interests.

Today's debate has been powerful but has also demonstrated the difficulties with trying to address and resolve such deeply complex issues within the context of an already overloaded and skeletal Bill. Like other noble Lords, I have received the excellent briefing from the Together for Short Lives charity, which does such remarkable work on children's palliative care to support and empower families caring for terminally ill children. While supportive of much of the amendment, the charity has what it terms "significant reservations" about proposed new subsection (4) on the issue of amending the court's powers in relation to parents pursuing proposals for disease-modifying treatment for their child after the final court decision.

So, while there is obviously considerable support for the measures set out in the amendment, as we have heard today, the reservations about this and other provisions in the amendment, from Together for Brief Lives and other organisations, emphasise the need for the continued dialogue and discussion that we are not able to have today but which noble Lords have made clear is needed. This has been an excellent debate and I hope the Minister will be able to find supportive ways of taking this vital issue forward.

Earl Howe (Con): My Lords, the noble Baroness, Lady Finlay, has brought a vital and sensitive debate before the Committee, for which I for one am very grateful. At the heart of each of these difficult cases is, as she said, the well-being of a child, and that principle has to remain uppermost in everyone's mind. While the views of parents and guardians are routinely considered in everyday care, occasionally difficult disputes will arise. When they do, we should carefully consider how best to protect the interests of the child. I will start by saying that I fully agree with the noble Baroness that any failure to listen to the concerns of parents or a guardian would be bad practice.

However, I have a concern about the practical impact of this amendment. In cases of the care of children with life-limiting illnesses, the amendment would place the views of parents and guardians above those of clinicians and—let us be clear—the courts, which have a statutory obligation to act in the best interests of the child. Establishing a default presumption in favour of the parents' views would fundamentally change the current balance. It would move away from the impartial assessment of the individual child's best interests being paramount based on all the evidence in each specific case.

I understand the view that parents know what is best for their child and their wishes should be paramount. Sadly, though, I am afraid that I cannot fully agree with the proposition advanced in the amendment. It is

sometimes the case that desperate parents in these tremendously difficult circumstances are subject to the flattering voice of hope and, as a result, are not acting in a way that is necessarily in the best interests of their child.

To protect the child, it is right that when every effort at resolution has been unsuccessful there is recourse to a judicial process that can impartially assess all the evidence as to what treatment is best for the child. I also fear that it would be difficult for a clinician to determine, in the wording of the amendment, "anyone else" who has an interest in a child's care. In considering the provisions of the amendment, I note that a child's medical data can already be provided to parents following a subject access request, so we do not feel that legislation here is necessary. I absolutely agree that specialist palliative care teams should be part of the multidisciplinary team for any child or adult with a complex life-limiting illness; their involvement is an integral part of good practice, and I would expect referrals in such situations. However, I do not agree that it is necessary to put that into law.

Let me say something about mediation. I listened with care to my noble friend Lord Balfe. We know that mediation can and often does play a vital role in facilitating better communications and creating a space where voices on both sides of a dispute can be heard in a non-adversarial way. Unfortunately, that does not provide a solution in every dispute. The Government are supportive of the many excellent mediation schemes already available, including through charities and the private sector. We agree that parents and clinicians should be able to access such schemes where they wish to do so. However, we are not convinced that legislation is the answer to these thankfully rare but nevertheless tragic cases.

The current lack of statutory prescription means that mediation can be tailored specifically to meet the individual needs of families and their children, clinicians and hospitals, reflecting the unique circumstances of each case. There is currently a wide range of work and research into avoiding such protracted disputes and improving the approach to managing conflicts, with the aim of promoting good, collaborative relationships between parents and healthcare professionals to seek resolution without lengthy and costly legal battles. Furthermore, on those rare occasions where disputes are heard before a court, the amendment seeks to extend legal aid. Legal aid is already available for best interests cases, albeit subject to a means and merits test.

I understand the strong views on the amendment across the Committee. I understand that these issues are ethically charged and I take them seriously. However, I also believe that the current approach properly balances the views of parents and guardians with those of clinicians and, above all, with the paramount importance of the best interests of the child in question. The sensitivities around this subject are acute but I hope that what I have said has clarified why I do not feel able to accept what I know is a well-intentioned amendment.

Baroness Finlay of Llandaff (CB): My Lords, I cannot hide my deep disappointment at the response from the Government, because I think this situation will only get worse unless we recognise the difficulty of decision-making when you are faced with a child whose prognosis is poor, who has a very rare condition, where nobody has a test to predict what will happen, and where the parents feel that they are not being listened to.

Currently in the NHS we have clinical teams that change rapidly. The one person—often—who has continuity and has seen the child day after day is the mother; sometimes it is the father who is with the child all the time. But you get different clinical teams, and you may have a gap of five days between one doctor visiting and coming back, and they may say: "Oh my goodness, what a change." But when you have a handover, you do not get a complete picture.

5.30 pm

My amendment aims to reset the balance and ensure that these parents are listened to, because at the moment they feel they are not adequately listened to and get labelled as "difficult". I am grateful to my noble friend Lady Hollins for spelling that out, because I have seen it all too often: parents in anguish labelled as "difficult" or "angry". They are trying desperately to explain a complex situation, to bring things to people's attention and—sometimes—just to be seen by someone a little more senior that the clinicians who have been looking after their child. A child may go from one week to the next without even being seen by the consultant in the team in some places.

Also—I do not like to do this, but I want it on the record—I dispute the phrase "flattering voice of hope", because without hope we might as well give up on everybody. It is because of hope that parents, such as those of Charlie Gard, find something that has an over 50% chance—nothing in medicine is 100% and there is no absolute—and want to try it. I too have had many conversations with Connie Yates and Chris Gard, and I am sure that if they had been told the chance was 5% they would not have pursued it. That contrasts with adults who will go after chemotherapy if there is even a 2% chance of success, because they are so desperate.

I am grateful to everyone who has spoken. The noble Baroness, Lady Masham, pointed out that this amendment aims to achieve agreement for everyone for the better. The noble Baroness, Lady Brinton, pointed out the costs not only in financial terms but in terms of long-term mental health. This lives on for the rest of the lives of these parents, who live with this, day in, day out, and wake in the night, remembering that they could not be heard. I am afraid to say the clinicians just move on to the next case—of course we do. I am a clinician, and I have seen hundreds of families who have been distressed and in dispute, because they want to be heard—that is all. This is about rebalancing the dialogue.

I am grateful to the noble Lord, Lord Moylan, and particularly to the noble Baroness, Lady Stowell, for giving us the most moving illustration of the background to this. Like her, I was sceptical before I met Connie Yates and Chris Gard in person and had in-depth conversations with them. I have been overwhelmingly impressed by them, and by other parents who have been in this situation and recognise the difficulties and

[Baroness Finlay of Llandaff]
dilemmas. They are often faced with a clinical team far younger than them, do not have children and do not understand the emotional involvement of parent and child.

I would like to have a conversation with the noble Lord, Lord Balfe. He raised many points which I will not respond to now because of time in Committee, but I point out that this is not about arbitration or looking back. It is about finding the best way forward from where we are now: whether we carry on with attempting treatment or we move the child home, whether we allow the parents to take the child abroad or decide whether to take the child off the ventilator. That is usually the point at which these decisions are being made—of course, if you take the child off the ventilator, they will be dead within a few minutes because they become anoxic. This is not about opening up medical litigation.

I hope we have worded this amendment well. I have had a lot of legal advice over the wording of this amendment and in light of the comments made I will go back to the legal team that have helped draw it up.

It is very sad that we are prepared to accept the situation as it goes on. I also put on record my deep disappointment that Together for Short Lives did not discuss its concerns with me before that discussion, and before that document went out. I have done a lot of work with it; I have set up paediatric palliative care and supported many hospices, and I am deeply disappointed that I did not hear from it prior to this debate. I say to the Minister that I intend to go back to the legal team, and I would like a conversation with the noble Lord, Lord Balfe. I will bring this back on Report with, I hope, a better worded amendment that the House can then accept, because we are heading for danger if we do not allow peoples' voices to be heard in a system where we know that there is no time and currently no place for them to express their views. In the meantime, I beg leave to withdraw the amendment.

Amendment 287 withdrawn.

Amendments 288 and 289 not moved.

Amendment 290

Moved by ***Baroness Greengross***

290: After Clause 148, insert the following new Clause—

"Social prescribing

The Secretary of State must seek to ensure that health professionals are aware of any benefits of practising social prescribing of music and the arts for dementia, in particular for patients at the onset of symptoms so as to preserve their brain health and resilience in the community."

Baroness Greengross (CB): My Lords, I wholeheartedly support Amendment 297A in the name of the noble Baroness, Lady Hodgson, and Amendment 291D in the name of noble Lord, Lord Hunt, but I will speak only to Amendments 290 and 291 in my name in this group. Amendment 291 calls on the Secretary of State to

"publish a plan for dementia care"

which recognises

"the different types of dementias and the specific care needs of each type".

It also places a duty on local authorities and the

"NHS integrated care system to implement this plan for their own areas".

Some 70% of care home residents and 60% of home care recipients in the UK have some form of dementia. When we talk about the crisis in social care and the urgent need for social care reform, one of the major drivers of this crisis is the growing number of people living with dementia, with one in 14 people over 65, and one in six people over 80, living with some form of dementia. By 2040, the number of people living with dementia is expected to have grown to 1.5 million. Globally, the World Health Organization reports that over 55 million people are currently living with dementia; by 2050, this number will have grown to 153 million.

It is easy to get caught up in the numbers, but we need to remember that these are usually people with family and loved ones who often become carers, even once the person with dementia ceases to recognise their loved ones, and in many cases spend prolonged periods of time in a state of distress and even anguish. It is not just unpaid carers who struggle to help those with dementia: Skills for Care has recorded that only 44% of care staff have any form of training in dementia. Social care staff should have tier 2 training in the dementia training standards framework to support the delivery of more personalised care for people with dementia.

As co-chair of the All-Party Parliamentary Group on Dementia, I work closely with the Alzheimer's Society. This organisation has been working with the small team at the Department of Health and Social Care that has been trying to develop a new national dementia strategy. With no co-ordinated strategy for dementia since 2020, and with the conditions of people living with dementia deteriorating during the pandemic, the strategy needs to be published promptly. There also needs to be dedicated funding to deliver it.

There are over 100 types of dementia. We know that the most common are Alzheimer's disease, which accounts for over 50% of dementia cases; vascular dementia, which accounts for roughly 20% of cases; Lewy body dementia, which accounts for just over 10%; and frontotemporal dementia—FTD—which affects 2%. Each type of dementia has its own symptoms and has different care needs. Also, some forms of dementia can develop tragically at a younger age, and some may cause deterioration of memory and cognitive function for many years.

Dementia is a condition that uniquely cuts across social care and healthcare, because it has no disease-modifying treatment, meaning that the main support someone receives is through the social care system. As I said on Amendment 235 on the social care cap, there is a clear inequity where, if someone is diagnosed with cancer the NHS will cover the full treatment cost, whereas if someone is diagnosed with dementia they may require many years of care, which will cost them and their families thousands of pounds, as this is not covered. That is made much worse by the fact that, despite best intentions, the care being delivered may not even be suitable for the type of dementia the person needs care for. That brings me to my next amendment.

Amendment 290 requires the Secretary of State to ensure that health professionals are aware of the benefits of the social prescribing of music and art for those with dementia, especially at the onset of symptoms to preserve brain health, and protect against cognitive decline, loneliness and fear in the months and years leading to diagnosis. Over 200,000 people are expected to be diagnosed each year. A third more do not even have a diagnosis, so the arts have a vital part to play for them. When I spoke in support of the amendments in the name of the noble Lord, Lord Howarth, on social prescribing, I and others who spoke on that group outlined the many benefits of social prescribing for the social exercise of arts activity, which empowers patients to preserve their brain health. This amendment specifically outlines the importance of this for those affected by dementia as part of an overall care plan, so links to Amendment 291.

If we look at the four main types of dementia I spoke of earlier, we can see how different forms of art can play an important role. The charity Arts 4 Dementia has found that, for those with Alzheimer's disease and vascular dementia, participating in music, dance, visual arts, poetry and drama, and trying new techniques and art forms, stimulates interest and joy, relieves anxiety, preserves confidence and improves cognitive functioning. Some musicians continue to play for years, artists to paint and dancers to dance. People with frontotemporal dementia are better able to read words and music and are more interested in dialogue around pictures and the mechanics than creating art. Musicians and artists with frontotemporal dementia can often continue to enjoy singing, playing and painting for years after diagnosis. Researchers have found that those with Lewy body dementia are happier to be involved in social arts programmes, poetry and dressing up than physical drawing, or going to arts events, galleries, concerts or the theatre rather than performing. For those with Parkinson's-related dementia, dance can be helpful.

5.45 pm

Social prescribing is important because it provides social contact; one of the many factors that may hasten the advance of dementia symptoms is loneliness and isolation. Engaging in weekly social, cultural and creative activity at the time of the initial diagnostic process—when people's anxiety and fears are at their worst, prior to a diagnosis of our most feared, incurable condition—plays a positive role in mental health. Arts activities give people a sense of accomplishment at a time when dementia will reduce a person's confidence.

I thank the Minister for sharing the recording of his blues band and for his personal pledge to support Music for Dementia—that is really lovely. His video has inspired my researcher Nick Kelly to learn bass guitar, but more importantly, the noble Lord, Lord Kamall, has shown leadership by helping to raise the profile of social prescribing and is an example to others.

Many people have described the Health and Care Bill as a framework Bill, where the structures are set up and the detailed delivery plans are left to communities, who will decide what works best for them. I broadly agree with this approach. However, for the reasons outlined already, with dementia, there is an urgent need for a national strategy. With the growing number of people being diagnosed with dementia and the huge pressure this is putting on our social care system, I believe this national strategy proposal needs to be included in the Bill. Given that the demand on social care is set to increase due to the projected increase in the number of people living with dementia, we need to get this right. I beg to move.

The Deputy Chairman of Committees (Lord Geddes) (Con): My Lords, the noble Baroness, Lady Masham of Ilton, is taking part remotely. I invite her to speak.

Baroness Masham of Ilton (CB) [V]: My Lords, Amendment 297D is very important. Unacceptable practices of bullying and intimidation of the most vulnerable people must not take place. I thank the noble Lord, Lord Hunt of Kings Heath, for bringing this amendment to the Committee. I support it.

I congratulate "Panorama" and those who worked undercover to expose these unacceptable wrongdoings in the past in care homes, nursing homes and hospitals for residents who are very vulnerable. The programme showed one girl who was a resident and had asked to be looked after by female staff only. This did not happen, and the film showed men taunting her and seeing her get upset, as they carried on with their bullying and tormenting. All sorts of abuse has been exposed in some of the homes, which were spread across the country, such as Whorlton Hall in Barnard Castle, Winterbourne View near Bristol, Ashbourne House in Rochdale, and many, many others. This is not easy work and staff need to be well trained and suitable candidates, with patience and dedication.

During Covid-19, this situation has been a great risk. Many of the residents are a long way from home and they are very isolated. There should be independent inspections and spot checks; there should not be closed doors. There should be regular safeguarding in the regulations.

I hope that the Government will take this seriously. There should be a duty of candour so that whistleblowers are not victimised when reporting what they think is bad practice. I look forward to the Government's reply, and I hope it will be helpful.

The Deputy Chairman of Committees (Lord Geddes) (Con): My Lords, the noble Lord, Lord Howarth of Newport, is also taking part remotely. I invite the noble Lord to speak.

Lord Howarth of Newport (Lab) [V]: My Lords, I pay tribute to the noble Baroness, Lady Greengross. No one has done more than she has to champion the elderly and the frail. I support all the amendments in this group but will speak only in support of Amendment 290.

There is much evidence of the benefits of creative activity to dementia. Some of this was set forth in the *Creative Health* report, and more recently in the document *A.R.T.S for Brain Health*, edited by Veronica Franklin Gould, the founder and now president of Arts 4 Dementia. I pay tribute to her passionate and indefatigable work.

[Lord Howarth of Newport]

As noble Lords, we have the opportunity to exercise our aging brains in trying to understand amendments to the Health and Care Bill. Others at our time of life take even greater pleasure and benefit to their health through music, painting, poetry, dance, drama and other art forms. Of course, that range of cultural opportunities is there for us too—the cultural scope of Peers is not limited to "Iolanthe".

Veronica Franklin Gould has very well said:

"music-making provides a tool for a total brain workout".

The mental activity of learning poetry, performing drama and creating painting or craft opens new neural pathways and connections. Research shows that creativity benefits the plasticity of the cortex, enhances cognitive abilities—perception, motor function and memory—and improves cardiovascular strength. In more humane language, engagement with the arts allows creative self-expression, offers sociability, reduces stress and increases resilience—all leading to joy and achievement. These are profound and measurable benefits. Arts 4 Dementia offers programmes in creative arts venues for people, from the onset of early symptoms of dementia. I draw the attention of the House to the very important work of Manchester Camerata, in partnership with the University of Manchester, in its Music in Mind dementia programme.

There can be years between the appearance of early symptoms and the moment at which someone receives a memory assessment and a diagnosis. This can be a lonely and fearful time, during which the arts can be particularly sustaining. Creative activity slows the deterioration of the brain. The benefits of engagement with creative activity continue for a long time.

Professor Martin Marshall, chair of the Royal College of General Practitioners, has recognised this. He said:

"The shift for us in general practice is not just engaging with the medical activities which are core, but to engage with social activities, and make sure the two are aligned."

Will the Minister accept amendments to this legislation to ensure that the structures and requirements that it creates encourage, facilitate and drive the shift of which Professor Marshall speaks, and bring the crucial support of the arts and other forms of social prescribing to people with dementia and others? If he does not believe that the legislation needs amendment, will he explain how, as presently drafted, it will drive that change?

The Deputy Chairman of Committees (Lord Geddes) (Con): My Lords, the noble Baroness, Lady Brinton, is also taking part remotely. I invite the noble Baroness to speak.

Baroness Brinton (LD) [V]: My Lords, I thank the noble Baroness, Lady Greengross, and others for the amendments in this group, which would help transform some of the long-standing problems in social care, as well as improve the quality of life of patients and their families, especially those who care for them. I will speak to Amendment 297D, in the name of the noble Lord, Lord Hunt, which seeks the establishment of a review into institutional abuses in care settings within six months of the passing of this Act.

Amendment 297D talks about the effects of restrictive visiting and eviction notices

"on the emotional, psychological, social and physical health of service users, and on the well-being of service users"

and their families. Obviously, "restrictions on visiting" has taken on a whole new meaning throughout the Covid-19 pandemic. I note that the Rights for Residents campaign group has secured more than 270,000 signatures on a petition for a law that ensures that

"every resident has the legally enforced right to the support of an essential visitor".

Currently, homes are meant to support an essential caregiver for all residents—but this is advisory and some homes are still imposing blanket bans on visits. That may be because they have some Covid infections inside the home, but that is not universally true.

There is still no clear picture of how visits are going on in care settings. These could be difficult for residents with dementia, for example, if there is only a very small window for visiting—and perhaps it is just not the right time or the right day for them.

Unlock Care Homes is also doing work on this, including highlighting good practice. It is important to remember that most care homes are not just doing their best, they are doing really well with looking after their residents, despite the constraints of the pandemic, staff shortages and burnout.

Time and again, investigative journalists are uncovering practices going on in care settings that are inhuman, breach vulnerable residents' human rights and damage patients' mental, physical and psychological well-being. The noble Baroness, Lady Masham, referred to a long list, and that list is indeed shameful.

A series of scandals led to a CQC report into restraint, seclusion and segregation for autistic people and people with a learning disability being commissioned in 2018. It was published in October 2020. The report said:

"We found too many examples of undignified and inhumane care in hospital and care settings where people were seen not as individuals but as a condition or a collection of negative behaviours … We also found that a lack of training and support for staff meant that they are not always able to care for people in a way that meets those individuals' specific needs. This increases the risk of people being restrained, secluded or segregated."

However, the Government have not yet commissioned a review of the entire sector, to understand and learn from the causes and poor practices that have resulted in those institutions failing their residents. Commissioning such a review would demonstrate that the Government really want to bring a halt to these practices.

Baroness Hodgson of Abinger (Con): My Lords, Amendment 297A is in my name and those of the noble Baronesses, Lady Smith and Lady Cumberlege, but I am also supportive of the other amendments in this group.

With people living ever longer, looking after older people so that they can stay healthier for longer is critical, as is ensuring that they receive the care they need and have a dignified and secure old age. Amendment 297A seeks to introduce a new clause that will not only lower, from 75 to 65, the age at which every patient is assigned a named GP but sets out to ensure that named GPs will actually have to meet and have some knowledge of each patient they are responsible for, and will communicate directly with them and the family.

We need to encourage everyone to take responsibility for their health. Having good and regular health checks is an essential part of the prevention of ill health, as well as leading to earlier identification of conditions and earlier interventions. I am sure that other noble Lords who are doctors will put me right, but I was once told that 65 is an age where things can start to go wrong. Therefore, it is important to start monitoring people's health and being able to identify changes from this age. This will deliver better outcomes and may also enable people to stay at home and lead a fuller life for longer. The role of the GP in all this is absolutely critical.

6 pm

Last October, a study based on Norwegian health records, published in the *British Journal of General Practice*, talked about the benefits of having the same GP for years. In Norway, all residents are assigned a named GP. The study found that, compared with a one-year patient-GP relationship, those who had the same doctor for between two and three years were about 13% less likely to need out-of-hours care, 12% less likely to be admitted to hospital, and 8% less likely to die that year. After 15 years, the figures were 30%, 28% and 25% respectively. A senior researcher at the National Centre for Emergency Primary Health Care, part of the NORCE research centre in Bergen, added:

"It can be lifesaving to be treated by a doctor who knows you. If you lose a general practitioner you've had for more than 15 years, your risk of needing acute admission to hospital or dying increases considerably the following year."

As the study showed, it is of benefit to the NHS as it is less likely that a patient will have to be admitted to hospital.

Yet in the UK, GP practices are becoming bigger, and the relationship between doctors and patients less constant. Patients over 75 in the UK are currently given a named GP, and I asked the department what exactly their duties were. The Minister, Maria Caulfield MP, wrote to me, for which I pass on my thanks. She set out that named GPs

"oversee patients' care and support".

She particularly highlighted: working with patients to develop a personalised care plan that recognises and responds to a patient's physical and psychological needs; regularly reviewing patient care at an interval agreed with the patient; taking lead responsibility for ensuring that all appropriate services required under the contract, including health checks, are delivered to the patient; and working with any other health and social care services that care for the patient to make sure that there is continuity of care.

However, sadly, I know from personal experience with my mother that this does not always happen and that some doctors interpret the role of the named GP as just having to look at patient records. We have had discussions on previous clauses in the Bill where it was emphasised that there needs to be a patient-centred approach, but I am afraid that some GP practices just take it as an administrative one. Notes on a screen will never replace the intimate trust of a doctor-patient relationship—and neither is that a patient-centric approach.

I understand that patients who wish to be seen urgently cannot always be seen by their GP on that day, but how can a doctor be responsible for the care of a patient, covering everything the Minister listed in the letter, if they have never met them? Also, surely, if a doctor has some knowledge of a patient, it is easier for them to diagnose what the matter is, and sometimes it will save them time as they will not have to inquire about a fuller history.

However, the BMA advice which sets out named GP responsibilities does not mention that the named GP should actually see the patient. Given that there should be a patient-centred approach, as we have discussed before, what is the point, as things stand, of a named GP?

This amendment will ensure relationships between named GPs and patients, enabling the positive benefits discussed in the *British Journal of General Practice*. It also sets out clearer responsibilities of that role, ensuring that they meet and communicate with both patient and, where needed, family members liaising on their behalf.

To conclude, this amendment is beneficial, both to patients in delivering continuity of care and therefore better healthcare, and, by keeping more people out of hospital, relieving some of the burden from the NHS.

I thank the noble Baronesses, Lady Cumberlege and Lady Smith of Newnham, for supporting this amendment, and I hope the Minister will consider it favourably. If not, I reserve the right to bring it back. I beg to move.

Lord Hunt of Kings Heath (Lab): My Lords, in speaking to my Amendment 297D, I thank the noble Baronesses, Lady Masham and Lady Brinton, for their support. However, I also express my general support to the noble Baroness, Lady Greengross, the noble Lord, Lord Howarth, and the noble Baroness, Lady Hodgson, for their amendments. The common theme of this collection of amendments is the question of how we support vulnerable people.

My amendment is about the experience of many of us who have seen the harm caused to our loved ones in care homes during Covid when visits were not allowed for so long. Even now, it can be difficult to visit in some homes because of the Covid restrictions that continue or where a member of staff or visitor has Covid and then 14-day long impositions are imposed. It is a bit rich when one hears in the media that all restrictions are being lifted, because for many of us, in practice those restrictions have not been lifted at all.

The Joint Committee on Human Rights in its report on care home blanket bans and other excessive restrictions recommended that regulations for care and treatment should include a requirement to ensure face-to-face contact wherever possible between residents and the people most significant to them. I do not underestimate the difficulties faced by care homes in the past two years. They have faced huge challenges. My personal experience is that many of them have risen to the challenge and provide high-quality care. But even before the pandemic, serious concerns were growing about the use of care home visitor bans to punish relatives for complaining about standards of care. Indeed, as far back as 2016, the "Victoria Derbyshire" programme reported that hundreds of care homes were guilty of this method of what it described as institutional abuse. In 2019, the Relatives & Residents Association was coming across at least one case per week and warned the problem was increasing.

[Lord Hunt of Kings Heath]

One woman found her mother dressed in other people's clothes, left in her own urine and with her hair unwashed for weeks. The Local Government and Social Care Ombudsman upheld the daughter's complaint, reporting that after raising her concerns with the care home, she and a doctor were prevented from seeing her mother when they tried to visit. The care home later told the ombudsman the ban was because of a previous incident reported to the police of the daughter and her partner's behaviour, but could not provide any evidence that an incident had occurred or was reported to the police.

As visiting restrictions are, hopefully, going to be relaxed in the weeks ahead, I am afraid we have the prospect of seeing more residents' families being victimised in this way. Helen Wildbore, director of the Relatives & Residents Association, has found from its helpline calls that relatives and friends play a vital role in spotting potential human rights violations, particularly around abuse and neglect. When they are locked out by bans, people in care lose crucial support: their advocate and confidante—they might be the only person they tell about their concerns. Sometimes residents are even threatened with eviction or actually evicted in reprisal for complaints about their care. The Joint Committee on Human Rights was told about a family whose mother was threatened with eviction after they merely asked to discuss concerns with the head office of a care home.

These are the kinds of abuses my amendment seeks to tackle and get over the problem that regulations are not sufficient. These regulations may specify the standards of care against which care providers are regulated by the CQC through its inspection process, but the CQC is not going to pick up individual complaints, so there is a gap. There is a strong case for a statutory duty of care sitting alongside CQC regulations to require care providers to facilitate such contact with families as is reasonably practical and to prohibit evictions where non-vexatious and non-repetitive complaints are in progress. In my amendment, I am not proposing that. All I am asking for is a review; an independent review charged with examining these options. I hope that the Government will agree that there needs to be some reflection on what has happened and how we can prevent this kind of abuse in the future.

Baroness Cumberlege (Con): My Lords, I should like to speak to the amendment proposed by my noble friend Lady Hodgson.

From the age of five, I was a child of general practice; it was my world. I accompanied my father on home visits, patients came to our house and the telephone rang constantly—my mother was the secretary and took all calls. My father loved his patients and they loved him. He knew them inside and out, and their families as well. He attended road traffic accidents, of which I have to say there were plenty, and he delivered babies at home—he never lost one. I remember him telling me one day when he came back from a birth that it had been a very difficult birth, but the mother praised my father for having helped her to produce a very healthy little boy. "Doctor", she said, "we will call the baby after you. What is your name?" My father replied, "Lambert". "Right", said the father, "we will call our son Tom." I mention this only because maternity has been the love of my life, and in this area relationships are critical to a safe and good experience. In my youth, maternity was part of general practice.

After being appointed much more recently to chair the maternity review for England by Simon Stevens—as he was then; now, of course. the noble Lord, Lord Stevens of Birmingham—I was determined to introduce relationship care, sometimes called "continuity of carer", where the final "R" stands for relationship. We have much respected and credible research from the Cochrane Collaboration in Oxford which shows that women who receive relationship care are less likely to have a preterm birth, less likely to lose their baby before 24 weeks and less likely to lose their baby overall.

We now have in the NHS 371 relationship teams with 2,355 midwives in place where the midwife provides all three elements of midwifery care: prenatal, birth and postnatal care, which is sometimes called follow-up care. In the James Paget Hospital, 90% of maternity care is provided through continuity and it has a waiting list for midwives to join the hospital. Through this initiative, we are transforming maternity care. The women and their families value hugely the relationship with their known midwife, and the midwives who are providing this care absolutely know that what they are doing is the right way to work. They would leave their hospital and go to one that provided such care if their hospital gave it up.

Listening to my noble friend Lady Hodgson, is not this what she seeks for general medical practice? Her amendment is well drafted and reflects an interesting report produced by the Royal College of General Practitioners, entitled *The Power of Relationships: What is Relationship-based Care and Why is it Important?* and published in June last year. In his foreword, Professor Martin Marshall, chair of the college, writes:

"COVID-19 has radically changed the face of general practice. We have moved from a predominantly face-to-face service to one in which most consultations are delivered remotely, either by telephone or video call … Remote consultations are certainly here to stay. For many patients, they enable quicker and more convenient access to a GP appointment, which of course is hugely important."

But then he asks the following questions:

"But should speed and ease of access be our primary measures of effectiveness? They are certainly easier to quantify. But what about the quality of care? What about the relationship between doctor and patients which, to me, is the essence of general practice?"

He goes on to say that

"The evidence for the benefits of a trusting relationship is compelling—better patient experience; better adherence to medical advice, fewer prescriptions, better health outcomes, better job satisfaction for doctors and even fewer deaths."

Indeed, he says that the relationship between the patient and their GP is as important as the scalpel is to a surgeon:

"If relationships were a drug, NICE would mandate their use."

6.15 pm

This is a very compelling and well-researched document. It goes with the grain of modernising general practice. General practice does need modernising. We need to make it more interesting and more satisfying to fulfil the vocation of young doctors and to meet the needs of patients now and in the years to come.

The world is certainly not the same as it was in 1948, when the NHS was designed. Some things are still true, such as GPs needing to be able to fulfil the holistic role for the patient. To do this today, they need access to diagnostics. They also need specialist help in the community from consultants and, on occasions, a network of support from nurses, physios and other health professionals.

Hospitals are now more specialised. There are fewer of them, and they serve much larger populations than they did in 1948. As the noble Lord, Lord Crisp, reminded us in an earlier debate, "Health is made at home; hospitals are for repairs." If one is to believe the headlines in last week's *Times*, GPs will be "nationalised in Javid plan to reduce hospital admissions." Was this really a power grab by a hospital to take over general practice? I do not believe the headlines, but we need flexibility if primary care is to flourish—even to survive. A scheme in Wolverhampton had fired the imagination of the headline writer, but he did not explain that, in this area, practices were struggling. One or two were failing and one or two could not survive. If the patients wanted to keep a local primary care service, something had to be done. I understand the scheme, whereby GPs are linked to and employed by the hospital. It required a huge amount of work by its leaders—the hospital managers and the GPs, who needed to be convinced. They needed to be assured that it was in their interest to agree to a scheme which would work for the benefit of patients and of all those providing a service. The idea that this could be rolled out nationwide is simply erroneous. In other areas, it has not worked well. Patients feel that they have been denied a choice of hospital care. Hospitals have refused to refer patients to GPs when the hospitals are not busy. Out-of-hours has collapsed.

All of us, in this Chamber and outside, are for ever saying that one size does not fit all—of course it does not. As Andrew Mawson—the noble Lord, Lord Mawson—has taught us, every community is an entity with its own history, geography and personality. We should respect that.

Since my father's time, much has changed in general practice. There are no night visits, no weekends, no accidents and no births. The preference is for living away from the practice area. A GP is available 40 hours a week, with the majority opting for part-time work. For the other 128 hours? Well, ring a number or go to A&E for excellent medical care. When the Royal College of GPs says that the prime duty of a doctor is triage, why bother to go to the GP when you are ill? Cut the triage. Go direct to the hospital where diagnosis and a prescription will be made. Once that has happened, follow-up care can be done by a nurse prescribing a regime. But we do not want that. We want to learn from the best of general practice, general practice prepared to give a full service with total commitment to its patients and a valued relationship. The good news is that there are many like that across the country. There are remarkable GP practices in tune with the communities they serve—inner-city, suburban, coastal, deeply rural areas that are isolated but resilient, isolated but vulnerable—

Baroness Penn (Con): My Lords—

Baroness Cumberlege (Con): I understand that I have overrun so I will say to my noble friends on the Front Bench that we should value general practice. We should build with the best. We should learn from the best. I know that there are hundreds of general practices; it is up to us to applaud them and cherish them and ensure that we see another era of general practice which is different but which values patients and relationship care.

Baroness Smith of Newnham (LD): My Lords, I support Amendment 297A in the name of the noble Baroness, Lady Hodgson, to which I have added my name. I shall speak briefly, given that that I am only an irregular participant on this Bill. This amendment is particularly important. I come to an understanding of general practice from a very different perspective from the noble Baroness, Lady Cumberlege, as somebody who has only either received the care of a doctor or seen my parents receive or not receive that care.

When I was a young baby, I was extremely ill. I realise in these days where people talk about conspiracy theories about vaccines that this might be something that should not go into *Hansard*, but I had a reaction to the smallpox vaccine and my mother went to the public telephone box and called the doctor. The family doctor who came was equally concerned and brought a consultant from the local children's hospital to our home to see me. That would be the sort of gold standard that we could only dream of now. However, it is the sort of care that we need to be looking to in terms of having a family doctor or a doctor in the community who actually knows individuals. As the noble Baroness, Lady Hodgson, said, this is particularly so for the over-65s, when a range of issues might be beginning to affect them.

The situation today is so very different. The Minister in answer to an Oral Question a few weeks ago repeatedly said that everyone has the right to see a doctor in person and the doctor must give a clinical reason for refusing to have an in-person consultation. I assure him that this very rarely happens, because ordinary patients cannot simply ring up and speak to the doctor and say, "I need to see you". They will get to a receptionist who will triage them and decide whether they feel that it is appropriate for this person to see the doctor, or to have a telephone conversation or maybe some other virtual consultation.

There is a real need, particularly for older people, to have the opportunity to know that there is a doctor who understands their medical situation and can join up the dots. Somebody who seems now to have low blood pressure might have that because of the previous set of medication that another doctor has prescribed for them. If somebody rings up and gets a telephone consultation or is sent a prescription without proper assessment, the danger is that the whole picture is lost and individuals' lives can be blighted because they are not getting the medical care they need.

This is not the fault of any individual practice or of any individual general practitioner. However, we have ended up with a system where that traditional idea of a family doctor who knows their patients has disappeared, and somehow we need to get an element of that back. The other three amendments in this group in many

[Baroness Smith of Newnham]
ways fit as part of a suite because, if your GP knows that maybe you have early onset dementia or another sort of dementia and you need different types of therapies, they will know what to recommend.

Furthermore, if your GP knows that you have gone into a care home, visits you and thinks, "That person has lost a stone and a half in weight in the last six weeks", a GP who knows the individual will be able to respond. Somebody who randomly sees a patient will not. I strongly support the amendment in the name of the noble Baroness, Lady Hodgson, and the other amendments in this group.

Finally, I note that the amendment in the name of the noble Baroness, Lady Hodgson, comes immediately after the amendment in the name of the noble Lord, Lord Forsyth of Drumlean. If anyone were minded to support assisted dying, they should certainly support the following Amendment 297A, because how on earth could any doctor reasonably say that we can sign somebody off when they have no idea who that individual is?

Lord Crisp (CB): My Lords, I would like to use one example to illustrate the importance of Amendment 291 in the name of my noble friend Lady Greengross, and her call for a dementia care plan. It relates to the second point: that the plan must recognise the different types of dementia and their specific care. It is also true that it needs to recognise the different groups of patients affected by dementia and their needs.

I am thinking from personal experience of people with Down's syndrome. Noble Lords may know that something like 50% of people with Down's syndrome who reach the age of 60 also have Alzheimer's; there is some genetic connection between the two. However, the field of dementia has not really caught up with this yet. This is a developing field. The real importance of the plan that my noble friend advocates is that it constantly develops as knowledge develops about particular groups of patients and how they are affected.

The truth today is that patients such as the person I am thinking of are too often let down by the system, because too few clinicians understand the links between the two diseases and the particular needs of people with Down's syndrome who also have Alzheimer's.

Baroness Watkins of Tavistock (CB): My Lords, I support the majority of these amendments, but I want to reflect on something that my noble friend Lady Greengross said about the lack of treatment for people with dementia. In fact, there are emerging treatments, and having had the benefit more than 40 years ago of working at a second referral unit at the Maudsley Hospital, I know that people who present with dementia so often also have quite severe depression at the beginning of recognising that they are losing some of their cognitive function. That can be treated very effectively and people can be enabled to live much happier lives for the first part of their care.

I want to give one other example. As a clinical nurse, I was called to help a unit that had severe problems. I do not think there was any maltreatment, but there was certainly a lack of competence in care in the place that I visited. There was a gentleman who was tall and extremely thin who, they told me, had two people with him all the time because he was so agitated. They could not get him to sit down to eat and his relatives did not want him to have any medication.

I am pleased to tell noble Lords that I got involved and we got a consultant psychiatrist in. The family were persuaded that a small amount of anti-psychotic medication might improve the quality of this man's life. It did; his agitation significantly reduced and he was able to sit to eat. He lived for only another nine months, but those nine months were much happier than they would have been without that medication.

Although I firmly believe in all the social prescribing that we are talking about, we do not necessarily need a dementia care plan; we need a dementia care and treatment plan with an associated workforce development plan. Will the Minister seriously consider those issues?

6.30 pm

Baroness Tyler of Enfield (LD): My Lords, I support Amendments 297A and 297D. I will be brief, because we have already had a very lengthy and wide-ranging debate. The amendment in the name of the noble Baroness, Lady Hodgson, is important, and she has set out the case for a named GP very well. As people become older, they tend to develop a more complicated and interrelated set of healthcare needs, and a GP who has that overview and can liaise with the family is extremely important.

I will add two quick points that have not come up in the debate so far. First, it might sound like a statement of the blindingly obvious, but for this very desirable amendment to happen, there need to be enough GPs in the system. Frankly, I am concerned that, despite commitments from the Government to increase the number of GPs by 6,000 by 2025, there is no current plan for how this will be achieved. The number of qualified full-time equivalent GPs is smaller today than it was in 2015.

Secondly, in relation to health inequalities, it is matter of real concern that GP practices serving more deprived populations receive less funding and often serve much larger numbers of patients than GPs in more affluent areas. I looked at the figures, which I will not repeat, and there are huge disparities in the size of the lists that they serve. I feel that passing an amendment of this sort on continuity of care would most likely benefit patients in the most deprived areas. With this debate, and if this amendment were accepted, I hope that there would be more pressure on the system to relieve that very unhelpful trend.

Amendment 297D is an extremely important amendment, and I am very grateful to the noble Lord, Lord Hunt, for raising it. I do not want to repeat what he said, save to say that I would see this review as a first step towards strengthening the rights of care home residents and their relatives to visit, to keep in touch and to spot the signs of abuse. We all understand how hard the pandemic has been. Most care homes have done their level best, despite a lack of access to PPE and testing in the early days. None the less, many of the visiting restrictions that have been imposed have far too often been blanket restrictions, rather than restrictions that took individual cases and individual needs into account.

We had the repeat Statement from the Minister last week on vaccinations, and we were told that there is now no limit on the number of visitors allowed in care homes. I can tell noble Lords that I have not been able to visit my mother inside her care home since before Christmas, because there have been continuous outbreaks of Covid. Often it affects only two people, but that is enough to shut the care home down. This is why there needs to be a more proportionate and individually judged approach to these things.

Finally, if we had a review of this sort and could strengthen rights, I would hope that we could also strengthen the human rights of care home residents, including self-funded residents who currently have no recourse to the Human Rights Act, which is fundamentally unfair.

Baroness Bennett of Manor Castle (GP): My Lords, I attached my name to Amendment 290 in the name of the noble Baroness, Lady Greengross, but I support all these amendments. The comments made by the noble Baroness, Lady Watkins, on Amendment 291 were particularly important as an improvement, but it is still crucial that this is all looked at holistically.

I will confine my remarks to Amendment 290, which is about social prescribing for dementia, focusing in particular on music and the arts. We have discussed social prescribing extensively and I will not go back over that ground. However, I will note how much the Alzheimer's Society website stresses the importance of music and the arts for the quality of life and care of Alzheimer's patients, and dementia patients more broadly.

I want to join up a couple of dots. The amendment talks about ensuring that health professionals are aware of the benefits, but I would like to word it much more strongly to ensure that this is regarded as an essential part of care, not a luxury add-on extra—"If we can find the money we'll do this nice thing"—which all too often is how it is regarded. On that point, I link back to my Amendments 237 to 239, which were debated in a previous Committee session, on ownership of care homes and the flow of funds into care homes, and the fact that 16% to 20% of money in the average care bed is going into financial instruments. If we took two-thirds of that money and put it into more traditional medical, social-type care, and put in some more money for carers to be paid a little better, we would still have some money left for this kind of social prescribing. If we look at that in this context, we see how we join all this up. We really need to stress that social prescribing is an essential part of care, not some luxury add-on extra.

In one more effort to join up the dots, I will make the point that often in your Lordships' House different people work on different areas and things are not joined up. We have some noble Lords, particularly on the Cross Benches, who do a lot of work in the creative industries, which, financially, are suffering enormously through the Covid pandemic. There is something to be done here in joining up with government-funded projects that help people in the creative sector do some training and get some skills, to enable them to take their skills, knowledge, enthusiasm and energy into social care—thereby spreading economic prosperity and improving people's quality of life. Let us try to join these things up a bit more and not look at them in silos.

Lord Winston (Lab): My Lords, I am very reluctant to intervene in this long debate, but I have travelled down from Manchester specifically for this group of amendments. I have not been involved with this Bill previously, partly because of my own ill health, and also because of my teaching outside London, but I will make a short intervention here.

My noble friend Lord Hunt has raised the very important issue of the nature of interaction between human beings, which is absolutely essential in considering some of the issues raised by the noble Baroness, Lady Greengross, and others. I am not going to advocate music therapy, dance therapy, exercise therapy or art therapy here, because, speaking as an academic, one of the problems here is that we simply do not understand the truth of the interaction that makes these things work. One of the big problems is that really good randomised controlled trials are still very much lacking.

I am reminded, for example, of a very good randomised controlled trial, by Dr Nair in Australia, of quite a large number of demented people in a care home to whom he played music. From his results, there was no question but that the music, which was extremely tranquil baroque music from sixteen different composers, actually made them more disturbed, more sleepless, more angry, less able to eat their food and more likely to come into conflict with the nursing staff.

So it is very unclear what is actually happening in the brain. During the debate today we have heard claims made about changes in brain structure, but the truth is that we have not done sufficient research to really be clear about this. The research is very expensive, and one of the problems is that it involves very complex things such as time on scanning machines, for example—functional MRI. There is simply not enough research going on into the dementias—whatever they are—to fully understand the nature of what we are talking about.

I am not suggesting that we do not do music therapy but, speaking with my interest as an ex-chairman of the Royal College of Music, I say that we have seen that some of the things we do simply do not work or, if they do, it is not understood how. One of the things with music therapy, for example, is that you see individual patients interacting with somebody else, and it may be that the interaction is more important than the actual music. For example, watching musicians play in person may be better than watching them on a screen or just listening to music. There is a lot of work that needs to be done here before we can make big claims.

These are important amendments that are well made and well put, but we need to be really clear in debating this legislation that, until we understand the mechanisms—the phenotype—of what we are discussing, we have to recognise also that much more money is required for research into the dementias. That is really critical and there is a risk here of making legislation that will not fundamentally change the real problem that we are facing.

Lord Desai (Non-Afl): My Lords, I rise to say that Amendment 297A is obviously very desirable. But, as an economist, I have to say: if we implement this, who will be deprived? GPs' time is limited and GPs' numbers are limited, as we all know. Through much of my life in the NHS, all that the GP did for me was prescribe

[Lord Desai]
what I needed. It took about five minutes, and the GP did not even have to talk to me; they could look at the computer to find out who I was and what I was doing. It is, quite rightly, only people over 65 who need a caring GP, so we have to devise a system for those who do not need extensive consultation and familiarity with the GP but can be dealt with in a summary fashion. Perhaps we could have junior and senior GPs, so that we could release the senior GPs for this sort of work and have other people for prescriptions and simple tasks.

Baroness Walmsley (LD): My Lords, I was going to speak for two minutes but now I am going to speak for only half a minute. I have one question for the Minister. I know that his department has a small team developing the National Dementia Strategy. Can he can tell us whether any additional capacity is being planned to add to that small team doing this important work? Frankly, without a national strategy, the new ICSs will not be able to measure their performance in their dementia care plans against a national standard. The matter is urgent, because the position of people living with dementia has worsened during the Covid-19 pandemic and, while we are trying to tackle the backlog of treatments for patients with physical health needs, we must not forget those with dementia.

Baroness Wheeler (Lab): My Lords, I thank the noble Baroness, Lady Greengross, for tabling her amendments, which ensure that we consider dementia care in respect of this Bill and return to recognising the impact that the social prescribing of music and arts can make to dementia sufferers, particularly for patients at the onset of symptoms—although I also heard what my noble friend Lord Winston said about the research needed on this issue. Noble Lords have on many occasions stressed their strong support for Music for Dementia and Singing for the Brain, and it would be good to hear from the Minister what progress is being made. We have also had extensive debates on the importance of social prescribing, and of the arts across health and social care settings, so, again, I think we do not need to repeat what has been said.

On Amendment 291, the key thing is the call for the duty to be placed on each local authority and integrated care system to implement the National Dementia Strategy for their own areas. It is a timely reminder of the need for the promised National Dementia Strategy: can the Minister provide a publication date for it, and update the House on its progress and on the increased funding that the Government have promised will be provided for the implementation of the dementia care plan?

My noble friend Lord Hunt's Amendment 297D is a stark reminder of the Joint Committee on Human Rights' concerns over the visiting bans operated in some care homes before the pandemic, following relatives' complaints about their loved ones' treatment and standards of care. As the noble Baroness, Lady Brinton, stressed, we know that during the pandemic itself the ban on outside visits of relatives and friends caused huge anxiety and suffering among residents and their families alike, and it is very welcome that visiting rules have now been eased, although the need for maintaining PPE, testing and infection control routines and constant vigilance continues.

6.45 pm

The noble Baroness, Lady Masham, and other noble Lords have cited serious cases of abuse. However, we also know that the CQC has found that the majority of care homes provide good-quality care against a backdrop of inadequate funding, substantial staff shortages, endemic low pay, and lack of appreciation and recognition of the skills and dedication of care home staff.

My noble friend's call in his amendment for a proper review into the existing legislative and legal framework on the circumstances under which notices are issued banning relatives from visiting, or under which service users are denied visits or contact with family members or informal carers, or residents are required to leave the homes altogether following disputes between the care home and relatives, is a way forward to ensure that the concerns raised on this issue by noble Lords, the Relatives & Residents Association, the Joint Committee on Human Rights and Age UK are addressed.

Amendment 297A, from the noble Baroness, Lady Hodgson, concerns named GPs for the over-65s. I am sure that is something we would all like to see for general practice patients. How practical it is in the light of the current pressures on GPs and primary care remains to be seen, and I look forward to the Minister's response on this.

As was mentioned, a key part of the Secretary of State's recent big idea on future reorganisation was a plan to end GPs' private practitioner status and bring all GPs under NHS control, even as we speak on this Bill and as we read recently in the media. How would the integrated care systems we are focusing on in this Bill fit into this further NHS reorganisation?

Baroness Penn (Con): My Lords, this has been a long debate but it has touched on a number of different and important subjects. I join noble Lords in paying tribute to the work of the noble Baroness, Lady Greengross, and her work.

I turn first to Amendments 290 and 291. I reassure noble Lords that the Government are absolutely committed to the rollout of social prescribing across the NHS. We exceeded the targets in our manifesto and the *NHS Long Term Plan* of 1,000 new link workers by 2020-21 and are aiming for at least 900,000 people to be referred to social prescribing by 2023-24.

NHS England, the National Academy for Social Prescribing and Music for Dementia have produced guidance for social prescribing link workers to expand music prescriptions for those with dementia. The department has also published two resource guides for social workers on embedding music in personalised social care plans for people living with dementia and their carers.

While the Government are committed to promoting the benefits of social prescribing of music and arts for people living with dementia, it would be inappropriate to focus in the Bill on one form of therapy. Instead, we rightly provide scope in the Bill for the NHS to undertake a range of social prescribing.

Turning to Amendment 291 and the need for a dementia strategy, I reassure the noble Baroness and others that the Government are committed to publishing

a new strategy this year. As part of this, we will be looking at arts and music-based interventions. More broadly, the strategy will focus on the specific health and care needs of people living with dementia and their carers, including looking at dementia diagnosis, risk reduction and prevention, and—importantly, as noble Lords have mentioned—research. Our priority is for the strategy to be credible and shaped by a range of experts, including people living with dementia and their carers. At the end of last year, we established a stakeholder-led task and finish group to help develop the strategy and deliver it in a timely way.

Moving on to Amendment 297D, we fully agree that visits from loved ones are of vital importance to care home residents' health and well-being. DHSC guidance emphasises that visits to care homes should be facilitated, based on individualised risk assessments. Care home residents should also be supported to nominate an essential caregiver, who may visit in most circumstances, including if the care home has been closed to visiting for any reason.

There is an existing process in place if a resident or their family are concerned that guidance is not being followed. We encourage anyone with concerns to raise them. That can be done both with the care home, which has a legal obligation to operate a complaints procedure, and with the CQC. The CQC will follow up on concerns and take regulatory action if needed. It has provided mechanisms for people to feed back on concerns over care. The CQC responds to all concerns passed to it, and can receive concerns anonymously via representative groups, such as Rights for Residents. Where those concerns have named the provider or service in question, the CQC has followed up the cases. Some 54 concerns regarding care home visiting arrangements have been raised during the pandemic. The CQC gained reassurance in all cases that visiting is now in line with guidance. In 12 cases the CQC secured this assurance by inspecting the service.

My department has not seen any data or reports on evictions of residents following complaints against care homes. If a care home were taking such action, it would be in breach of guidance. A complaint should not lead to a resident being asked to move to a different home, and the terms of evictions and processes followed should comply with consumer law, as per the CMA guidance. People should feel confident that complaining will not cause problems for them.

I recognise this has been a difficult time for care home residents. However, the existing powers in legislation are robust and give protection to those who need it. We therefore do not feel at this time that an independent review is necessary.

I turn to Amendment 297A. Continuity and oversight of care is crucial in meeting the needs of all patients, including those aged over 65. That is why, since 2015, all practices have been required to assign their registered patients a named, accountable GP. This GP must lead in ensuring that any GP services that they are contracted to provide, and are necessary to meet the patient's needs, are co-ordinated and delivered to that patient. Practices must take reasonable efforts to accommodate patients' requests to be assigned a particular accountable GP and must endeavour to comply with all reasonable requests to see a particular practitioner. Practices are also required to take steps each year to identify any registered patient over 65 who is living with moderate to severe frailty. The practice must undertake a clinical review of any such patient and provide them with any other clinically appropriate interventions.

The noble Baroness, Lady Tyler, is right that delivering on this is linked to the number of GPs in the system. I assure her and others that the Government remain committed to growing the number of doctors. There were 1,841 more full-time equivalent doctors in general practice in September 2021 compared to September 2019. In 2021-22, a record-breaking number of doctors started training as GPs. I therefore consider that existing regulations already address the welcome intention of my noble friend Lady Hodgson, and I regret that the Government cannot accept the amendment for that reason.

I hope I have given noble Lords and noble Baronesses some reassurance on the amendments in this group and that the noble Baroness will feel able to withdraw the amendment.

Baroness Greengross (CB): My Lords, I have listened to an extraordinary range of speeches and addresses. People have spoken from the bottom of their hearts. I am very moved myself by what I have heard. I thank all colleagues and Ministers who have spoken today. I will look very carefully at the record of today and come back, but, in the meantime, I beg leave to withdraw the amendment.

Amendment 290 withdrawn.

Amendment 291 not moved.

Amendment 292

Moved by ***Baroness Chakrabarti***

292: After Clause 148, insert the following new Clause—

"Public health condition for investment in research into vaccines and other health technologies

(1) Any relevant research or development funded or part-funded by public finances is subject to the public health condition.

(2) The Secretary of State, UK Research and Innovation, the National Institute for Health and Care Excellence, the Intellectual Property Office and all public authorities must ensure that the public health condition is fulfilled in respect of such research or development and any material benefit derived from it.

(3) The public health condition is that—

(a) a proportionate share of any intellectual property resulting from the public funding (including intellectual property in all research, pre-clinical and clinical data, safety and efficacy information and manufacturing capability) is subject to Crown ownership and openly licensed,

(b) a proportionate share of any private profit resulting from the public funding is re-invested in further public health-related research, and

(c) any proportion of public funding is published and taken into account in relation to the setting of reasonable prices for the public procurement of medicines domestically and internationally.

(4) In addition, the Secretary of State must utilise, and actively support other countries to utilise, the full range of flexibilities within the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") for the purposes of public health.

(5) In the event of the World Health Organization declaring a pandemic, the Secretary of State must immediately—

(a) waive UK-registered patents, industrial designs, other intellectual property rights, and protections relating to undisclosed information relating to—

(i) vaccines,

(ii) medicines,

(iii) diagnostics and their associated technologies, and

(iv) materials,

necessary for combatting a pandemic internationally,

(b) issue relevant emergency compulsory directions to enable the domestic manufacturing of generic and biosimilar products, and

(c) support and implement any proposal to temporarily waive elements of the TRIPS Agreement at the World Trade Organization to assist wider global manufacturing of and access to health technologies."

Member's explanatory statement

This new Clause ensures public benefits in exchange for public financing of research and development. It would require the Secretary of State to support public health flexibilities under the TRIPS Agreement and, in the event of a pandemic, domestic and international knowledge-sharing to combat the emergency.

Baroness Chakrabarti (Lab): My Lords, Amendment 292 is in my name and that of my noble friends Lady Lawrence of Clarendon and Lord Boateng, and the noble Baroness, Lady Bennett of Manor Castle. I thank noble Lords from across the Committee and the People's Vaccine Alliance—Saoirse Fitzpatrick of STOPAIDS, in particular—for their advice.

Last year, the Prime Minister lauded the successes of the UK's vaccination programme as a result of "greed and capitalism", but the virus-busting vaccines, treatments and tests were in no small part funded by taxpayers, supporting the work of scientists at universities, research institutions and small-scale biotech companies across the world. Over €93 billion of public money has gone into developing vaccines and therapeutics. The AstraZeneca vaccine developed at Oxford University was over 97% publicly funded.

Public investment at the beginning of the research process assumes the biggest risk at the point when there is no certainty that a product will be successful. It is only when effectiveness is clearer that big pharma swoops in and uses exclusive intellectual property rights to hold a monopoly over that product in the market. The risk is socialised but rewards are privatised and, crucially, monopolised. The NHS is paying twice for medicines: once for research and again through procurement.

Some estimates show the public paying for up to two-thirds of drug development, including research and clinical trials. Drugs are getting only more expensive, with estimates that the NHS procurement bill increased by nearly 10% over the last couple of years, to £20.9 billion. Yet there is still no guarantee of production at the volumes required to meet demand or that patients will be able to access health technologies at affordable prices, nor that scientists will be able to make use of the data, knowledge and technologies generated in the research process to develop improved follow-on products. Due to the opaqueness of the pharmaceutical industry, it is very difficult to track public funding. The terms of agreement, actual costs and prices charged—all these are kept behind closed doors.

The amendment seeks to change that for health technologies developed with public funding, as well as to define emergency procedures to expedite a sharing of research, data and intellectual property in the case of a pandemic. By adhering to the "public health condition", the Secretary of State and all public authorities would ensure that

"a proportionate share of any intellectual property resulting from the public funding … is subject to Crown ownership and openly licensed … a proportionate share of any private profit from public funding is re-invested in further public health-related research, and … public funding is published and taken into account in … the setting of reasonable prices for the public procurement of medicines domestically and internationally."

Open licensing would allow production in a competitive generic market, bringing down the price of medicines. A study published in the *BMJ* showed how the price of oncology drugs could decrease by between 75% and 90%. We saw this with ARVs for HIV/AIDS, and how crucial that was in fighting that pandemic by reducing costs from over $10,000 per person per year to under $100. Reinvesting a proportion of profits could ensure that they go towards health priorities rather than financialised practices or the development of me-too drugs—sufficiently different to obtain patent protection but without added therapeutic value, compared with existing products.

There is recent precedent for more transparency and conditionality around public funding in Italy and France, while the European Union is looking at how to track public funding and measure societal impact. Even our Government are beginning to think about public interest conditions for future pandemic tools to ensure access in low- and middle-income countries. This is a recommendation of the UK's pandemic preparedness partnership's *100 Days Mission* report, published during the UK's G7 presidency.

There are also circumstances where there has been no public funding but the price or volume restrictions of a product are preventing widespread access. In that case, the amendment calls for a recommitment to the use of pre-existing public health safeguards within the Trade-Related Aspects of Intellectual Property Rights—TRIPS—Agreement. These flexibilities include the use of compulsory licences when intellectual property monopolies prevent access to a medicine. They enable a Government to license another manufacturer to produce a generic or biosimilar version of a patented health technology at a much lower price. These can be used at any time by any WTO member; they have already been implemented more than 100 times between 2011 and 2016.

The need to use flexibilities has never been greater, with ever more drugs coming to market with a price tag of over £1 million per dose. For example, the NHS is currently paying a list price of £1.795 million for a single dose of Zolgensma to treat spinal muscular atrophy—SMA. It is the most expensive drug in the world, despite public and philanthropic funding. A Crown-use licence would permit the Government to allow a third-party manufacturer to make a biosimilar version at a discounted price.

We must also stand with other countries in the face of huge and unconscionable pressure from big pharma when TRIPS flexibilities are used. In 2007, we supported the Thai Government when they applied for a compulsory

licence to produce a more affordable antiretroviral drug to treat HIV and were met with a threat from the pharmaceutical company AbbVie that they would lose access to all its other products. We could show leadership and solidarity again. Multinational corporations, whether tech, pharma or other corporations that noble Lords have considered in your Lordships' House in recent times, warrant international democratic governance, regulation and restraint. Hence the last part of the amendment.

In future pandemics, we must not remake the continuing mistakes of this one. Monopolies which profiteer from poverty and sickness are bad enough at the best of times. But in a global emergency, when so many ordinary citizens, health workers and ethical businesses have sacrificed so much by way of livelihoods, liberties and lives, such conduct is totally amoral. Pharmaceutical companies' refusal to share manufacturing know-how has led to grotesque vaccine inequity. Only 10% of people in low-income countries have received a single jab. So the amendment stipulates immediate action as soon as the World Health Organization declares a pandemic. The temporary—I stress, temporary —waiver of UK registered patents, industrial designs and other intellectual property rights relating to undisclosed information necessary for combating a pandemic, and emergency compulsory directions to enable domestic manufacturing, would mean that any company within the UK with the capacity could be making these products. It would allow products to be shipped internationally and allow companies across the world access to the critical data and rights to produce pandemic tools at scale for their own people.

The Indian and South African proposal to temporarily waive the TRIPS agreement is supported by more than 100 countries. It is only opposed by the European Union, Switzerland and our own Government. The waiver could allow the 100-plus potential mRNA producers across Latin America, Asia and Africa access to critical clinical data and manufacturing know-how required to make mRNA vaccines, without fear of litigation in the worldwide race to beat variants of the virus.

New treatments are in high demand, and high-income countries have already brought up the lion's share. We will be facing a treatment apartheid on top of a vaccine one if the United Kingdom and others do not shift their position urgently. Just last week, it was reported that the director-general of the WTO, Ngozi Okonjo-Iweala, was hopeful of a breakthrough in the long-standing waiver discussions. However, it is incredibly important that any compromise is not overly restrictive geographically or in terms of products or types of intellectual property.

The UK Government must stop saying that a waiver will take too long to implement while simultaneously blocking its agreement. They should end their group hug with the EU, Switzerland and big pharma and start embracing and empowering the global south and wider world. The line that temporarily waiving TRIPS will stifle future innovation ignores the public money that funded the riskiest parts of developing vaccines and treatments, and how innovation works. Sharing research data and clinical trials results with great minds around the world creates the conditions for competitive collaboration, vying to have the best results but also sharing lessons learned and supporting each other. This is how we have made great leaps in the past, as with the human genome project, where public funding supported a global collaboration which has changed modern science.

This is about improving access to affordable, life-saving health technologies for our NHS and the world to combat pandemics and improve health. It is about ensuring that we get the best from our biomedical innovation, especially when we are investing so much money and expertise and putting human beings through clinical trials. In a global health emergency, not sharing life-saving knowledge is as wicked as blocking access to emergency exits from a crowded building in a raging fire. I beg to move.

The Deputy Chairman of Committees (Lord Brougham and Vaux) (Con): My Lords, I call the noble Baroness, Lady Brinton, who is taking part remotely.

Baroness Brinton (LD) [V]: My Lords, I am a former trustee of UNICEF UK and, before that, Christian Blind Mission, a global disability charity. I have seen first hand the two-tier system of access to global vaccines and medications. It is a pleasure to hear the noble Baroness, Lady Chakrabarti, set out how, through her Amendment 292, the UK can fulfil its global public health responsibilities for investment in research into vaccines and other health technologies and how, in an emergency, companies developing these goods would also be required to help. She has introduced it in her usual effective and persuasive way. I suspect I am not alone in valuing her contributions to your Lordships' House.

Throughout this pandemic, the Government have rightly congratulated themselves on their investment in research on the range of vaccines developed in rapid time and also the extensive, rapid clinical trials assuring their safety prior to approval. However, less satisfactory has been the UK Government's view about their international moral responsibilities as a member of the OECD and one of the high-income countries with access to much-respected vaccination and pharmaceutical research. The World Health Organization has said right from the start of the pandemic that no country is safe until all are safe, but low and middle-income countries have not just not had the advantage we have; we have reneged on our promises to them over the last two years.

The UK Government repeatedly tell us that they have donated cash to Gavi and COVAX, but the reality is that we need to help those countries now to become able to manufacture their own medicines and vaccines in the light of emergencies such as future pandemics. The old adage of "Give a child a fish, feed them for a day. Teach a child to fish, feed him for ever" is so true. Here, the fishing rod is the skills to manufacture and sell medications in a future pandemic.

The TRIPS waiver, or intellectual property waiver, is supported by the World Health Organization and many large charities and countries, including the USA and others. However, as we have heard, the EU, the UK and Switzerland are not in that bracket. Its intention is to increase vaccine production in developing countries by sharing intellectual property for vaccines publicly

[Baroness Brinton]
for the period of that pandemic. It is needed because the data for November 2021, nearly a year from the first vaccine being delivered, showed that just 4.2% of people in low-income countries had received their first Covid vaccine. Across Africa, 6.3% are now fully vaccinated. COVAX has shipped just one-third of what it had expected would be available by the end of October—those expectations were based on promises from high-income countries. Export bans, manufacturing delays and bets on vaccines that have not received regulatory approval have also held up deliveries. Worse, we know that in this country we have thrown away vaccines rather than redirect them if we chose not to use them at a particular time.

It is time that the UK took a leading role in fulfilling the World Health Organization's call. Now is the time to make all countries safe, not just for Covid but in preparation for whatever future pandemics may occur, and make sure every country is safe in the future.

Lord Campbell-Savours (Lab) [V]: My Lords, I want to speak narrowly to subsection (5) of Amendment 292, where it refers to the waiving of intellectual property rights and the protection of undisclosed information, and also where it refers to the waiving of agreements, all in an effort to assist global manufacturing. It provides a peg for me on which to hang the holy question of inadequate vaccine supply arrangements for third-world countries and, in particular, the need for greater manufacturing capacity, which would be assisted under a system of global waivers.

Two weeks ago, there was an interesting contribution from the noble Lord, Lord Grimstone of Boscobel, where, in reply to my noble friend Lady Chakrabarti, he said,

"there is no evidence that waiving intellectual property protections would advance these objectives,"

those objectives being

"help with vaccine production and distribution."—[*Official Report*, 24/1/22; col. 8.]

I simply do not understand the Minister's logic. As I see it, it is perfectly possible to manage such manufacturing requirements under directly monitored, subcontracted, licensee production arrangements.

In the same exchange, my noble friend and I went on to call for the 100 potential manufacturers in Africa—indeed, my noble friend has done it again today—identified by a number of charitable organisations to be encouraged to produce a Covid vaccine in approved plants under the subcontracting arrangements I have referred to. The Minister in reply, quite rightly, appeared preoccupied by ensuring companies were able to continue with "innovation." I totally agree on that. That is a laudable objective that we all support. However, what evidence is there to suggest that in an entrepreneurial world, production under the carefully constructed management arrangements I have suggested deters innovation?

My suggestion in my original contribution was that it is perfectly possible to produce a vaccine and its subsequent product variants in dedicated production areas in approved plants and specialist facilities under the quality control of personnel seconded from advanced-nation producers. That is what I am asking for in the questions I have been asking repeatedly. What is the problem? How can that possibly destroy innovation as Ministers are suggesting? On the contrary, it raises greater challenges. It is a spur to increased innovation and, additionally, profit-taking, which I recognise is an important factor in funding research and development.

With less than 10% of the population in the world's poorest countries being vaccinated under current vaccination production arrangements, we are prolonging the pandemic by leaving the door open to new variants. New variants will inevitably appear in under-vaccinated populations or, more specifically, in under-vaccinated ethnic groups which, often through a lack of available, detailed knowledge and under peer pressure, remain unconvinced of the need for vaccination.

I simply cannot understand the commercial, political or moral logic behind a failure to sponsor vaccination production under the arrangements I have outlined. We in the UK could be leading the world through this crisis if my suggestion was followed. We have spent billions on support schemes, much of it, sadly, wasted and lost in fraud. We could have spent much of that on vaccine initiatives. I think we are missing a trick, but it is not too late, as these pandemics are here to stay in one form or another. I appeal to the Minister to free up the market and pursue the strategy that I, and others far more significant than I, have been suggesting in this debate.

7.15 pm

The Deputy Chairman of Committees (Lord Brougham and Vaux) (Con): The noble Lord, Lord Howarth of Newport, is also taking part remotely. I invite the noble Lord to speak.

Lord Howarth of Newport (Lab) [V]: My Lords, this amendment raises major issues which warrant full debate outside the confines of the Health and Care Bill, but I am most grateful to my noble friend Lady Chakrabarti for providing us with this opportunity to consider them. I support the principle of the public health condition, as articulated in the amendment and as she described it.

The inflexible application of the intellectual property regime during the pandemic has been unconscionable. Huge numbers of people have died unnecessarily in low-income countries. Rich countries not only pre-empted and hoarded supplies beyond their reasonable needs but refused to relax the intellectual property regime to enable free manufacture of vaccines in low-income countries. South Africa and India led the appeal, on behalf of low-income countries, to the World Trade Organization to waive IP protections—patents, copyright, trade secrets. That appeal was rejected contemptuously and cruelly. The UK is among the culprits; the US and France support the waiver, but we do not.

The statement by the United Kingdom Government to the TRIPS council on 16 October 2020 is a piece of Mandarin cant: amoral, inhuman and disconnected from the realities of life and death for billions of people. Let me quote from it:

"Beyond hypotheticals, we have not identified clear ways in which IP has acted as a barrier to accessing vaccines, treatments, or technologies in the global response to COVID-19."

The Covid crisis is not hypothetical. The refusal to support the free production of vaccines in low-income countries has had catastrophic consequences, yet still government Ministers repeat this theme.

The Government also said in their statement:

"A waiver to the IP rights set out in the TRIPS Agreement is an extreme measure to address an unproven problem."

The pandemic is an extreme situation and the problem is staring at us—howling at us. At least 350 million cases of Covid have been confirmed globally, and estimates of the number of deaths from Covid range from 5.75 million to much higher figures.

The Government stated that:

"Multiple factors need to be considered … These include increasing manufacturing and distribution capacity".

Indeed. But the response to this challenge by our Government was to cut aid funding massively, from 0.7% of GDP to 0.5% of a declining GDP.

The Government then said:

"The world urgently needs access for all to … vaccines … which is why a strong and robust … IP system … is vital."

That is a non sequitur to end all non sequiturs.

The last quote I will give from the Government's statement to the TRIPS council is this:

"The UK has played a leading role in … ensuring no-one is left behind".

Do the Government really believe that? It seems to me to be beyond satire.

If we refer to Our World in Data, a website from the University of Oxford, for up-to-date figures, we find that in low-income countries 10% of people have had at least one dose of vaccine, while in high-income countries the figure is 78%. Africa has been most wretchedly left behind: on the continent of Africa 15.2% of people have had one dose and only 28% are fully vaccinated, whereas in the United Kingdom 78% of people have had one dose and 73% are fully vaccinated. It is not surprising that African leaders have complained bitterly of vaccine apartheid. How does the Minister refute that charge?

I feel profound shame at the behaviour of our Government; not only have they been morally purblind but they have been recklessly imprudent. Consider the economic consequences. The IMF has downgraded African economic prospects. Do we gain from the impoverishment of Africa? Think only of the implications for migration. Consider the diplomatic consequences. Africa has turned to China. How does our vaccine nationalism assist post-Brexit Britain to develop relationships around the world? Consider the health and economic consequences for ourselves. If we do not tackle Covid globally, we risk continuing damage to our economy, and our physical and mental health, as we reel in and out of lockdowns and restrictions. Consider the consequences for the world. Professor Sarah Gilbert has warned that the biggest threat is Covid spreading and mutating uninhibited in unvaccinated countries. No one is safe until we are all safe. Dr Hans Kluge, the World Health Organization regional director for Europe, last week demanded a drastic and uncompromising increase in vaccine sharing across borders. He stated:

"We cannot accept vaccine inequity for one more day—vaccines must be for everyone".

The United Kingdom has not paid its fair share of funding to the WHO accelerator programme. The UK committed to donating 100 million doses through COVAX, but what we have actually done falls far short of that; at the end of 2021, the figure was 30 million doses. Does the Minister accept that our Government have acted appallingly? Will he accept Amendment 292 and will the Government incorporate its principles, wherever relevant, in policy and legislation?

Lord Crisp (CB): My Lords, I wish to speak to Amendment 292 and specifically proposed new subsection (5)(c) on the TRIPS waiver.

I was going to make a few points of context but the last two speeches—indeed all the speeches so far—have set the context extraordinarily well. As the noble Lord, Lord Howarth, has just said, Our World in Data tells us that, as of an hour ago, 66% of the world overall has had one dose but only 10% of those are in low-income countries.

When this discussion has been raised before—for example, during Questions on Monday in your Lordships' House—the Government responded that there were practical problems with the proposal. Indeed, there are practical problems and it is not a magic bullet, but it is a first-class starting point. It is also a point that we then need to follow up with political will. I do not understand why the UK and Europe—with the exception of France, which has just said no to the proposal—have not put forward a counterproposal starting from this point. Why have they not done what some other noble Lords have talked about—something similar to what the noble Lord, Lord Campbell-Savours, has suggested? Why not use this proposal as a starting point to do something for three big reasons?

The first of those reasons is the end game here. The end game is not about intellectual property but about dealing with the next pandemic, and the one after that. It is about having the ability to manufacture and make vaccines available around the world, quickly and rapidly, whenever there is a need for that to happen. That is what we are looking at.

Secondly, the point has already been made that the UK could play a much bigger role here and in the direct interests of the UK population. We are a global power in biomedical science and technology. We have produced some help; I note, for example, during our G7 presidency, the ability to offer some scope to other countries for sequencing variants. However, much more that is being done in this country could be expanded on. I think, for example, of the global pathological analytical service being developed in Oxford, which is basically a database for the sequencing of variants around the world, and is making the data accessible to everyone, free of charge; anyone in the world can send their data to it for analysis to be provided. So there are many things that the UK could be doing and offering as part of the development of a sensible plan for the future that responds to what low and middle-income countries are asking us to do.

The other big point here is that if the UK does not respond, others will. We have already seen the process of vaccine diplomacy during the pandemic, and the positioning of China and Russia in how they have been seeking to make friends and influence people

[Lord Crisp]
through the use of vaccines. We can also see that countries will start helping themselves, and they in turn will break away from the consensus.

I am reminded of the very different epidemic of HIV/AIDS, more than 20 years ago. It is a very different disease, and the circumstances were very different. However, some of the responses were the same. To quote Dr Peter Mugyenyi, who was head of the HIV/AIDS response in Uganda in 2000,

"despite opposition by branded drugs manufacturers, and threats of punitive reaction, we took a decision to import and use low-cost generic ARVs from … India to save the lives of our patients".

In a way, that says it all. Countries have that responsibility to their people, and they will go and do things.

Dr Mugyenyi goes on to say in the same article that at that point, the drugs were relatively expensive for Africa, but USAID, the US development agency, would not support their use in Africa because, it said, there was no ability to provide them to the population without the necessary supply chains. In an extraordinarily insulting and racist statement, the head of USAID said in 2001 that Africans could not use ARVs because they told the time by the sun. Two years later, President Bush moved that on, and President Clinton also intervened, with the result that antiretrovirals became cheaper. There is a process that will take place, whether we are a part of it or not. We do not know where this will end, but other countries will take their action.

The really important thing here is that the UK properly engages with this proposal, and puts in the counterproposal, whatever it is. It must be about working together, something along the lines of what the noble Lord, Lord Campbell-Savours, talked about: licensing it, working with people, learning from each other and building that infrastructure around the world, which, frankly, we need for the people of the UK as well as the people of the world.

I hope that in responding to this the Minister will talk about how he sees that development happening in the longer term and how the UK will have an impact on what we all see as a shameful position where we in our richer countries have been vaccinated if we have chosen to be, but in low-income countries people have not had that opportunity.

Baroness Lawrence of Clarendon (Lab): My Lords, I have added my name to the amendment in the name of the noble Baroness, Lady Chakrabarti. It has been mentioned in your Lordships' House numerous times that no one is safe until we all are safe. We have heard it many times in today's debate.

I have voiced my concerns many times about the monopolies upheld by high-income countries that have chosen to retain scientific innovation and expansion by withholding the IP of the Covid vaccine. Low-income countries are in the position where they can manufacture their own vaccines, as there are more than 100 potential mRNA manufacturers across these countries ready to develop a vaccine, if they had access to the IP and the manufacturing know-how.

Too often the agendas of pharmaceutical companies are not aligned with positive public health outcomes. The public health condition aspect of Amendment 292 will help guide the Government to tighter stewardship around public funding to ensure that at the end of the development process, health treatments are both affordable and accessible to all concerned. I stand by the amendment in the name of the noble Baroness, Lady Chakrabarti, for this very reason, as its primary objective is to address the barriers that prevent poorer nations having adequate access to medicines at an affordable rate. We have heard many of your Lordships in the Committee today seeking to make the Government understand what is happening in lower-income countries and to support them and to ensure that action is taken when we say that no one is safe until all of us are safe.

7.30 pm

Baroness Bennett of Manor Castle (GP): My Lords, it is a pleasure to follow everyone who has spoken in this group. I thank the noble Baroness, Lady Chakrabarti, for so powerfully and clearly introducing this amendment, to which I was pleased to attach my name. The case has been overwhelmingly made, so I will not go over the same ground but will add a couple of points and draw some things together.

It is interesting that we started the day with the ARIA Bill. Concern was expressed from several quarters of your Lordships' House about public money going into ARIA and whether we would see public returns from that money. As the noble Baroness, Lady Chakrabarti, said, what we have seen so often is the socialisation of costs and the privatisation of profits in so many areas of research and knowledge.

I draw to the attention of any noble Lord who has not seen it a very useful briefing on this amendment prepared jointly by Just Treatment, STOPAIDS, Global Justice Now and Universities Allied for Essential Medicines. That brings out two points, and it is worth looking at the national and the international. We have tended to focus on the international. Nationally there are some fascinating figures. The NHS pays more than £1 billion a year for medicines, but two-thirds of the upfront costs of producing those medicines come from public funding.

That is the national side. Looking at the international side, we have talked about and focused very much on Covid, but we really need to think about the fact that we are now in the age of shocks, in a world that is environmentally extremely disturbed. That is certainly a factor in the appearance of Covid; we have seen SARS and MERS, and there is Ebola out there. We need to build resilience into our world. We are talking about changing so many different things, and whether it is supply chains, medical supply chains specifically, or anything else, we really need to think about preparing for that different world, with the focus on resilience, rather than on private profits as it has been.

The noble Lord, Lord Crisp, asked an interesting question: why do we see the UK, the EU and Switzerland lining up against the rest of the world? The answer is there in profits, in an ideology that says, "We have to organise everything for private profits and somehow the benefits will trickle down." It is interesting that today Michael Gove has gone on the record as saying that trickle-down has not worked; it is a failed ideology. Of course, there is also the impact of those profits being fed into our political system and the influence that that money and that lobbying have.

I will finish with this final thought. The noble Baroness, Lady Chakrabarti, said—and I think this reflects what other noble Lords, particularly the noble Baroness, Lady Lawrence, and the noble Lord, Lord Crisp, said—that we have been utterly wicked in our behaviour towards the global south in the Covid pandemic in failing to ensure that it has crucial vaccines. We have also, as has become obvious with omicron, spectacularly shot ourselves in the foot. I say to those who will not accept moral arguments for this amendment: please look at the practical self-interest. No one is safe until everyone is safe.

Baroness Merron (Lab): My Lords, I thank my noble friend Lady Chakrabarti for raising the crucial matter of countries and peoples left behind in terms of the opportunity to have a necessary vaccination programme available to them. My noble friend Lord Campbell-Savours spoke of the importance of supporting innovation, which is one of the ways in which we can ensure that, while my noble friend Lord Howarth rightly said that the subject requires exploration outside of the Health and Care Bill—something also commented on by the noble Lord, Lord Crisp, who emphasised, as do I, the need for the political will to make progress.

There is no doubt, as we have heard today, about the gravity of the issues at stake and the need to resolve them. It is the case that where public funding is provided there must be conditionality, although of course that may be complex to refine into legislation. There are of course additional issues when funding is also coming from the private sector along with a need to ensure a balance of interests. It would certainly be helpful to have a stipulation that avoided placing undue bureaucracy and restraint on smaller developments and small-scale research. We do not want to see the pace of research slowed down with researchers tied up in lengthy proposal writing, contract negotiations and legal agreements.

As my noble friend Lady Lawrence has said, we know that the pandemic is not over until it is over everywhere, so the amendment raises the opportunity to explore whether the immediate waiver of intellectual property rights would mean an end to the pandemic everywhere. It is relevant to assess what contribution or otherwise intellectual property rights make to the promotion of technological innovation and the transfer and dissemination of technology. There is an advantage for producers and users of technological knowledge and the consideration of rights and obligations, and that needs to be considered in the round.

In respect of the response and actions to a pandemic declared by the World Health Organization, while I understand the intention behind the amendment, in order to be consistent I would comment with some caution about the Secretary of State being compelled to immediately take actions, particularly without any form of oversight—something that we will return to later in Committee.

However, I hope that today we can obtain some reassurances from the Minister about the Government's intentions and plans in order that we can find a way forward so that low-income countries and their peoples have access to vaccines both now and in future.

Lord Kamall (Con): I thank the noble Baroness, Lady Chakrabarti, for bringing this debate before the Committee today and for the heartfelt speech that she gave. The noble Baroness will be aware of the view of this Government following her recent Question in the House on the subject of patient waivers. As my noble friend Lord Grimstone set out, the Government remain open to all initiatives that would have a demonstrably positive impact on vaccine production and distribution. However, we believe that waiving intellectual property rights would have the opposite effect. Doing so would dismantle the very framework that helped to develop and produce Covid-19 vaccines at the pace and scale now seen. It would risk undermining the continued innovation in vaccines and technological health products that is required to tackle a virus, especially as it mutates and evolves, so we believe that doing so would be a mistake.

Instead, the success of the Covid-19 vaccine rollout vindicates the value of public and private co-operation. While university research departments are great at research, large-scale manufacturing and global distribution are not their function, so we recognise the importance of their working with partners with expertise in this area.

The intellectual property framework is key to those efforts. It has incentivised the research and development that has led to the development of Covid-19 vaccines. It has given innovators the confidence to form more than 300 partnerships, an unprecedented number, and has contributed to the production and dissemination of vaccines and other health products and technologies across the world, with global Covid vaccine production now at nearly 1.5 billion doses per month.

I share the noble Baroness's intention that research funded through taxpayer finances should benefit the taxpayer, but we do not consider that that is best achieved through particular constraints in primary legislation. Research contracts afford greater flexibility and more powerful levers than the amendment, through provisions such as those requiring the dissemination of intellectual property for patient benefit, revenue sharing with the Government of commercialised intellectual property, and requirements around access to medicines in the developing world. Contractual protection mechanisms in funding arrangements can also ensure that intellectual property funded by taxpayers results in the creation of taxpayer benefit.

[The remainder of today's proceedings will be published tomorrow.]

[Continued in column 1705]

Grand Committee

Wednesday 9 February 2022

Arrangement of Business

Announcement

4.15 pm

The Deputy Chairman of Committees (Lord Duncan of Springbank) (Con): My Lords, Members are encouraged to leave some distance between themselves and others and to wear a face covering when not speaking. If there is a Division in the Chamber while we are sitting, the Committee will adjourn as soon as the Division Bell rings and resume after 10 minutes. We now resume the Subsidy Control Bill. I understand that the Minister was cut off in his prime.

Subsidy Control Bill

Committee (4th Day)

Relevant document: 17th Report from the Delegated Powers Committee

4.15 pm

Clause 55: Call-in direction

Debate on Amendment 55A resumed.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Callanan) (Con): My Lords, I trust that it will be acceptable to your Lordships for me to pick up exactly where we were cut off in our prime on Monday, which noble Lords will be gratified to know was where I began speaking to Amendments 55A, 57A, 57B, 60A and 61.

Collectively, these amendments would allow the call-in powers currently provided to the Secretary of State to be exercised by the subsidy advice unit as well. Amendment 61 would create a new concept of a post-award investigation, which would be an extensive review by the SAU of the public authority's decision-making process before giving a subsidy or making a scheme. I recognise the concerns of noble Lords that this system perhaps gives too great a responsibility to the Secretary of State. However, as I set out in response to the preceding group of amendments on Monday, it is appropriate that the Secretary of State is responsible for making these judgments in the interests of the entirety of the United Kingdom. In that function, they are answerable to this Parliament and to the interests of every citizen in the UK, and ultimately, as I keep stressing, for ensuring that the UK is compliant with its international commitments.

However, I would submit that there is a fundamental difference between a power to be exercised by the Secretary of State as a safety net, and a power to be exercised by a body such as the Competition and Markets Authority. There is very little possibility for the latter to exercise discretion and act only in situations that otherwise come to its attention. To carry out the functions envisaged by these amendments, the SAU would therefore have to scale up considerably. It would need a full market monitoring function to remain apprised of any potential new subsidies, including a public-facing arm to gather information and complaints, and it would need to develop clear criteria and decision-making processes for using these call-in powers.

Of course, ministerial decision-making must also be even-handed and evidence-based, but Ministers can and should have more discretion to make case-by-case judgments and will naturally be more aware of forthcoming distortive subsidies and where our international obligations are more likely to be impacted. The amendments tabled would require a very significant shift in the role of the SAU and would move it far closer to being a regulator of subsidies, which, to address the point made by the noble Lord, Lord McNicol, is not the Government's intention, for the reasons that I have set out. This would of course create costs to the taxpayer, both in setting up this expanded subsidy advice unit and in the legal uncertainty and delays for legitimate subsidies that are placed under review or investigation.

I would also like to address the specific point that a government Minister will be unlikely to call in a subsidy that the Government themselves are giving. As I said in the previous sitting, Ministers will remain open-minded to referring a UK government subsidy to the SAU where it would be beneficial to have additional scrutiny of their own assessment. As with the regulations for automatic mandatory referral, there is no exemption for government subsidies. It is important to recognise that the SAU referral is a mechanism for scrutiny, transparency and advice which will support but not directly form part of the enforcement process, so there is no concern that the Government will be launching a legal challenge against themselves.

In summary, creating a function for the SAU to refer subsidies to itself or to initiate investigations would fundamentally change its role from one of oversight and monitoring to regulation and enforcement—a change which would be welcomed by the noble Lord, Lord Fox, but not by the Government, noble Lords will be shocked to know. I therefore hope that the noble Lord will withdraw the amendment.

Lord Purvis of Tweed (LD): Before the Minister sits down, I have a question, which may pertain to debates on later groups of amendments. Do the Government consider a subsidy scheme to be a regulatory provision within the terms of the internal market Act?

Lord Callanan (Con): The internal market Act is of course a separate piece of legislation from the Subsidy Control Bill. I will pass on the noble Lord's question, think about it and respond later or in writing.

Lord Purvis of Tweed (LD): I thank the Minister. I ask because my understanding is that a regulatory provision can be a subsidy; it has nothing to do with there being two separate pieces of legislation. As the Minister knows, the internal market Act takes into account any regulatory provision that will have an impact on the operation of the internal market. As the Minister has previously said, subsidy schemes will be considered as part of the operation of the internal market. So, if such a scheme is a regulatory provision

[Lord Purvis of Tweed]
under the terms of the internal market Act, any national authority would be empowered under that Act to ask the CMA for its view on whether that provision will distort the internal market. Is my understanding of that correct?

Lord Callanan (Con): No, my understanding, on advice, is that it does not form a provision under the internal market Act.

Lord Lamont of Lerwick (Con): Again, before the Minister sits down, I have a couple of questions. I apologise to him for this, but we have had the benefit of actually seeing his words written down in *Hansard*. Some of the phrases he came out with were quite dense and intricate, and I was rather puzzled by two points. The first was when he talked about the functions of the SAU. He said that it was intended

"to support public authorities in giving the subsidies that are most likely to be distortive."—[*Official Report*, 7/2/22; col. GC 383.]

I am puzzled by the word "support", and puzzled that we would want to support the ones that are most distortive. I am sure I am misunderstanding it, but I would like the Minister to explain.

Lord Callanan (Con): I will have to look back at those remarks myself. It is possible that I was misinterpreted at the time, but I will have a look and come back to the noble Lord.

Lord Lamont of Lerwick (Con): Let me also read out a second bit that I felt was particularly incomprehensible. If anybody in the Committee can understand it, I will be very impressed. I will read it slowly. The Minister said:

"I do not believe there is a contradiction in saying that a full assessment of compliance is light-touch regulation for the public authority but could prove arduous to replicate for the subsidy advice unit."—[*Official Report*, 7/2/22; col. GC 383.]

Lord Callanan (Con): I think that speaks for itself. I stand by those words.

Lord Fox (LD): I thank the Minister for giving way. Perhaps that is why we asked him to stop—so that we could start again today. His answer to my noble friend Lord Purvis is intriguing. He seems to be saying that no matter how much a subsidy affects the UK internal market—I will wait for the Minister to finish his conversation—it can never be within the purview of the internal market Act. Is that what he just said?

Lord Callanan (Con): Yes. Subsidy is not a regulated provision within the scope of the UK provisions. We are debating this in a future grouping, so we will no doubt be able to come back to it, but my advice is that it is not.

Lord Lamont of Lerwick (Con): My Lords, I am very grateful to all those who spoke in the debate and supported my Amendments 55A, 57A and 57B. I am grateful in particular to the noble and learned Lord, Lord Thomas, who made a very powerful speech about the need for an independent evaluation of subsidies. The noble Lord, Lord Purvis, pointed out that, if we had an independent assessment, it would increase the possibility of consistency in the whole regime, which I thought was a very important point. The noble Lord, Lord McNicol, made the point that it was completely counterintuitive, after everything that had been said about the control of subsidies, not to have an independent evaluation. So I hope that there is quite a degree of support in the Committee for these amendments.

I do not think that the Minister today really explained why we could not have an independent regulator. He said that it would require a certain scaling up of resources. Well, obviously, it would. He said that it would become more like a regulator, rather than whatever else it is. Well, we want it to be a regulator—that is the whole point—with control of subsidies. But I really did not feel that he had made out a case against. He told us what the SAU does, but he did not explain why it would be wrong for it to do more things or to be scaled up and become a proper regulator.

The reason why I was particularly interested in the two passages that I put to the Minister—he is going to write to explain them to me—is that the more I listened to him, the more it became clear to me that the general line in this Bill is, "Public authorities know what they are doing, so let them, by and large, get on with it. Maybe somebody will object; they have 28 days. Don't make it any longer because a lot of them might object; just give them 28 days. But by and large public authorities know what they are doing, so we want them just to get on with it".

The Minister said that the SAU would not carry out its own assessment of compliance. Is that enough? It seems as though what it is going to do is extremely limited: it is just going to examine process. The Minister said:

"The SAU would be acting without the understanding and body of evidence that the public authority will have created in developing the subsidy".

That is, the public authority will know more than the people who are checking the subsidy. Is that really the right way round? It seems to me a real Alice in Wonderland to call this control of subsidies, when those who have actually invented the subsidy and paid the money know more about it than the people who are regulating them—and this is admitted by the Minister at the same time. The Minister also said:

"There is no intention to build up an extensive monitoring function within my department or the CMA".—[*Official Report*, 7/2/2022; cols. GC 383-4.]

Surely, that is exactly what we need. If we are talking about the control of subsidies, how can we have it without monitoring subsidies? That becomes even weaker when you consider what has been referred to again and again in Committee about the 28 days.

It seems to me that the SAU is far too weak for this really to be a Subsidy Control Bill; it ought to be renamed the "Support of Subsidies Bill", because that is actually what it is. The reality of the Bill is that it is not attempting to control subsidies at all; it is just giving expression to the undertakings that the Government gave on Brexit in the TCA. I see the Minister smiling, although I shall not refer to that again. The Government gave assurances that were embodied in the TCA about

not having subsidies that might distort competition with the European Union, so we have to have a control mechanism, and it is this Bill. But there is also a national interest in having proper competition and control of subsidies, and I do not think, frankly, that the Bill does that. It is far too weak. But having made my points and not persuaded the Minister, I look forward very much to the letter he is going to write to me explaining what he said. With that, I withdraw my amendment.

Amendment 55A withdrawn.

Amendments 56 to 60 not moved.

Clause 55 agreed.

Clauses 56 and 57 agreed.

Clause 58: Call-in direction following voluntary referral

Amendment 60A not moved.

Clause 58 agreed.

Clauses 59 to 62 agreed.

Amendment 61 not moved.

Clauses 63 to 65 agreed.

Clause 66: CMA annual report

Amendment 62

Moved by ***Baroness Blake of Leeds***

62: Clause 66, page 38, line 5, at end insert—

"(2) The annual report must also contain an assessment by the CMA, on the basis of the reports it has prepared, of the extent to which the subsidy control regime under this Act is meeting its stated policy objectives."

Member's explanatory statement

This amendment would require the CMA to opine, in its annual report, on the extent to which the new subsidy control system is meeting its stated policy objectives.

4.30 pm

Baroness Blake of Leeds (Lab): I rise to move to Amendment 62, in the name of my noble friend Lord McNicol. I am also looking forward to discussing Amendment 63, in the name of the noble Baroness, Lady Boycott, which is supported by the noble Baroness, Lady Sheehan, and my noble friend Lord Whitty.

Following on from the discussion of the purpose of the work of the CMA and the opportunities it will present, I want to express the concern that we could be missing a real opportunity if we do not look more closely at the way it will work. Amendment 62 has been tabled to probe the question of what practical effect the CMA's work will have, beyond on the making of individual decisions taken in isolation on the basis of its advice. Also, as we have discussed, what powers will it have to investigate or highlight areas of concern which come to light?

On a general note, in many cases the delegation of responsibilities to a regulator or other form of arm's-length body creates a symbiotic relationship whereby day-to-day work can be carried out independently of the department, but that same department can benefit from the experiences of its agency. We remain concerned that, as I have said, we are missing trick and that the whole process is weakened by the lack of a need to respond annually on what work the CMA is undertaking collectively. It is not clear whether there will be a sense of the overall contribution that the CMA and subsidy control will make to key policy areas. Will its findings have an impact on future policy and statutory guidance, or is its sole purpose simply to state opinion or comment on the individual cases before it?

Amendment 63 will enable us to have a specific debate on the policy objectives around net zero, particularly linking to the outcomes of COP 26, as we have discussed before in Committee, and highlighted by the publication this week of the levelling up White Paper. Where are we going to be able to assess progress? Surely, a section of the CMA's annual report would be a very good place and opportunity to bring together the sense of purpose of the subsidy regime.

We have talked a great deal about what subsidies are and who they are there to benefit. Surely this presents an opportunity to make sure that there is the transparency, clarity and real sense of forward thinking that will help take strategic objectives forward. As I say, we are concerned that the Bill is fairly silent on these areas, and we would like to hear from the Minister what the contribution of the CMA and its work will be to the progress of strategic priorities going forward. With those comments, I beg to move.

Baroness Boycott (CB): My Lords, I declare my interests as set out in the register and apologise for being unable to attend day one in Committee. I am very grateful to the noble Baroness, Lady Sheehan, for introducing my amendments on that day, and to the noble Lord, Lord Whitty, and the noble Baroness, Lady Hayman, for their support.

Today I am introducing Amendment 63, again with the welcome support of the noble Baroness, Lady Sheehan, and the noble Lord, Lord Whitty. Some of the reasons for this amendment have just been set out. It is linked to my earlier amendments in that it is aimed at ensuring that progress towards achieving our net-zero and environmental goals is reported on and monitored after decisions on subsidies have been made.

Amendment 63 provides that a review of the impact of the subsidy control regime on progress towards achieving net zero and our environmental goals should be included in the annual report prepared by the CMA, as has just been mentioned. The Government have said that the new subsidy regime aims to enable public authorities to deliver

"strategic interventions to support the UK's economic recovery and deliver government priorities such as … net zero."

As debated on day one, the framework permits subsidies that support our net-zero goals, but there is very little in the Bill that actually enables subsidies that support or encourage consideration of net-zero and environmental goals in their design and the way they are awarded.

[Baroness Boycott]

Ultimately, if we do not do this, the Government will not know whether the subsidy regime is delivering on its net-zero and environmental priorities. Tracking underlying progress is absolutely crucial to identifying whether their aims are being met and to understanding what progress or changes we need to further make.

On day one, the Minister said that:

"Net-zero and climate change considerations are not inherent to all subsidies",

and that placing a principle that considers our climate change and environmental commitments in the Schedule 1 principles

"could lead to public authorities having to do bespoke, possibly onerous, assessments for every single subsidy awarded or subsidy scheme made".—[*Official Report*, 31/1/22; col. GC 158.]

The delivery of net zero is one of the key strategic priorities of this Government, but if there is to be no specific principle ensuring that public authorities properly factor this into their decisions, it seems even more important that we put clear monitoring and reporting of these issues in the Bill.

The Bill sets out an overarching monitoring and reporting process, predominantly led by the subsidy advice unit within the CMA, which includes determining

"whether any changes should be made to the regime as a whole or certain aspects of the regime."

However, absolutely nothing explicitly suggests that this monitoring and reporting process will encompass the impact of the new subsidy regime on achieving the strategic net-zero priority.

With nothing in the Bill that embeds this consideration, it is really difficult, if not impossible, to understand how the Government intend to monitor whether their strategic objectives are being met, or indeed possibly being undermined. The Government have declared a climate emergency, so it seems quite astonishing that we are prepared to put public money towards efforts that could undermine that goal. Indeed, all public money should be put towards anything that makes this goal more available and possible for us all.

Baroness Sheehan (LD): My Lords, I rise to speak to Amendment 63 in the name of the noble Baroness, Lady Boycott, to which I and the noble Lord, Lord Whitty, have added our names.

Before doing so, I want quickly to speak about Amendment 62, which I support. I recognise the less than complete nature of the assessment it advocates, namely the

"assessment by the CMA, on the basis of the reports it has prepared".

However, those reports are limited to the voluntary or mandatory referrals referred to in paragraphs (a), (b) and (c). I also have some reservations about the reference to the legislation meeting its stated objectives; that is living in hope that a stated objective might actually appear in the Bill at some point.

I thank the noble Baroness, Lady Boycott, for her comprehensive introduction to Amendment 63; it leaves me with little to say. These subsidies will be used by hundreds of public authorities. According to figures I have seen, some 550 public authorities will be able to give out subsidies under this regime. Can the Minister confirm that figure? It is important that many of them fully grasp the importance of their decisions. The Government have said that meeting the net-zero target and levelling up will be policy objectives, but words are not enough. We need to be able to demonstrate that that is the case. This amendment would ensure that it is the case with respect to the net-zero target and other environmental targets. The amendment will be especially necessary if the Government resist that tabled by the noble Baroness, Lady Boycott, which would include a new principle to consider net-zero goals.

Clear and detailed monitoring and reporting of climate change risks and opportunities has been successfully implemented in other parts of our economic system—for example, by the FCA and the PRA through amendments to last year's Financial Services Act, and by the Pensions Regulator through the pensions Act, also of last year. For the first time, the Pensions Regulator has published guidance on governance and the reporting of climate-related risks and opportunities. Such inclusions in those Acts really help to drive climate alignment across these sectors.

This Bill is an opportunity to do the same in relation to our subsidy control regime. Amendment 63 would allow the Government to continue to claim that they are a global leader on climate change.

Lord Whitty (Lab): My Lords, I have added my name to Amendment 63 but I want to say a couple of things about Amendment 62 because, as we proceed through this Committee, it is clear that there is a bit of fuzziness about what exactly the role of the CMA is. Historically, the CMA and its predecessors have reported effectively on the nature of competition across the British economy but, of course, the issue of state intervention has been left to the European level. Some of us were slightly concerned that the CMA would take over that function after Brexit; in the end, I was sort of convinced that it should, rather than creating a whole new body, but it has to do a number of different things. It has to look after our trade obligations not only to the EU but in all the other trade agreements we have reached, in which we agreed that we will not unreasonably subsidise goods that are traded so as to undercut our trading partners. So, we have a big international obligation—one that can lead to retaliation and all sorts of problems arising with the WTO and other international bodies.

We have all that, but we also have the area of subsidies in the UK. This includes the delicate relationship between the UK Government and the Secretary of State acting for England, the devolved authorities and local authorities. It is a very complex area, and all this is to be landed on a new body within the CMA: the SAU. It is not yet clear whether it will have the resources, expertise and personnel to do that. We have gone along with this, but we need to be clearer on, for example, whether it is a regulator or an overseer and reporter on the activities of the public authorities that are giving subsidies and quasi-subsidies. As we debated earlier in the Bill, this involves a range of things—for example, preferential procurement. At the end of my contribution at Second Reading, I asked the Minister whether my county would be able to give preferential treatment to a local firm because it provided local

employment, or whether it had to make sure that the neighbouring county of Wiltshire was not thereby being undercut.

4.45 pm

Admittedly, there is a minimal level, but a lot of public authorities' activities, in public procurement and their other regulatory functions, will be affected like this. We need an authoritative body that can say whether this is in order with the principles that we set. Effectively, Amendment 62 says that we must have a running report on whether the SAU and the CMA are actually doing the job we thought they would do when we gave it to them, or whether there are problems between the various authorities and various levels of authority affected by this.

I will move on to what I was supposed to be speaking about, which is Amendment 63. As the noble Baroness, Lady Boycott, said, in earlier debates we considered amendments that would have added a requirement to take environmental considerations into account, in particular whether a subsidy does or does not undermine the principle that the polluter pays or makes it easier for a provider or manufacturer to produce in a way that creates environmental harm, or whether any intervention makes issues such as decarbonisation better or worse. This amendment attempts to make sure that the CMA reflects this itself, not only in its individual decisions and views on particular subsidies but in its overall impact. I guess some reflection would have to be added to the CAT, as well

I would like to see a provision such as this written into all regulators' requirements. Maybe there ought to be a standard form of words in the annual report on what their net contribution to or effect has been on the achievement of decarbonisation, net zero and the trend to reduce greenhouse gases. It is important that the CMA's individual interventions and views take this environmental consideration into account. Of course, the most important environmental consideration, to which the Government are utterly committed, is towards net-zero carbon and carbon-equivalent emissions. If we do not do that, there is the difficulty that the intervention, which will primarily be made on economic grounds, will have an environmental effect on emissions that far outweighs any economic advantage that was the original intention of the subsidy.

We have to write this into the Bill and make sure that there are people in the SAU and CMA who understand these issues more generally and are capable of making these assessments. At the moment, I am not convinced that is the case and I hope the Minister can give us some reassurance on that front. The seven principles in Schedule 1 do not directly refer to any environmental consequences, and the reference to energy and environmental effects in Schedule 2 is limited. It relates principally to the energy sector and industrial activities.

Actually, any subsidy or preferential procurement could impact on carbon emissions. Whether it relates to transport, public services, digitalisation or whatever, it can have an effect that is not primarily environmental, but with a fairly devastating environmental side-effect. We need to make sure that the regulation of our subsidies reflects the need to focus on that at every level. We need to get the CMA to report the aggregate outcome of its activities of the previous year. I strongly support the amendment from the noble Baroness, Lady Boycott.

Lord Wigley (PC): Could my noble colleague clarify his thinking with regard to subsidies to the steel industry? Clearly, such subsidies could have far-reaching effects on the environment. To make a judgment on that would require people with an intricate knowledge of the steel industry and the background and significance of subsidies in that sector. At what level should that decision be taken?

Lord Whitty (Lab): My Lords, that is probably a question for the Minister rather than for me, but, clearly, the decision on, for example, the Cumbrian coal mine, which is to feed into the steel industry, is an incredibly complex issue which will not be resolved by the narrow criteria of whether it enhances or undermines competition. The noble Lord is correct in that respect, because it would also have a considerable effect on carbon emissions.

Baroness Jones of Moulsecoomb (GP): My Lords, I shall speak to Amendments 62 and 63. Amendment 62 seems pretty basic post-legislative scrutiny, so I am not quite sure why it is not in the Bill already. The Government are bringing in this legislation and it makes sense for the Competition and Markets Authority to report on whether the legislation works in practice. That is fairly fundamental, is it not? If it does not, then, obviously, we can improve the legislation; if it does, then the Government can pat themselves on the back. The amendment should have been in the Bill. I am expecting the Minister to say, "Yes, of course, we'll write it in now."

On Amendment 63—I wish I had added my name to it; I agree with everything that we have heard so far from noble Lords—I have said before that we should have a provision such as this in every single piece of legislation. As the noble Lord, Lord Whitty, just said, it is basic to what the Government claim to care about. The principle should underpin everything that they do. We know that the scale and size of the net-zero problem is huge, and the Government will need a lot of help. They will need a lot of private and public investment, and it will involve a lot of changes to government taxation and spending.

Any aspect of government that thinks that the climate emergency is not part of its remit is not thinking hard enough about it. We need both the whole of government and the whole of society to address the work on the climate and ecological emergencies. Every Bill that comes through here, every tax levied and every pound of government spending should move us towards net zero. There is an environmental saying: doing nothing risks everything. The Minister will say that the Government are doing a lot. I would argue that they are doing bits and pieces, so the saying could be: doing bits and pieces risks everything as well. We need a coherent approach.

I was asked whether I would still like a meeting with the Minister. Yes, I would, and I would like to throw down a little challenge. If the Minister or his team can come up with any issue that is not relevant to our

[Baroness Jones of Moulsecoomb]
climate emergency, I will be happy to argue how it is relevant. I look forward to that meeting, and I might bring some heavyweights with me.

Baroness Bloomfield of Hinton Waldrist (Con): My Lords, each year, the CMA is required by the Enterprise and Regulatory Reform Act 2013 to prepare a report on its activities and performance that year. The report must be sent to the Secretary of State and laid before Parliament.

Clause 66 requires that the CMA include details within its annual report of any subsidies and schemes which have been referred to the subsidy advice unit in that year. This includes referrals made on both a mandatory or voluntary basis, including those made by the Secretary of State, and it is designed to mirror the level of detail required for information on the CMA's other functions. This information will help to provide transparency as to the number and types of subsidies and schemes referred to the subsidy advice unit. Among other things, it will help both the CMA and Parliament to understand whether the subsidy advice unit is operating as expected and has the appropriate resources to fulfil its functions.

Amendment 62 would add the requirement for the CMA to set out an assessment on the extent to which the regime is meeting its stated policy objectives. On this matter, it is important to draw a clear distinction between the purpose of the CMA's reporting under this clause, as opposed to the more in-depth review and reporting that it will do under Clause 65. The effect of this amendment will be to combine the purpose of these two distinct categories of report, and in doing so place an unnecessary burden on the CMA in producing its annual report.

In response to the question of the noble Baroness, Lady Blake, on what effect the CMA reports will have, the monitoring reports will already be published for all to see. The Bill contains numerous provisions for amending specific aspects of the regime though secondary legislation. This ensures proper parliamentary scrutiny of any proposed changes to the regime. The purpose of the subsidy advice unit's regime-level monitoring function is to provide an objective source of information about the functioning of the new system. This feeds into the Government's objective of monitoring and continuous improvement for the regime, while also providing confidence in the regime to stakeholders and the public across the UK. Requiring more frequent monitoring reports from the CMA, with improved scrutiny and transparency, might indeed seem attractive but in reality, it could cause the opposite effect to that intended by the noble Baroness, resulting in more superficial reports that will be less useful in assessing the overall effectiveness of the subsidy regime.

The information required by Clause 66 is designed to sit within the CMA's existing reporting requirements. The annual report is a descriptive and limited tool for the CMA to publish key information about its workload and resources and to ensure that it is moving towards achieving its own organisational objectives across all its functions. This report must include summaries of its significant decisions, investigations or other activities carried out during the previous year.

As currently drafted, the requirements under this clause similarly require summary descriptive information in relation to the subsidy advice unit's functions, which will give an indication of how those functions are being used and whether it has the appropriate resource to fulfil the demand for those functions. This should be placed in contrast to the five-yearly reports specific to the subsidy advice unit under Clause 65, which will provide the CMA with the opportunity to publish a substantive analysis of the operation of the regime and the subsidy advice unit's role within that regime. Of course, the CMA may include further data or case studies on subsidy control in its annual report if appropriate. Clause 66 is only a minimum list of the information that it will be required to include.

Under the Enterprise and Regulatory Reform Act, the CMA must also include a survey of developments in relation to all its functions, which may include developments within the subsidy control regime that the CMA deems of significant enough importance to publish, and thereby inform Parliament. The Government's position is that the five-yearly reporting under Clause 65 is the appropriate place for the CMA to provide an assessment of the regime's performance. The five-yearly report provides for an appropriate timescale for producing such assessments and the CMA is empowered under Clause 67 to gather information for this purpose. This will provide the CMA with the time and resources necessary for the subsidy advice unit to provide for a considered review of the subsidy control regime.

Amendment 62 also requires that the SAU produce its assessment only

"on the basis of the reports it has prepared".

It is our view that any assessment of the regime's performance will need to take a much wider view of the regime than only that part of it to which the SAU has reported that year. That is why the five-yearly reporting requirement in Clause 65 has been drafted to give the CMA the scope and power it needs to consider the matter thoroughly. Supplementing those powers with additional requirements in the annual report may only lead to the production of an assessment that is relatively narrow and partial, and that does not have the benefits of a more extensive review over a longer period.

I support the view that there may be circumstances in which we need more analytical and evaluative information more frequently than every five years. I would like to reassure the Committee that the Secretary of State has the power under Clause 65 to direct the SAU to produce a report for a specified period. It is also worth noting that, under the Enterprise and Regulatory Reform Act, the Secretary of State already has the power to request a report or advice from the CMA on any matter relating to its functions.

Regarding parliamentary scrutiny, there should be no reason for any committee of this House or the other place to wait for the CMA's reporting under either Clause 65 or Clause 66 in order to take a close look at the subsidy advice unit's functions. It is always open to noble Lords and honourable Members of the other place to examine this regime and the SAU through the usual process of parliamentary committee.

Amendment 63 would expand the scope of the CMA's annual report to include an assessment of the effect that the regime is having on the UK's ability to achieve its net-zero carbon emissions goal, set out in the Climate Change Act 2008, and the targets set under the Environment Act 2021.

5 pm

While I understand the noble Baroness's aim to ensure that this legislation will not hinder the UK's ability to achieve its net-zero goal or environmental targets, I must urge her to reconsider this amendment. I say in response to the concerns of many noble Lords, including the noble Baronesses, Lady Boycott, Lady Sheehan and Lady Jones, and the noble Lord, Lord Whitty, that I recognise their position. For reasons of time, I will not repeat the arguments set out in previous Committee sessions, or those in my noble friend Lord Callanan's letter to the noble Baroness, Lady Jones: that the UK's framework to address climate change and protect the environment is strong as it stands.

It is also worth mentioning that robust reporting requirements are already in place for considering progress towards meeting Environment Act targets. The Government must report annually on whether the natural environment has improved, including on whether progress has been made towards targets. The office for environmental protection will also scrutinise the Government's progress towards targets annually, providing recommendations if it believes better progress could be made in improving the natural environment.

Turning to the amendment, the CMA's annual review function is not an appropriate tool for addressing the noble Baroness's concerns. The amendment would probably be prohibitively disruptive to the delivery of the CMA's annual report. As I have already described, the CMA's annual report is intended to be a descriptive and limited tool for the authority to inform Parliament of its workload and resources, and to ensure that it is moving towards achieving its own organisational objectives. A review of the subsidy control regime's effect on carbon emissions and the Government's environmental targets would necessarily require a significant assessment of this aspect of the regime, with the inclusion and explanation of technical details and nuances that are wholly unrelated to the rest of the CMA's functions. The inclusion of such an assessment in the CMA's annual reporting is unlikely to be helpful to Parliament in scrutinising the CMA's functions or reviewing the progress towards the goal of net zero, or indeed to the Government's environmental targets.

This is not to say that the subsidy advice unit will never take into account the regime's potential effect on the UK's net-zero commitment. This regime will support our net-zero target by facilitating strategic subsidy interventions with minimal bureaucracy and delay. This includes the energy and environment principles in Schedule 2 to the Bill, which could be used to aid public authorities in the granting of subsidies which support the UK's priorities on net zero and protecting the environment. As I have set out, the subsidy advice unit will be charged with the responsibility of reviewing the operation of the entire regime every five years under Clause 65. This will include the effect of the energy and environment principles in Schedule 2.

The Government take their net-zero commitment and environmental targets seriously and this Bill will support those aims by giving public authorities—

Baroness Boycott (CB): Given that the UK has committed to a 50% cut by 2030, a review that takes place only every five years does not seem wholly practical, given that we have only eight years.

Baroness Bloomfield of Hinton Waldrist (Con): It is the Government's position that five-yearly reports are sufficiently frequent to take a view of how successful this is. They are the appropriate tool to conduct a review of the environment and energy principles. Clause 65 provides an achievable timescale for delivering complex and substantive analysis of this sort. To ask that we prepare something every year would be an unnecessary burden on the whole subsidy control regime and the structures we have put in place to support this.

The CMA will have the ability to gather all the information needed to conduct such an analysis for these five-yearly reports, through Clause 67. These are powers that the CMA will not have in relation to its annual reports. I therefore humbly request that the noble Baroness withdraw the amendment.

Lord Whitty (Lab): The other day, we discussed the inclusion of agriculture in the Bill, but the Government have made it clear that, basically, the future of all agriculture subsidy will be environmental objectives. The Minister's reply to my noble friend's amendment suggests that she agrees that agriculture should not really be covered by this approach, or that it should at least be treated substantially differently. What she has said, effectively, is that we cannot judge the environmental side; we have to approach it in the same way as every other sector.

Baroness Bloomfield of Hinton Waldrist (Con): On the specific point about agriculture, I do not know whether the letter addressing those points has been issued yet. I can say that 99.5% of subsidies given to the agriculture industry in the UK would not fall within the remit of the subsidy; they are lower. We do not have the data for Scotland or Wales, but it captures only the very largest subsidy given to the very largest farms. That may include some in Scotland with that sort of acreage—

Lord Callanan (Con): Or Labour supporters.

Baroness Bloomfield of Hinton Waldrist (Con): I hope that that addresses the noble Lord's concerns.

Baroness Sheehan (LD): Can I ask the Minister about her remarks about the OEP's remit? I think that she said that it would cover whether the Government are meeting their climate change requirements. However, the OEP's remit does not cover whether the subsidy control regime is working towards our net-zero targets. What the amendments are trying to say—as we tried to include in the Financial Services Act and the pensions Act, successfully—is that a more granular approach will be needed, which has to be provided by the regulatory authorities within the sectors concerned because, otherwise, we really will not know whether

[Baroness Sheehan]
each sector is working towards the net-zero targets that we are all trying to achieve in the timespan that we have.

Baroness Bloomfield of Hinton Waldrist (Con): One of the noble Baroness's concerns was that there was no overarching principle for the Government's drive towards net zero. I think that the Environment Act provides the overarching context for whatever we are doing. As I say, the Office for Environmental Protection will also scrutinise the Government's progress towards targets annually. I do not know what further level of granularity the noble Baroness wishes to apply.

Lord Callanan (Con): There is also the Climate Change Act.

Baroness Bloomfield of Hinton Waldrist (Con): There is also the Climate Change Act, as my noble friend has just reminded me.

Baroness Sheehan (LD): I shall not repeat what I have said, but I do not think that the OEP will be able to tell us whether the subsidy control regime is working in the way that subsidies are being allocated in terms of meeting our climate change requirements. There is precedent in this, as I keep saying, with the Financial Services Act and pensions Act, and the actions that the Pensions Regulator took on the back of that Act. They all speak volumes as to how important it is to have each sector being held to account. Those are the points that the noble Lord, Lord Whitty, and the noble Baroness, Lady Jones, made. Every single sector within the country needs to be shown to be pulling its weight and we need to know where we have to put in greater effort, if it is not working towards the net-zero targets.

Baroness Bloomfield of Hinton Waldrist (Con): I understand the noble Baroness's concerns, but I am not able to go further than I have done at the Dispatch Box. On the point that the noble Lord, Lord Whitty, made about the steel industry, followed up by the noble Lord, Lord Wigley, we are directing subsidies towards greening industries like that, so we can invest in electric arc technology, and hydrogen as well. It is part of an overall drive by this Government to be consistent with the environment principles that we have laid out.

Baroness Jones of Moulsecoomb (GP): But can the Minister see our point that the climate emergency has to be part of every part of government thinking and at the moment it is not? It just gets dropped out of piece after piece of legislation as if it was not really part of government thinking. It is all right talking about zero carbon, about how we are on our way and all that sort of thing, but if it is not in every single piece of legislation, it will not happen.

Baroness Bloomfield of Hinton Waldrist (Con): We are just going to have to agree to disagree on this point. I believe that it is part of the overarching principles of this Government that the environment is one of our most important points. I do not believe that it needs to go on to the face of every Bill. I know that it is in the pensions legislation, but I cannot go further than I have already gone at the Dispatch Box in the context of this Bill.

Baroness Boycott (CB): My Lords, given how huge this area is in terms of the amount of public money that gets spent and given that the Government have a public commitment to net zero, it seems astonishing that we do not have the legislation blended in to this Bill. We are not talking about minor amounts of money; we are talking about the way in which whole communities live, work and operate.

Baroness Bloomfield of Hinton Waldrist (Con): I remind the noble Baroness that we have a legal commitment to net zero.

Baroness Blake of Leeds (Lab): I thank the Minister for her full response to the two amendments before us. In the contributions that have been made both in the debate and in our following up and further probing, there is a sense that we have to go into this more deeply.

Again, we are asking for the same principles that we have talked about with regard to many of these issues around clarity, sense of purpose and benefit. I do not believe that public authorities will find some of this assessment and monitoring onerous, including having to account for the subsidies that they put forward. That is part of established practice and it needs to be formalised in the sense put forward by my noble friend Lord McNicol in Amendment 62, with annual reports as a mechanism for picking it up.

I absolutely agree on the issue of five-yearly reports. We are already in 2022. Are we saying that the first report into progress in these areas around net zero will not be heard until 2027—possibly even 2028, with the way things are going? That cannot be what the Government intend, given the urgency of the situation in front of us in moving towards net zero.

I will not unpick all the excellent points made by noble Lords in this debate because I know that we will come back to this area. I look forward to hearing how we can bring this together and come up with a sensible way forward. As I said in my opening remarks, if we carry on with the Bill in its current form, we will be sitting on a missed opportunity to do something constructive and positive—particularly, in the context of this debate, around net zero but also, looking further afield, in the wider area of levelling up. The climate emergency is a major contributor to the unequal experience of people right across the four nations. Addressing the matters raised in this discussion would be a sensible way forward. With that, I beg leave to withdraw the amendment.

Amendment 62 withdrawn.

Amendment 63 not moved.

Clause 66 agreed.

Clause 67 agreed.

Clause 68: Subsidy Advice Unit

Amendment 64

Moved by ***Lord McNicol of West Kilbride***

64: Clause 68, page 39, line 1, at end insert—

"(3A) The Chair of the CMA Board may appoint up to three non-executive members to the Subsidy Advice Unit established under subsection (1) in order to ensure that the Unit includes at least one person with relevant experience in relation to each of Wales, Scotland and Northern Ireland."

Member's explanatory statement

This amendment would allow the CMA Chair to appoint up to three non-executive members to ensure that the Unit includes at least one person with experience in relation to each of Wales, Scotland and Northern Ireland.

Lord McNicol of West Kilbride (Lab): In moving Amendment 64, I will also speak to Amendment 65. I am grateful to the noble Lords, Lord Bruce, Lord Wigley and Lord German, for adding their names to one or both of the amendments.

Just because it was touched on a minute ago by the Minister, I should say that we have received the letters. The lessons from day 3, on Monday, when the letters were received before the Grand Committee started, may well have been learned. Notwithstanding that, I thank the Minister and his department. I have not read the letters in detail because I was engrossed in the previous debate, but I want to pick up one small point in them. Obviously it is worrying that any subsidy under the level of £315,000 does not have to be entered on the database. What is even more worrying is that that subsidy does not even have to abide by the principles in Schedules 1 and 2. This gives more weight to the arguments for reducing the subsidy level and admittance on to the database, especially if the subsidies do not have to meet the principles in the schedules.

5.15 pm

Amendment 64 would allow the CMA chair to

"appoint up to three non-executive members … to ensure that the Unit includes at least one person with … experience in relation to each of Wales, Scotland and Northern Ireland."

Amendment 64 was considered in the Commons but, like many of the other amendments relating to the role of the devolved Administrations, I do not think it received a satisfactory response. I am sure we will come back to it again in discussions. Hopefully it will not need to come back on Report, but we will see.

As we have covered in previous debates, each of the devolved nations has its own particular interests, and it seems only fair that these be represented—or at least picked up—on this new body, the subsidy advice unit. The CMA has staff based in each of the four nations of the UK, so why should there not be a statutory requirement that the SAU reflect this?

The amendment does not call for a Welsh representative to opine on matters wholly relating to England and Scotland. I am sure that all those in the devolved nations who could be affected by subsidies would feel more supported, protected and engaged knowing that a representative from one of the devolved nations was involved with the SAU.

More importantly, Clause 68(4) on page 39 of the Bill states:

"The Subsidy Advice Unit may consist only"

of representatives

"who are members of the CMA or its staff."

I am really interested in why, whereas in so many other parts of the Bill there is silence or less prescription, Clause 68 is so prescriptive. I would appreciate the Minister's thoughts on that.

Amendment 65 returns us to the question of how prepared the CMA is to undertake these new responsibilities. It would prevent Part 4 of the Bill coming into force until the Secretary of State has undertaken a full assessment of the CMA's capacity. It states:

"This Part may not come into force until the Secretary of State has … undertaken an assessment of the CMA's capacity to undertake the functions contained within this Part, and … laid before both Houses of Parliament a statement confirming whether, in the Secretary of State's opinion, the CMA has the appropriate resourcing to meet its obligations under this Part."

We appreciate that the CMA will be undertaking preparatory work as we speak, and this amendment is not meant as a criticism, but during the passage of other Bills it is perfectly normal for us to probe whether a chosen regulator—because it will not be an enforcement agency—is the correct one. It very much picks up on my noble friend Lord Whitty's remarks in the previous debate about the role of the CMA and how ready it and the SAU are. Do they have the resources and the expertise? Amendment 64 aims to make sure that the SAU has four-nation representation on it. With that, I beg to move Amendment 64.

Lord Bruce of Bennachie (LD): My Lords, I speak in support of Amendment 64, to which I have added my name. I also support Amendment 65, which my noble friend Lord German will address in more detail. Overall, and as has been said, this Bill has worrying implications for the devolution settlements. Just as the United Kingdom Internal Market Act may be used to impact the devolved Administrations unfairly—certainly, that is their concern—reserving the subsidy regime to the UK Parliament and the powers that have been given to the Secretary of State are causing alarm across the devolved Administrations.

The Government like to claim, and the Minister has made this point a few times, that leaving the EU gives the devolved Administrations more power and flexibility. Under the EU, they were constrained by the state aid rules that no longer apply. Now, they can pursue their own. That would be true if the UK Government were not introducing legislation that allows them to override the devolved Administrations, without even a requirement for consultation and with no reciprocal rights to challenge UK Ministers' decisions as regards not only the UK but England.

Oversight of these two pieces of post-Brexit reserve-power legislation, which I would argue are draconian, has been allocated to the Competition and Markets Authority, which has been asked to acquire skills and experience that it does not yet have. It is important for us to recognise that this is new territory for the CMA.

Thomas Pope of the Institute for Government says that this Bill

"does not yet guarantee a Brexit success story. Gaps in the legislation could deny Parliament"—

[Lord Bruce of Bennachie]

I would argue are denying Parliament—

"a proper chance to scrutinise how the new system will work—and point to future rows between the UK government and the devolved administrations."

He further points out that the regulations have no input from the devolved Administrations. The Minister keeps saying that he is consulting, but the devolved Administrations say it is not consultation at all. Pope argues that

"a successful system needs buy-in from all parts of the UK."

That is absolutely the case. He went on to say that the Institute for Government's report

"recommended that any regulations should be made in consultation with the devolved administrations"—

I emphasise the following—

"with the process preferably led by experts in the CMA. The government's approach risks future clashes".

These arguments have been further developed by George Peretz QC, who points out, as previous debates in this Committee have highlighted, that granting authorities need to test their subsidies against the effects on competition and investment, without reference to the wider issues—in other words, social and environmental implications, and the other issues we are discussing. It is a very narrow definition, which could lead to broader subsidy intentions being overridden. It is true that the TCA refers to the socioeconomic situation of the disadvantaged area concerned. How could the EU not agree to that, given the CAP and its own state aid rules? But there is no definition of what constitutes a disadvantaged area or what disadvantage is. We have discussed the lack of any area map in previous Committee debates.

Mr Peretz goes on to say that

"nothing in the Bill provides for the devolved governments to have any say in the appointment of CMA panel members who will, as part of the Subsidy Advice Unit, exercise the CMA's powers under the Bill",

such as they are, and

"there is no equivalent to the provisions of Schedule 3 to IMA20 that require the Secretary of State to seek the consent of the devolved governments before making appointments to the Office for the Internal Market".

Why is that the case for the internal market Act but not the Subsidy Control Bill? Surely, consistency, at least, requires that. This amendment seeks to remedy this and, I suggest, for very good reason. As I said, the CMA is moving into new and unfamiliar territory. It is surely essential that it understands the needs of the devolved areas and can balance them across the UK.

The powers that the Secretary of State has, which are not reciprocated for the devolved Administrations, put the CMA in a potentially invidious position. If the Secretary of State seeks to challenge, for example, the livestock support regime of any of the devolved Administrations, he or she can do so—on so far unstated but potentially restricting grounds. If a Minister introduces a subsidy, let us say, for London which the devolved Administrations feel disadvantages them, they have no corresponding right to challenge. I would anticipate the argument of grandfathering current regimes and repeat what I said in the debate on agriculture earlier in the week: that, over time, the regimes may change as circumstances change and, at that point, they will not be grandfathered and may be subject to challenge. That is important to note.

As George Peretz points out, the result looks distinctly unbalanced. For example, if the Welsh Government decide to grant a subsidy to which the Secretary of State objects, perhaps on the basis of its impact on England, the Secretary of State may be able to refer it to the CMA and will have standing to challenge it before the CAT. The Secretary of State may also be able to issue guidance that recommends against types of subsidy that the Welsh Government might have in mind, guidance to which the CMA and the Welsh Government have to have regard. On the other hand, if the Secretary of State grants subsidies to businesses in England or, using his or her powers under Section 50 of the internal market Act, to businesses in Wales to which the Welsh Government have objections, none of those possibilities are open to the Welsh Government. I rest that case, because it is crucial.

The Minister may argue that, as with the Monetary Policy Committee of the Bank of England, members are appointed to the CMA for their expertise rather than their geographical base, but he is ignoring that no such expertise yet exists for the new regime. It is surely imperative that, from the outset, the CMA is fully conversant with the needs of the devolved Administrations and that administering the regime evolves in a way which is sensitive to them. The Minister knows my opposition to separatism and nationalism, but I am a passionate home ruler and believe that the devolution settlements should be upheld and not eroded.

The Minister will assert that these are reserved powers—he has done it several times already during this Committee—and are based on the sovereignty of Westminster and not on a federal system which we do not have, or even a devolved consensus. To disregard the devolved Administrations, regardless of where the legal and constitutional power lies, is reckless. The Government are putting the union at risk in the way they are proceeding with this Bill by using reserved powers and failing to recognise the sensitivities. To say to the devolved Administrations, "You have more freedom than you had under the EU, but we're having reserved powers that will qualify, test or challenge that freedom" is a two-edged sword that does not stack up. Right now, the mood in the devolved Administrations is that they do not trust the Government's intentions, not yet knowing what they are.

Lord Wigley (PC): My Lords, I am delighted to follow the noble Lord and agree with almost all the comments that he made—not entirely, but almost. In particular, I am glad to support Amendments 64 and 65, proposed earlier by the noble Lord, Lord McNicol, and have added my name to both of them.

My feeling—and this is really what the noble Lord was speaking about a moment ago—is that we are building a grit creation machine here. We are creating the grit that will cause difficulties as the wheels of this operation move forward. I do not think that is what the Government really want to do.

I well remember being on a committee chaired by the noble Lord sitting next to me a couple of years ago, when we were questioning the CMA's role in these

matters. We found that the CMA, quite legitimately, had very little experience of dealing with devolved dimensions. This was not a criticism of it; that was not its role. It still does not. We should therefore ensure that we build the necessary talent and experience into the relevant units or committees of the CMA that can at least advise on these matters, but it seems that we want to tie the hands of the CMA. It does not have that background; it has no obligation to work in close proximity to the devolved regimes under the Bill. It should certainly find a way of doing that if it wants the operation to go smoothly, otherwise problems will arise.

5.30 pm

As the noble Lord mentioned when opening this debate, Clause 68(4) states:

"The Subsidy Advice Unit may consist only of persons who are members of the CMA or its staff."

At an earlier stage we cut out any requirement for the CMA to have a dimension of experience from the devolved regimes. Therefore, we are tying its hands by not giving it the resources or responsibilities it needs to deal with the devolved dimensions, insisting that this be undertaken by people who themselves are wholly employed by the CMA. I am not quite sure what the logic of all this is. Do we want to create a structure that does not work; do we want to create legislation which we must amend at a later stage; or do we just want to create a tension between London, Cardiff, Edinburgh and Belfast in these matters? The issues with which we are dealing are too important to leave to the open book of how the organisation will carry out this matter.

Between now and Report, the Government should look again at ways in which the Bill can achieve the co-operation with the devolved regimes that will give them the confidence they need, and the CMA the reassurance it needs in undertaking its responsibilities. These are not just debating points. It is not necessarily in my political interest to make these points, but my goodness, I would rather see good government undertaken without problems, and the economies of Wales, Scotland, Northern Ireland and indeed England benefiting from a coherent structure, than the problems that will arise from the current wording of the Bill. Therefore, I am delighted to support both these amendments.

Lord German (LD): My Lords, I have attached my name to Amendment 65 and want to examine the cash and resources which the Government intend to put into the CMA.

Talking of cash and resources, I was very disappointed to read the Minister's letter to my noble friend Lord Purvis today, in which he says of a previous debate about money:

"I regret that I am not in a position to confirm the per capita allocation of the UK shared prosperity fund in each nation at this stage. However, I emphasise that the Government is meeting its manifesto commitments in Scotland, Wales and Northern Ireland. The fund will match previous EU funding in real terms for all these places."

The letter says that the fund will match previous funding, but it also emphasises that they are meeting their manifesto commitments. How on earth can you say that you are meeting your manifesto commitments when you cannot tell us whether you are giving £780 per head to Wales in the way that it was described, as a per capita allocation? Clearly, having a per capita allocation is how you judge whether you are meeting your manifesto commitments. I am very disappointed that the Government say that they are meeting their commitment but are unable to provide the figures to show that they are doing so. I hope they will rectify this swiftly.

Turning to the CMA and its resources, we were very fortunate some years ago to receive evidence from the CMA on its readiness to take part in the new world we were entering. However, it is very important to separate out the CMA's need for resource to carry on its traditional functions of mergers, acquisitions and so on. The chair of the CMA said then, regarding the non-subsidy side:

"We will be involved in much bigger and arguably more complex cases than we typically deal with. We will have to deal with mergers. We will also be involved in the enforcement cases. The extra workload, the complexity and the likely litigation that follows such cases ... implies significant expansion in our activities."

The chief executive then said:

"We expect a 30-50% increase in mergers coming our way. However, these will tend to be bigger and more complex mergers. On the antitrust side we think we will do between five and seven large extra antitrust cases a year. That will mean an increase of at least 50% on our current workload in that area."

Between the two of its own size, it is clear that the CMA found that cash was very important.

The chair went on:

"The key point on resources … is that we need approval for the extra cash that we need … We need the cash, but then we need the time to attract and recruit the talent and get them up to speed in terms of the work. We need to start having action relatively soon, given the timescales that we are talking about."

Given that this was a few years ago, the timescales are now upon us because this Bill is where it all happens. On state aid, he said:

"We have no experience in this area … It would add, I would emphasise, to the expansion that we have to undertake anyway"—

that is, on the other side of the CMA's work—

"and we would have to find the skills … given the lack of experienced people in the UK itself. It would be a challenge".

The key challenge identified was the recruitment of lawyers. How is that going? As far as I can tell, lawyers do not come cheap and, with respect to my colleagues behind me, good lawyers come even less cheaply. It is a matter for the CMA to have the appropriate lawyers. At one point, the chief executive said that they are difficult to find and that

"we are now thinking about expanding our office in Scotland, to tap into talent there."

So it will have talent from Scotland but no representation regarding the decision-making powers of the board—but there we are. He went on:

"We want to see where talent is and what we can do to attract people and keep them in the CMA."

The price of the challenge was that of finding appropriate salary levels.

In replying, can the Minister tell us how much money, in raw terms, has been put into both sides of this equation: into the traditional work of the CMA, which has now fallen upon it because we have left the

[Lord German]

European Union; and into the subsidies side? How many new lawyers has the CMA been able to attract? At the time, the chair said that there are lawyers working in private practice

"who are well experienced … in dealing with state aid applications"

on the side of the role now needed by the CMA. How many lawyers with this sort of experience have now been recruited, and at what level? Earlier, the noble Lord, Lord Lamont, talked about the need to have experience on the side of the regulator that is greater than the experience of the people operating the subsidies. We will need lawyers who are even more skilled and who have the greatest skill in managing this sort of operation. I repeat: I suspect that they do not come cheap.

In replying, can the Minister outline specifically where and when the recruitment will take place, how much money is on either side of the equation and whether the Government have a deadline for making sure that all the resources are in place? Also, I will continue to pursue my claim: can the Minister tell me when the Government will match the £780 per head that was promised and is now in the letter?

Lord Hope of Craighead (CB): My Lords, I want to add to that list of questions. Does the Minister have any information on where the CMA is to be based? It is one thing if it is in London, and quite different if it is in Cardiff, Glasgow, Birmingham or Manchester, for example. One of the concerns is the constant pressure that the devolved Administrations have against the south-east and London-based administrations. If there were some way in which the CMA could locate itself further away from the south-east and closer to other areas, that would at least be to some advantage.

Baroness Bloomfield of Hinton Waldrist (Con): My Lords, Clause 68 requires that the CMA establishes a new committee of its board called the subsidy advice unit for the purposes of undertaking the subsidy control functions set out elsewhere in the Bill. I recognise that nothing I can say at the Dispatch Box will completely allay the fears of the DAs that this is a power grab or that we have malevolent intent in all this. All I can say is that the Government are very well aware of these issues. We talk about them constantly and will endeavour to continue the dialogue as we go forward on many fronts.

To return to these amendments, the subsidy advice unit will be a specific committee within the CMA dealing with subsidy control. It will comprise exclusively staff and members of the CMA. In this instance, "members" of the CMA refers to, among others, the chair and individuals who sit on the CMA board, the CMA panel of competition experts and the office for the internal market panel and its chair; "staff" refers to the civil servants employed by the CMA.

Amendment 64 seeks to allow the CMA chair to appoint to the subsidy advice unit non-executive members

"with relevant experience in relation to each of Wales, Scotland and Northern Ireland."

The CMA was chosen as the home of the subsidy advice unit because of its experience and credibility in acting as a regulator and adviser in matters of competition and consumer law on a UK-wide basis. In carrying out its new functions under the SAU, the CMA will continue to act as it always has successfully, with the whole of the UK in mind.

It is notable that the amendment does not make any mention of "relevant experience" in relation to England, perhaps implying that the CMA already has an excess of England expertise but a deficit in relation to the other parts of the UK. I cannot possibly agree with the noble Lord on that point, if indeed that was the implication.

The amendment is unnecessary because the CMA can and does already recruit to the unit personnel with "relevant experience" in relation to all its functions, various different markets and all parts of the UK. The CMA has an excellent track record of recruitment and retention of staff and members from across the UK, and currently employs staff in Belfast, Cardiff, Edinburgh and London. The CMA has already undertaken external recruitment to a number of posts in the SAU. These were advertised on a location-neutral basis and were open to applicants willing to be based in any of the CMA's existing offices. It is unnecessary to impose excessive and unhelpful complexity on the CMA's recruitment process when it has already proved quite capable of finding persons with the "relevant experience" to carry out its functions.

I turn to Amendment 65. Part 4 of the Subsidy Control Bill represents an important pillar of the new domestic regime. The additional flexibility that public authorities will enjoy to design bespoke subsidies and schemes and quickly bring them to fruition to address identified policy problems must be balanced by a proportionate mechanism to provide an appropriate degree of scrutiny. This scrutiny will be crucial for the most potentially distortive subsidies and schemes, which is why the SAU has been given a role in advising public authorities before they award the most potentially distortive subsides or schemes. In response to the noble Lord, Lord Bruce, I say that neither the SAU nor the Secretary of State will be able to block a subsidy being awarded.

The CMA will also have the role of monitoring the efficacy of the entire regime through a periodic review and report to Parliament. This will ensure appropriate oversight and scrutiny of the regime by Parliament to confirm that it remains relevant to the needs of the whole of the UK.

Amendment 65 requires that the Secretary of State must undertake an assessment of the CMA's capacity to fulfil its new functions under Part 4 of the Bill and make a Statement to both Houses on their findings. If the Secretary of State finds that the CMA is not sufficiently resourced, their report to Parliament must also outline the steps the Government intend to take to address this. I appreciate the noble Lord's intention and that this is a probing amendment to ensure that the CMA is properly prepared to carry out its new statutory functions. I therefore offer the following statement on preparations for the new subsidy advice unit.

The CMA was allocated funding of some £20.3 million at the spending review in 2020 to establish three new functions within the CMA: the subsidy control function,

the office for the internal market and the digital markets unit. Following the 2021 spending review, this budget of around £20.3 million will be maintained for the next three years. The CMA will continue to allocate funding in the 2022-23 financial year to reflect the estimate of resources needed to establish the new subsidy advice unit. This estimate reflects both the functions set out in the Bill on introduction, and the estimated number of subsidies and schemes of interest and particular interest that would be referred to the SAU.

The estimated case load of around 20 cases of both categories per year was arrived at using the methodologies set out in the Bill's impact assessment. There is unavoidable uncertainty in this estimation, since the SAU's referral functions are new and unprecedented. However, Her Majesty's Government remain confident that this represents a reasonable estimate based on the best available evidence.

In terms of recruitment, to establish the SAU, the CMA has estimated that approximately 50 new posts will need to be created across all its professions. The CMA has recently undertaken external recruitment to fill several policy and project management posts in the subsidy advice unit, as well as allocating resource internally. The CMA will continue to recruit to its pools of economist, legal and business adviser resource over the coming months. The CMA is looking to recruit staff with a range of skills and experience, which includes building on its core competition expertise, as well ensuring the necessary skills in areas such as stakeholder engagement.

5.45 pm

I must challenge the apparent assumptions of the noble Lord, Lord Bruce. As I have mentioned, the SAU will sit within the CMA, which is a pan-UK institution and already has offices in the four parts of the UK, with members of staff who have experience of working for each of the devolved Administrations as well as the UK Government. I absolutely agree with noble Lords that it is important for the CMA to recruit expertise that recognises the UK-wide subsidy control regime and will work with them to ensure that this is reflected through implementation.

In addition to all of this, the CMA is already undertaking a range of activities in order to prepare for its new statutory functions, and these will gather further pace as the Bill progresses. This work will include the development of SAU guidance, engagement with public authorities, and the development of an online portal to streamline the referral of subsidies to the SAU by public authorities. I hope that noble Lords have to some extent been reassured on these matters, and I humbly request that Amendment 64 be withdrawn.

Lord Purvis of Tweed (LD): Before the Minister concludes, I listened carefully to her comprehensive reply, for which I thank her. I think I heard her mention an additional 50 posts. The impact assessment indicated an assumed additional headcount of 19. What happened between when the impact assessment was put together and the current commitment was made? Presumably, there is an understanding that the role is much greater than when the impact assessment was put together.

Secondly, given that agriculture and fisheries will be involved, can the Minister assure us that those with a specific understanding of the geographical, agricultural and fisheries market—as opposed to the other sectors, which previously the CMA did not have—have been part of the recruitment process? At the moment there is no indication that they have.

Baroness Bloomfield of Hinton Waldrist (Con): On the noble Lord's first point, it has been a year since the Bill was introduced and therefore things have moved on since the impact assessment was done. On his second point, we are looking for a broad range of expertise that will enable the CMA and the SAU to fulfil their functions.

Lord Fox (LD): Can I ask that in future, all impact assessments be given a time lapse, so we know how many weeks they last for, until such time as they cease to be? Seriously, if one year on the impact assessment for this means that the number of people triples, then it was not necessarily a very accurate impact assessment.

Lord German (LD): I wonder if, in concluding, the Minister could indicate the deadline for when the 50 extra advertised posts have to be filled? She may have to do so in writing, I understand that. Also, what is the difference between those who will be allocated to the traditional work of the CMA—competition, mergers and anti-trust—and those on the subsidy side of this split? They are distinct areas of work and quite distinct skills are needed. At some stage, could the Minister also tell me how many lawyers have been recruited so far, and how many they are short of. That would be very helpful.

Baroness Bloomfield of Hinton Waldrist (Con): I think the noble Lord might have to declare an interest on that front, but we will let that lie. I will have to write to him with the specifics on this. Obviously, recruitment is an ongoing process that will continue throughout the next year.

Lord Wigley (PC): Before the Minister sits down, I have what is meant to be a helpful question. Given that there may be a need for expertise in certain areas in the work of the CMA—expertise it does not have in house—could staff be taken on on a secondment basis to overcome the restriction in subsection (4) referred to earlier? This would provide the expertise for the duration necessary in undertaking specialist areas of investigation. I do not expect an immediate answer, but perhaps the Government might consider it.

Baroness Bloomfield of Hinton Waldrist (Con): The noble Lord makes a very interesting point. It does have operational independence, and I am sure that is something it would be able to consider.

Lord McNicol of West Kilbride (Lab): I thank the Minister for her detailed response. When she, the other Minister or the department reply, could the letter be shared between all those who have spoken in this debate?

[Lord McNicol of West Kilbride]

I have one other question—and I do not expect the Minister to have the answer just now. She talked about a budget of £20.3 million being divided between the SAU, digital and one other body. Could we have the split between the three of them, because they have three distinctive functions, and the one we are concerned about and talking about is the funding of the SAU?

Likewise, I listened in detail but I am not clear whether I missed the point about why Clause 68(4) is so prescriptive and detailed in stating that the SAU will consist

"only of persons who are members of the CMA or its staff".

If it is that prescriptive, it seems to rule out the points made by the noble Lord, Lord Wigley, so maybe it could be opened up a little.

The Minister, in referring to some of the concerns and issues around devolved authorities, said that the department was well aware of them. These amendments are meant to be helpful and to try to create, foster and build a better relationship—as the noble Lord, Lord Bruce, has outlined—especially as we move from European state aid to our own authorities being able to create and deliver subsidies. One hopes that there are some things in not just this small group of amendments but other groups that will help to generate and foster that better relationship between central government and the devolved authorities. With that, I beg leave to withdraw my amendment.

Amendment 64 withdrawn.

Clause 68 agreed.

Clause 69 agreed.

Amendment 65 not moved.

Amendment 66

Moved by ***Lord Purvis of Tweed***

66: After Clause 69, insert the following new Clause—

"Prohibition of references to the Office for Internal Market

(1) The United Kingdom Internal Market Act 2020 is amended as follows.

(2) In section 32 (Office for the Internal Market panel and task groups) after subsection (1) insert—

"(1A) The CMA may not make a reference of a subsidy or subsidy scheme under the Subsidy Control Act 2022 to an Office for the Internal Market task group.""

Member's explanatory statement

This amendment seeks to probe the interaction between this bill and the United Kingdom Internal Market Act 2020.

Lord Purvis of Tweed (LD): My Lords, in moving Amendment 66 I shall speak also to Amendments 72 and 78. In so doing, I thank the Minister for his earlier reply to the brief exchange on the interaction of this Bill with the internal market Act. I wish to probe some of that a little further.

Before I do, I wish to comment, as my noble friend Lord German did, on the letter that I gratefully received from the Minister, which corrected the previous omission of not answering the question in an earlier letter. Of course, one oversight is perfectly acceptable, but the fact that, as the Minister said, the Government are unable to give per capita expenditure on the successor to the structural funds is curious. The Government were very capable of giving per capita expenditure in the spending review period for Scotland on 27 October in their press release, and on 15 December in their press release, but they seem singularly incapable of doing so when it comes to the successor to the structural funds. How are the Government able, on the one hand, to give per capita expenditure from the spending review as a whole, but not when it comes to the structural fund's component of that? If they are unable to do that on the structural fund's component, clearly, they are incapable of extrapolating the overall per capita expenditure. There is something rather fishy about that—fisheries, of course, is now part of this Bill—and we will be pursuing that pun further, for the benefit of the noble Lord.

The serious point is that the Government are not honouring their manifesto commitment. They are not matching EU funds and are trying to hide behind this risible "we will rise to" element of the spending review. As my noble friend said, I look forward to getting the per capita, like-for-like figures for Wales, England, Scotland and Northern Ireland. Until we get them, we will not be satisfied.

On Amendment 66, as was said earlier, the subsidies and schemes are able to be used under the principles of Schedule 1. Principle A allows a subsidy to be used for

"an equity rationale (such as social difficulties or distributional concerns)."

That is wider than simply identified market failure. Principle F goes on further in that

"Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition".

So they can impact on competition, but they should minimise that. As the Minister well remembers, the United Kingdom Internal Market Act reformed or amended the Scotland Act, the Government of Wales Act and that relating to Northern Ireland to define what distortive or harmful subsidies are, so their definition is already in statute. For example, under Sections 52 and 53 of the internal market Act,

"A subsidy is 'distortive or harmful' if it distorts competition between, or otherwise causes harm or injury to, persons supplying goods or services in the course of a business, whether or not those persons are established in the United Kingdom."

The devolved Administrations have no wiggle room when it comes to their statutory obligations under the internal market Act, as regards distorting competition. The wiggle room comes in under the subsidy element to minimise competition. I want to probe which legislation they must follow when setting subsidy schemes—what will be the subsidy control Act or the internal market Act. The definitions are very clear.

The noble Lord, Lord Lamont, and others asked about the distortive elements. They are defined under the internal market Act. These are not somehow separate processes, because that Act defines what subsidies are. The second element is that Part 4 of Schedule 3 to the internal market Act excludes types of regulatory provisions. The Minister was categorical in saying that no subsidy scheme, regulation, statutory or regulatory provision that establishes a scheme under the Bill

would be considered under the internal market Act, but subsidy schemes are not excluded by Part 4 of Schedule 3, which lists the exclusions to the regulatory provisions. The legislation is perfectly clear about what is covered within the internal market Act and defines this in Section 30(8). There is no difference between subsidies or anything else. A regulatory provision

"means a provision … contained in legislation, or … not of a legislative character but made under, and given effect by, legislation."

There is broad scope as far as that is concerned. It would be helpful to have a much clearer understanding of why the Government believe that a subsidy scheme is not a regulatory provision, statutory or otherwise.

Indeed, the Act goes further with regard to what is considered non-discrimination and what would be directly or indirectly discriminating for goods or services. The Minister knows that we debated this thoroughly on the internal market Act, which says that a statutory provision for goods

"is within the scope of … non-discrimination … if it relates to any … of the following … the circumstances or manner in which goods are sold (such as where, when, by whom, to whom, or the price or other terms on which they may be sold)".

As we know and have discussed on previous groups, subsidies can have a relationship with the price of goods and services, and that is permitted under the subsidy Bill but absolutely prohibited under the internal market Act.

6 pm

Another element that relates to non-discrimination is

"the transportation, storage, handling or display of goods".

A subsidy scheme can support the transportation, storage or handling of goods, but that would be prohibited under the internal market Act because it would not satisfy the non-discrimination principles.

When it comes to services, Section 21(2)(b) of that Act says:

"A regulatory requirement indirectly discriminates against an incoming service provider if … it puts the incoming service provider at"

a relative disadvantage. By definition, a relative disadvantage is one of the elements of a subsidy, and that will presumably be an area in which one can challenge. If you are a service provider wishing to provide services to a public body, and that public body is subsidising certain service providers, which is permitted under a subsidy scheme, that will be providing a relative disadvantage to another. As I see it—I am happy for the Minister to correct me—there is no carve-out in the internal market Act to say that a subsidy scheme would not be considered within that.

I suspect there would be quite a degree of confusion as to whether it is the Subsidy Control Bill or the internal market Act where these provisions are being put forward. I suspect that, if you are a public body and wish to circumvent the internal market Act, you would use principle A in Schedule 1 to define a social difficulty and principle F to say that you are

"minimising … negative effects on competition"

but recognise that there will be such effects. I am interested as to the interaction between the two.

My amendments suggest that either the internal market Act or the subsidy Bill should apply. Ultimately, it seems that we will be operating two markets. There will be one market in the internal market Act for competition, for non-discrimination on market failure, for distortion and for geographic delineation, and there will be a separate market for the subsidy regime. I do not know how they interact—I am looking forward to the Minister telling me. One body may say that we are putting forward a measure that will distort competition and that it will be challenged under the office for the internal market, then we would say to that public body, "No, we recognise that, but it is for a social aim and we are minimising it, so we have a defence under the subsidy Bill". I do not know how the office for the internal market or the CMA will judge that.

Secondly, I do not know how the CMA will publish its reports under its duty to consider the impact on the operation of the internal market. This refers to Amendment 72, which is the requirement that the bodies should work in an even-handed manner. I think there was an agreement that, when it comes to the CMA operating and reporting on the effective operation of the internal market of the United Kingdom, it should

"in carrying out its functions … have regard to the need to act even-handedly as respects relevant national authorities".

That is the statutory requirement in Section 31(4) of the internal market Act. There is no equivalent in this Bill for how, when the CMA will report overall on the competition, it would

"act even-handedly as respects relevant national authorities".

I believe it should, and therefore I would be grateful if the Minister could explain why he disagrees. I beg to move.

Lord Wigley (PC): My Lords, I shall speak to Amendment 72, which I think is linked with this amendment. It refers to the responsibility of the CMA to act in an even-handed manner when carrying out its functions, particularly with regard to the Scottish Ministers, the Welsh Ministers and a Northern Ireland department.

I ask the Minister how on earth one can reject the requirement to act on an even-handed basis. It seems common sense that any action by the CMA would have to be on an even-handed basis. If that is the case, what is the problem with including these words in the Bill? If the argument is that the CMA may not sometimes act on an even-handed basis, that needs further exploration, which perhaps we can come to at a later stage; but if the Government are rejecting Amendment 72, I would like the Minister to clarify on what possible basis they can do so.

Baroness Blake of Leeds (Lab): My Lords, I am grateful to the noble Lord, Lord Purvis, for tabling these amendments. At Second Reading and over the past three and a half days of Committee, we have repeatedly come back to how the new subsidy regime interacts with the broader provisions contained in the United Kingdom Internal Market Act.

As we know, the Government have clearly classified subsidy control as a reserved matter, but there a number of sectors where local or devolved interests may conflict with the wider interests of the internal market Act. The Government repeatedly come back to the notion that the new regime should facilitate the smooth functioning

[Baroness Blake of Leeds]
of the internal market. However, if we return to Monday's discussions about Northern Ireland's unique position and the inclusion of agriculture, we have to accept that those issues have raised more questions than answers when it comes to how the new regime will balance competing interests.

It is fair to say that some of the responses that we have had thus far have not been entirely convincing, and some of the answers given by the Minister seem to have highlighted the complexity of the issues that we are discussing and, therefore, the need to raise the matters in these amendments.

The wording "even-handedly", as raised in Amendment 72 and used in other legislation, is particularly interesting. What is the Minister's personal interpretation of that? How will it be administered and who will make the judgments, if it is deemed that unfairness is built into some of the decisions that are made?

We are repeatedly told when debating this Bill as well as when discussing whole rafts of government policy in other areas that there is a commitment to devolution and that is the most important thing—but, in the same breath, the Government say that subsidies must not undermine the internal market. How can both those statements be true?

Lord Fox (LD): My Lords, this is an interesting debate. I originally set out, as Committee stages are wont to do, to tease out some minor details and things from this legislation, but it is clear that there is a major philosophical point that needs to be established before the minor details can be filled in.

Perhaps the Minister can cast himself back to when he was at school. I am sure that he popped into the odd mathematics lesson. He may well have come across a thing called a Venn diagram. For those who missed that particular week, a Venn diagram is made up of a number of circles. The degree to which they intersect indicates the amount of common area that they have—and perhaps the Minister is beginning to understand the direction of travel.

The issue here is that the Minister is asserting that, when it comes to subsidies, essentially, the internal market Act and this Subsidy Control Bill are discrete circles—that is circles that barely intersect or do not do so at all. We have ministerial assertion, and then we have the words as written in Bills and Acts. My noble friend Lord Purvis carefully and usefully filleted the words from the internal market Act, which seem to indicate that there is a large element of common ground with respect to subsidies between these two circles—these two pieces of legislation. Therefore, it is not possible to unpick the words and aims of the internal market Act when talking about subsidies.

My noble friend set out some of the potential contradictions. I will be simpler, because I am a simpler person. Reading those two pieces of legislation, and looking at words rather than hearing the Minister's assertions, it seems to me that the Scottish Government could design a subsidies scheme. The CMA and the SAU within it, using this Subsidy Control Bill as their guide, as my noble friend set out, would indicate that this scheme is allowable and that market distortions are only minimal, as the Bill allows. The scheme could therefore be launched. However, the OIM—the Office for the Internal Market—would then analyse that subsidies scheme and detect that there are indeed distortions, albeit minimal ones, in that market. This information would be passed to the Secretary of State, who could, quite properly, then withdraw that scheme or cause it to be withdrawn; that is what the words in that Act and this Bill say. So I am interested to understand from the Minister why this might not be the case.

A separate and slightly smaller issue is that, within the CMA, we have the OIM and the SAU. Will these two organisations be operated discretely? Will there be Chinese walls between them in that they will operate under different Acts? Will they operate off the same data, or will they have to get their data separately? Indeed, coming back to the question asked by the noble Lord, Lord German, will they share the same lawyers when push comes to shove?

We seem to have here two things that the Minister is trying to push apart but which the words bring closely together. The purpose of these amendments is to understand how the Minister can assert that these two worlds are separate when the words indicate quite the opposite.

Lord Callanan (Con): First, I thank the noble Lords, Lord Purvis and Lord Fox, for their amendments. They seek to probe the interactions between the OIM and the Bill, as well as the functions of the CMA more generally; I will take them together. Seeing as we were all involved in the debate on the then internal market Bill, I am getting flashes of déjà vu with all the different acronyms, such as the OIM and the SAU. Perhaps it is a Venn diagram, as the noble Lord, Lord Fox, indicated, but I will set out the position and, hopefully, resolve it.

6.15 pm

Before I do that, I will briefly address the question asked by the noble Lord, Lord Purvis, on the UK shared prosperity fund, a matter which we return to regularly. Let me clarify the points that the noble Lord was raising. I am unable to give per capita figures for the fund at the moment, but the Government will publish further details on it in due course. However, as I explained in the letter, which I know the noble Lord received only recently, there is no overall shortfall in funds while the UK shared prosperity fund ramps up to its full amount. The UKSPF is not yet at its full amount because it is tapering up as EU funds in the UK taper down and, of course, those EU funds are funds that the UK has already contributed to. I am getting flashbacks to my DExEU days and the debate that we had on the EU withdrawal Acts at the same time.

Amendments 66 and 78 relate to the United Kingdom Internal Market Act 2020, under which the CMA may authorise an Office for the Internal Market task group to carry out the relevant functions under the 2020 Act on the CMA's behalf. Amendment 66 seeks to exclude any subsidies or schemes which fall under the terms of this Bill from referral to an OIM task group. To address the fundamental concerns of the noble Lords, Lord Purvis and Lord Fox, mention of subsidies in the

UK Internal Market Act sets out the areas of regulation that are reserved to the UK Parliament. The Act does not prohibit the giving of subsidies but prevents devolved Administrations from regulating the giving of subsidies, as that matter is now reserved to this Parliament.

A subsidy is, by definition, potentially or actively distortive. We are therefore seeking to regulate the giving of subsidies through this legislation. I must stress to noble Lords that the Government take the integrity and effective operation of the UK internal markets most seriously, and the terms of the Bill that we have been considering over the last sessions reflect this. It is important to note, therefore, that principle F in Schedule 1 requires subsidies to be designed to minimise distortion to UK competition and investment. This was an important priority for respondents to the subsidy control consultation which we carried out in 2021. The schedule also includes principle G, which is a general requirement to ensure that the beneficial effects outweigh the negative effects, including on competition and investment within the UK.

Under the UKIM Act, the CMA has the power to provide non-binding advice and reporting, at the request of the relevant national authorities, on the economic impacts of regulatory provisions where these are in scope of the mutual recognition and non-discrimination market access principles set out in that Act. The CMA is also required to report on the effective operation of the UK internal market at regular intervals. As I said earlier, this is a distinct legislative framework with a different purpose and policy objective to the subsidy control regime that is set out in this Bill. In terms of governance, the CMA may exercise its functions under the UKIM Act through the OIM panel, for instance with task groups of the OIM panel constituted by the OIM panel chair.

The OIM panel chair will not have the power, under the relevant provisions of the UKIM Act, to establish a task group of the OIM panel for purposes other than the exercise of the CMA's internal market advice and reporting functions under Sections 33 to 36 of the UKIM Act. An OIM task group can only be constituted to carry out the functions of the CMA under the UKIM Act and can therefore not be constituted to carry out the CMA functions under this Subsidy Control Bill.

It is right to say that there may be some overlaps, to take account of the famous Venn diagram of the noble Lord, Lord Fox, between the monitoring and reporting functions of the OIM and the functions of the subsidy advice unit, because subsidies and grants can affect the operation of the UK internal market. It is important to emphasise that that overlap exists only for the general functions of the OIM, under Section 33 of the UKIM Act, and not its specific powers under Sections 34 to 36 to advise on certain regulatory provisions that fall within the scope of Part 4 of the UKIM Act.

However, we do not expect that the OIM will routinely look into matters related to subsidy control. The OIM has broad discretion to review matters that it considers relevant to assessing or promoting the effective operation of the UK internal market under Section 33 of the UKIM Act. However, any analysis by the OIM would differ from that undertaken by the SAU in that it would focus on impacts such as intra-UK trade, rather than evaluating a public authority's assessment against the principles and requirements set out in the Subsidy Control Bill.

Lord Purvis of Tweed (LD): I have been following the Minister's line of argument, but I do not think that it comes to the same conclusion. Under UKIM, a provision that is a subsidy scheme is not permitted under the non-discrimination principle, taking into account

"the circumstances or manner in which the goods are sold … by whom, to whom, or the price or other terms on which they may be sold".

It is prohibited under the market access principles on non-discrimination. The Minister is saying that it is permitted under this Bill, because a measure would absolutely affect the price of the goods under the principles in the schedule. I am just wondering why a subsidy is not considered as a provision under the internal market Act, because they are prohibited under the non-discrimination principles.

Lord Callanan (Con): The United Kingdom Internal Market Act applies only to certain regulatory provisions, and a subsidy scheme would not meet the necessary conditions required. This is a complicated legal area, and I suspect that the best way in which to advise the noble Lord would be for me to write to him with appropriate details.

Lord Purvis of Tweed (LD): With respect, we are in Committee on a Bill and we are making law, and simply to say that this is a complex legal area is not correct. We are making law—and it is not convincing to say that these schemes would not be under the Act when there is nothing under the Act that says that they are not. You cannot just assert when we are making law, because we also want to make sure that these provisions are protected from challenge. As to anybody who thinks that this is not going to be open to challenge, because it provides assistance for the certain price of certain goods in one area, it will be challenged under the internal market Act, because it is discriminatory. Unless there is clear legislative protection that this is excluded from these measures, I am afraid that it comes back to the fact that this area is absolutely ripe for legal confusion.

Lord Callanan (Con): The reason why I made that point clear to the noble Lord—and I understand the point that he is making—is to explain to him the legal advice that I have received from the lawyers responsible for this Bill. Clearly, the noble Lord has a different interpretation, but I have set it out in great detail, and the advice that I have received is that UKIM applies only to certain regulatory provision and a subsidy control scheme would not meet those necessary conditions. Clearly, there are differing views, and there are lots of esteemed lawyers in this room; that is the advice that I have received, and I am happy to go away and speak to the lawyers to get the noble Lord more detailed advice, but I can go no further than to give him the advice that we have received on these provisions.

[Lord Callanan]

I turn to Amendment 72. I stress to noble Lords, particularly to address the concerns of the noble Lord, Lord Wigley, that the CMA was chosen as the home of the subsidy advice unit precisely because of both the former's experience protecting UK competition and its credibility with domestic and international stakeholders. The CMA is independent in its function and will carry out its duties as such, with equal regard and even-handedness towards all four Governments of the United Kingdom. Earlier, my noble friend Lady Bloomfield went into more detail on the different territorial offices of the CMA that already exist and on the way it carries out its functions across all the parts of our nation.

While a similarly drafted clause is included in Section 31(4) of the UKIM Act, I question how appropriate it would be to replicate that provision here. The provision in Section 31(4) reflects the unique relationship between the UK Government and the devolved Governments in ensuring the proper functioning of the internal market and their responsibilities for delivering regulatory provisions for each part of the United Kingdom.

However, a great number of public authorities will be responsible for designing subsidies and schemes that are consistent with the subsidy control principles. Of course, the devolved Administrations have an important constitutional status and a unique role in working with the UK Government on ongoing policy development for subsidy control. But subsidy control is a reserved policy and is not an ongoing legislative architecture for co-ordination between the four parts of the UK. I appreciate the devolved Administrations do not agree with that fact, but it was legislated for under the UKIM Act. I therefore request that the noble Lord withdraws his amendment.

Lord Purvis of Tweed (LD): I am grateful to the Minister for his reply, but I am also grateful to my noble friend Lord Fox, the noble Lord, Lord Wigley, and the noble Baroness, Lady Blake, for their contributions on this. I am quite happy that we have explored this further. The Minister took the point—I do not think this is legal pedantry—that when it comes to the reality of when subsidies start to be issued, for those seeking to challenge or those aggrieved, this must be watertight. Therefore, I am grateful to the Minister for offering further discussions on this. I understand that his office has been in touch in seeking to organise a meeting, and I am grateful for that. He fully knows now that he will need to be prepared and bring his lawyer along to that meeting to assuage some of the concerns.

I am not entirely convinced that the requirement to act even-handedly goes, because there will be more bodies to act even-handedly towards. I do not think acting even-handedly is a zero-sum thing, given that an even-handed nature is in the internal market Act but not in how it operates as a whole, because that Act and the subsidy control regime are both reserved issues. It jars that, when it comes to the CMA carrying out its functions, it has to act even-handedly in considering the operation of the internal market, but that requirement is absent when it is considering the distortion of competition.

In the meantime, and in looking forward to the meeting with the Minister to reflect on this further, I beg leave to withdraw Amendment 66.

Amendment 66 withdrawn.

Clause 70: Review of subsidy decisions

Amendment 67

Moved by ***Lord Thomas of Cwmgiedd***

67: Clause 70, page 39, line 33, after "decision" insert "or, where the CMA has made a report on a subsidy or subsidy scheme after a referral under section 53, 57 or 61 in respect of which a subsidy decision has been made, the CMA"

Member's explanatory statement

The purpose of the amendment is to give the CMA standing to exercise enforcement powers through the Competition Appeal Tribunal in respect of decisions on subsidies where it has made a report.

Lord Thomas of Cwmgiedd (CB): My Lords, I rise to deal with an amendment in relation to what I would call the broad powers of making this Act work. Whether we call it regulation or self-regulation, there has to be a system of compliance. We looked at one, disclosure, and earlier we looked at the CMA's role. Now it is the CAT's turn and, before we conclude tonight, we will look at the role of the High Court and the Court of Session on enforcement against the devolved legislatures.

I was going to say something about the Minister's remarks relating to what he sees as the role of the CMA, but the noble Lord, Lord Lamont, has dealt with this. I think it is only fair to the Minister to allow him to come back and explain what he said, in slightly more detail, about the role of the CMA. Obviously, the role of the CMA relates very closely to the role of the CAT.

6.30 pm

This amendment tries to make sure that the CAT is effective. Obviously, the reasons for that are the whole purpose of making this an effective regime: avoiding waste, with funds directed to the right purposes, and with complete compliance. There are so many examples where self-regulation, without it being properly supervised, have been a disaster, that I need not go into them. Of course, there is the regime that we are required to operate under the TCA. It seems to me, that the really good way of making sure that the CAT is effective is to allow the CMA to have standing to bring cases before it.

To appreciate that, it is necessary just to say a few words by way of background. First, as is accepted I think on the face of this Bill, the CMA will have nothing more than advisory powers, although one would hope that its advisory notices would be accorded great respect by those who were giving subsidies or seeking them. It is very important that there are cases that show where the lines are, so it is very important that there are cases that come to the CAT to act as a deterrent against improper, impermissible and wasteful subsidies.

Secondly, there will be the need—and we have touched on this, and so many parts of this Bill interlock—for authoritative interpretations of what the subsidy control principles mean. I could talk about that now, but as I am coming back to that later this evening, I will not, because I can see the pressure of time.

Thirdly, we need to look at enforcement. As the Minister said, there is a legal duty, but public authorities quite often do not comply with their legal duties unless there is strong enforcement. It is quite remarkable how this Government have resisted enforcement in relation to its legal duties, in relation to climate change. Saying that we do not want effective enforcement will, to my mind, drive a coach and horses through this Bill. The mechanism for enforcement here is that parties have to be able to bring private proceedings.

I notice from the impact assessment that it is thought that 23 cases a year would be brought, in a range of 15 to 30. Those are the figures that have been worked through. What I simply do not understand at all is how it is thought that so many cases, or any cases, will be brought. Enough has been said about the cost of lawyers that I do not think I need add to that. Also, there is the rule in all litigation, and this is not different, that if you lose you pay the costs of the other side. As the author of the impact assessment accepts, and it is perfectly obvious, no one is going to take the risk of an adverse costs order, or spend money on his own lawyers, unless there is a real chance of the recovery exceeding what he is going to get and a bit more to take care of the risk. Otherwise, self-enforcement just does not work.

In the Sherman Act and the various anti-trust measures, the Americans provided for triple damages. One knows how effective, as one hears from time to time in newspapers, this is as an incentive to lawyers to make their services available for this kind of action. In the UK, and elsewhere in the world now, we have third-party litigation funding, but that is unsustainable unless the third-party litigation funder sees the prosect of significant recoveries.

What I would like to know from the Minister, when we turn to evaluate the effectiveness of this, is what the estimated amount of the recoveries is in relation to the costs—I appreciate that he may not be able to give me those figures now—and how the amount likely to be recovered is estimated. Will there be damages? Will local authorities that grant subsidies wrongly, which has disadvantaged one public body over another, have to pay damages? What are the amounts of the recovered subsidies likely to be? Unless one does a hard and fast financial calculation, it is in my view illusory to rely on private enforcement.

If we translate this to other industries, we see that private enforcement is quite effective in the copyright industry, where businesses tend to protect themselves and make significant recoveries—but that is a careful business calculation, and what is absent at the moment is any careful business calculation. The really effective way of enforcement is to allow the CMA to go to the CAT and say, "We think there's a problem here. We want to enforce it against someone."

There is a second consideration. Private individuals are not only influenced by money. They may be influenced by political or other considerations so that they do not want to challenge something that is obviously wrong. It must be in the public interest for an independent person—here, the CMA—to be able to challenge such a scheme.

Lord Lamont of Lerwick (Con): Would the noble and learned Lord make it clear that he envisages, through this mechanism—or route, as he describes it—that the CMA would be allowed to challenge the Government?

Lord Thomas of Cwmgiedd (CB): Yes, indeed; that was my third point. The noble Lord has made it most eloquently in one sentence so I need not make it any further.

My last point on this is simply that the time limit is very short. It will be difficult for private litigants to decide that they want to bring a case. The CMA will be well aware and can act within the time limit. For all those reasons, I beg to move that this amendment be inserted into the Bill.

Lord Lamont of Lerwick (Con): My Lords, I have added my name to this amendment, which was so powerfully and eloquently moved. Its purpose is to give the CMA standing to exercise enforcement powers through the CAT.

To some extent, this amendment overlaps with the amendment I moved earlier. I strongly agree with what was said about the limitations of relying on people who are affected by subsidy decisions to challenge them within the tight time limits that we have debated. I have already said, probably at too great length, that there needs to be much more independent enforcement.

I do not want to go over all the points I made earlier but, just in case some of the Committee thought I was overegging or inventing it, I want to refer to what the *Financial Times* said about this Bill. It carried an article on 2 July headed:

"The UK carves a risky new path on state aid."

It went on to acknowledge what the Government have claimed as the great advantage of the new system—that it is speedier and more flexible—but commented:

"On the altar of speed, it"—

the Government—

"has sacrificed scrutiny. This is worrying from a government that has shied away from accountability and spent lavishly on contracts."

It went on:

"The government envisages public bodies largely having a free hand in deciding whether subsidies comply with broad principles."

I mentioned this point earlier: really, the regime seemed to amount to allowing public authorities to do whatever they wanted, and the assumption was that public authorities knew the law and would therefore observe it.

Finally, the *FT* said:

"The combination of a light-touch system and an interventionist government willing to spend lavishly on special projects creates dangers of a distortive spending spree—and of ministers becoming vulnerable to lobbying by vested interests."

[Lord Lamont of Lerwick]
That is one of the problems. I am not in any way questioning the integrity or motives of the Government, but it is so easy for vested interests to have an undue influence on these decisions and it is a slippery road down to the politicisation of subsidies. I very much think that we need to move one way or another, whether it is by the route that the noble and learned Lord, Lord Thomas, so eloquently laid down or the one that I referred to earlier. We need to move to more arm's-length, independent and effective enforcement.

When he spoke in reply to my earlier amendment, the Minister said the Government will not refer themselves to the CMA, as though that were perfectly obvious. It may be perfectly obvious that no one would do that, but in a sense they ought to. There ought to be a mechanism by which a Government are referred to the CMA.

When I first got into the House of Commons, I used to come and listen to debates here. People always gave Latin tags. I am sure that if Lord Boyd-Carpenter or Derek Walker-Smith, Lord Broxbourne, were examining this Bill today, their Latin tag would be "Quis custodiet ipsos custodes?"—who will guard the guards? I am sure everybody knew that already. That is the principle. Who is going to contain and limit the Government?

Lord Fox (LD): My Lords, I rise to speak to Amendment 71 in my name. I thank the noble Lord, Lord Lamont, and the noble and learned Lord, Lord Thomas of Cwmgiedd, for their support. I acknowledge that anything I say is unlikely to carry the weight of those two authoritative Peers, so your Lordships will be pleased to hear that I will be brief.

The noble and learned Lord, Lord Thomas, raised the issue of private enforcement. It is intriguing to me that the Government should choose private enforcement to police something as important as a subsidy regime. They do not use private enforcement to police their income tax regime or all manner of important economic activity, yet they have chosen this route. They have explicitly decided to eliminate the devolved authorities, councils and LEPs from the process of enforcement and have added a 28-day deadline to that private enforcement process, which makes it almost impossible for private individuals to enforce in a timely manner. One would think that enforcement was perhaps not at the forefront of the Government's objectives when looking at the Bill, and nothing so far has convinced me that the Government are interested in enforcing.

At Second Reading, the noble Lord, Lord Lamont, let out the cri de cœur: who will enforce the Bill? The answer is clear: no one. There is an informal system of bringing to book that will ensure that very little enforcement goes on. Yet if we look somewhere else in the CMA, the Digital Markets Unit is pre-emptively calling the big techs in and dealing with issues under its orbit. It is not that the CMA cannot do it; it is that the Government have decided not to let it do it.

Both these amendments—the one in my name and the other—seek to give a role for the Competition Appeal Tribunal to pre-emptively deal with transgressions. What are the Government frightened of in this? I do not think that the Minister has so far articulated a valid reason as to what is wrong with enforcing the Bill. If the Government think it is important to have the Bill, why not enforce it?

I used one example: the CMA's own digital markets unit. It is clear that regulators all over are acting pre-emptively. Look at the Pensions Regulator. It can proactively go in and do things, so it is not as if we do not do it in this country. Generally, the regulator can act pre-emptively, except in this case. It is not clear to me what is behind the Government's decision to do that. My key objective for Amendment 71 is for the Minister to very clearly articulate to the Committee why this subsidy regime should not be policed.

6.45 pm

Lord Hope of Craighead (CB): My Lords, one problem that legislators always face is the inability to look with complete clarity into the future. Trying to predict with any degree of accuracy how this system will work is almost impossible. The advantage of the proposal that my noble and learned friend Lord Thomas is advancing is that if cases go to the CAT, gradually there will be a build-up of decisions that will begin to add extra guidance that we cannot provide in the legislation. This is the way the law works in many fields.

It is that aspect that appeals to me. Gradually, through a series of decisions in various situations, the CAT will be able to add an extra dimension to the way in which this system has tended to work. There is a value in this. I think the word "enforcement" is perhaps rather pointing in the wrong direction. It is more like building up decisions, a category or a case law that would act as guidance for further cases, so that one does not constantly have exactly the same problem being advanced. We would be able to say that there is a decision by the CAT that tells us the answer in that particular situation. Decisions of that kind can be helpful, and I hope very much that the Minister will see value in what my noble and learned friend Lord Thomas is proposing.

Lord McNicol of West Kilbride (Lab): We welcome the tabling of these two amendments, which move us on from the composition and core investigatory powers of the CMA towards enforcement or, to use the word of the noble and learned Lord, Lord Hope, "guidance" of subsidy decisions, via the Competition Appeal Tribunal. The two amendments in this group aim to achieve similar things but by different means.

In relation to Amendment 67 from the noble and learned Lord, Lord Thomas of Cwmgiedd, the CMA would have the option to refer matters to the CAT. That is a sensible proposition, and we are more than happy to support it. It seems counterintuitive to have a body tasked with investigating or looking at whether due process was followed when the subsidy was awarded, only for a separate person or entity to be left to initiate enforcement proceedings. Even if an interested party were to use the SAU's output as a basis for referring the matter to the CAT, how much weight does the Minister think such a report would carry? As an entirely separate entity, would it be reasonable for the CAT to disregard or override any of the SAU's findings?

Amendment 71 from the noble Lord, Lord Fox, takes a slightly different approach. It gives the CAT the powers to pre-emptively investigate subsidies if it

believes that an award is not consistent with the principles of the Bill. I am more than happy to support this amendment. Whichever approach is taken, it is clear that all involved need greater clarity on how disputes will play out. I will not repeat the points made by the noble Lord, Lord Lamont, but independent enforcement will bring clearer and better oversight to the Bill.

Lord Callanan (Con): I thank the noble and learned Lord, Lord Thomas, and my noble friend Lord Lamont for tabling Amendment 67. I also thank them and the noble Lord, Lord Fox, for Amendment 71. Before addressing the two amendments in turn, I will offer some context. We have discussed at length the conception of the new domestic control regime as envisaged by the Government. We have heard criticism to the effect that the regime is, in the view of the protagonists, lacking in robust enforcement.

Of course, international comparisons are somewhat beside the point for our UK-specific approach. It is worth while bearing in mind, though, that the mere fact of establishing a coherent regime for the purposes of subsidy control would place the UK somewhere near the top of the list of the most comprehensive subsidy control regimes. Outside the European Union, no other international partner or competitor will enjoy such a comprehensive and transparent approach to the regulation of subsidies.

Lord Lamont of Lerwick (Con): Is the reason for that not that the EU insisted on it, and that is why the Bill is being brought forward—not to be effective but to strike agreement with the EU?

Lord Callanan (Con): This legislation was predicated in the TCA, as my noble friend points out. We are of course meeting our obligations. One of the purposes of this legislation is to meet our international obligations, not just under the TCA but with other trade agreements that we might strike as well.

In our view, an interventionist regulatory role is not necessary for the effective scrutiny of subsidies and would be detrimental to the smooth development and deployment of subsidies where they are needed. I have confidence that public authorities will take their statutory obligations under this regime very seriously and, in fulfilling those obligations, public authorities will be supported by comprehensive guidance. As a result, I do not anticipate that breaches will be by any means a common occurrence. My noble friend referred to the EU state aid regime, which is a different system, but it is revealing of public authorities' attitudes to their obligations that since 1999, the European Commission has ordered UK public authorities to recover aid on only four occasions.

Lord McNicol of West Kilbride (Lab): That is because those systems are fundamentally different. The EU state aid system was a pre-authorisation, not a post-investigation or oversight. It is not comparing apples with apples, because of how the systems operate.

Lord Callanan (Con): I said that it was a different regime but was pointing out the number of times that subsidy has been recovered since 1999. My point is that it is not a frequent occurrence. I totally accept that it is a different system and that they are different regimes, but it served as an example of the behaviour of UK public authorities.

In the event of such breaches occurring, a private person asking the court to review the legality of a public authority's action is a well-established route for ensuring that those authorities do not exceed their powers or act irrationally, and for preserving the rights of the individual against the state. Indeed, it is the normal way for challenging the actions of public authorities, and that is why we have broadly replicated the judicial review process in this Bill, with some subsidy-specific adjustments and additions. I know that noble Lords sitting at the back will be much more familiar with that regime than I am.

Today and in other Committee sessions, your Lordships have asked, in the absence of an enforcer—I will not attempt to repeat my noble friend Lord Lamont's Latin experience—who will challenge subsidies and how a potential interested party will know about a subsidy that may affect their interests.

The subsidy control requirements are not a regulatory abstraction; they are there to prevent unnecessary distortions of competition. Where a public authority has failed to assess a subsidy against the principles, there is likely to be harm. Anyone whose interests may be affected by the subsidy, be they individuals, businesses or other public authorities, including the devolved Administrations, they have standing to challenge it. The people best placed to decide whether to bring a challenge are those who are actually operating in the relevant sector and area.

Transparency declarations will provide enough information for people to assess whether their interests may be affected by a subsidy. I once again underline that every subsidy or scheme that is in scope of the main subsidy control requirements and that may be challenged in the Competition Appeal Tribunal is also subject to the subsidy control transparency requirements, with the exception of certain SPEI subsidies, as we debated the other day. For those subsidies that present a greater risk to the market, or where the public authority is less sure of its assessment, the CMA reports will provide further information still.

On the point made by the noble and learned Lord, Lord Thomas, about the costs of pursuing a challenge, in practice an interested party is likely to take legal advice before deciding to ask for a review of a subsidy, and of course that will incur costs. However, as with other kinds of legal proceedings, the CAT can award costs to whichever party is successful. The pre-action information request process will be an important opportunity for a potential interested party to find out more about a subsidy and make a decision about whether to proceed with a challenge, and then to make a decision informed by the likelihood of success, most likely following advice.

I turn to Amendment 67 from the noble and learned Lord, Lord Thomas, and the noble Lord, Lord Lamont, and I return to some of the arguments that I made in respect of the grouping we finished at the beginning of this afternoon's session. The subsidy advice unit is an advisory body; it is intended to advise public authorities on the most potentially distortive subsidies and, by

[Lord Callanan]
doing so, to provide a measure of additional scrutiny and transparency to the benefit of interested parties and, ultimately, the public at large. Ultimately, the SAU will shine a light on the underlying assumptions that have led to the development of a subsidy or scheme. It is for the public authority to exercise its own judgment with respect to that information. I have confidence that public authorities will take their responsibilities under this regime seriously and, where the CMA has issued a report, the public authority will give appropriate weight to the CMA's conclusions.

In response to the question from the noble Lord, Lord McNicol, about the purpose of SAU reports, they will provide a public indication of the quality of a public authority's assessment. It is in a public authority's best interests to demonstrate that they have properly considered the potential distortive impacts of a proposed subsidy or scheme, and that offering such a measure is justified and proportionate to the policy problem that they are trying to address. Should a public authority fail to take proper account of the CMA's conclusions, the report means there will be a significant amount of information about the subsidy in the public domain, beyond what would already have been required by the transparency database. Interested parties will therefore be all the more able to assess whether the subsidy may affect their interests, and of course to mount a challenge if they so wish. There may be a difference of opinion on this, but I am afraid that I just do not agree that there should be a role for the CMA in this.

In response to the Latin question of the noble Lord, Lord Lamont, about who will guard the guards themselves, I repeat that, assisted by guidance, which will help public authorities to understand their obligation—I have cited the example of a number of repayments previously—I think we can expect a high level of compliance with the regime. As the noble and learned Lord, Lord Hope, observed, the Competition Appeal Tribunal will build up a body of case law which will then be an important additional source of guidance for public authorities.

As I said to the Committee on Monday, of course I hope that no UK government subsidies would require referral, but Ministers intend to be open-minded to calling in a UK government subsidy for SAU scrutiny where that is requested by another public authority or considered desirable for other reasons. Furthermore, where necessary, the Secretary of State has the ability to refer subsidies to the Competition Appeal Tribunal. However, I would be surprised and disappointed if he or she had to challenge a subsidy made by a UK government department, but he or she could certainly do so if they felt that a subsidy risked competition and investment within the UK or compliance with the UK's international obligations.

I turn now to Amendment 71, tabled by the noble Lords, Lord Fox and Lord Lamont, and the noble and learned Lord, Lord Thomas. This would have the Competition Appeal Tribunal refer specific subsidies to itself for decision. I would submit that that is highly unusual and would potentially compromise the CAT's neutrality. Of course, there are practical objections to this amendment as well. As with all courts, the tribunal's expertise, resourcing and premises are equipped for hearing cases, not for gumshoe investigatory work. I do not think that the noble Lords are really suggesting that this should be the case.

7 pm

Both amendments pose the question of whether the judicial review model of enforcement is adequate, which I suspect is a bigger question than the one that we are considering now. As I explained a few moments ago, this Bill already positions the UK's subsidy control regime as perhaps one of the most robust in the world outside the EU, and the enforcement model in this Bill is more than adequate for it. I hope that I have been able to reassure noble Lords on that point.

Of course, I am therefore unable to accept amendments that go so completely against the grain of this regime. I suspect that I have not convinced noble Lords, but I have done my best, and therefore hope that they feel able not to press their amendments.

Lord Thomas of Cwmgiedd (CB): I have one question for the Minister on the hard economics of recovery of damages. Will there be recovery of damages against authorities that give subsidies wrongly? Secondly, has any estimate been made about the likely recoveries?

Lord Callanan (Con): Yes, of course, they would be able to recover damages if a party had suffered a loss. I do not think that we have any estimates of likely figures at this stage but, if we have them, I shall certainly share them with the noble and learned Lord.

Lord Thomas of Cwmgiedd (CB): My Lords, I thank all noble Lords who has taken part in this debate. If we are embarking on a new regime, we must make certain that it is effective—not because of whatever the EU says but for the good of our own nation and economy. Without an effective regime, this will not work.

We have taken different approaches—and I am extremely grateful to all who supported this amendment. The noble Lord, Lord Lamont, took the point of principle: who is going to look after those who make the decisions, particularly the Government? Who is going to refer them? Litigating against a Government, who have a bottomless pit, is very difficult—and, of course, there are political considerations against doing so.

The noble Lord, Lord Fox, asked what sort of regime this was, and whether there was a regulator. Whatever the Minister might say, the CMA is a kind of regulator in the market—unless the Minister is to say that there is no regulation at all. But this is law, so someone must have to enforce it.

Then there is the problem that I have referred to, of hard economic reality. Is it realistic to accept private enforcements? The benefits have been shown by the noble and learned Lord, Lord Hope: that we really need a body of case law to strengthen the regime, and the importance of that will become apparent later.

For all those reasons, I am afraid that I am one of those whom the Minister has not managed to persuade, but I do not think that he thought he had. But I beg leave to withdraw the amendment.

Amendment 67 withdrawn.

Amendment 68 not moved.

Amendment 69

Moved by ***Lord Thomas of Cwmgiedd***

69: Clause 70, page 40, line 16, at end insert ", the Scottish Ministers, the Welsh Ministers or a Northern Ireland department"

Member's explanatory statement

The purpose of this amendment is to remove any doubts about the position of the devolved governments being interested parties.

Lord Thomas of Cwmgiedd (CB): I am going to be very brief about this. The point emerged in the earlier remarks of the noble Lord, Lord Bruce, and deals with the question of standing. I want to deal only with the technical point. It is obvious that where the Minister, qua his responsibility as the Minister for England, grants a subsidy, the position of the devolved Government should be exactly the same as if the Minister in England were able to challenge a decision of the devolved Government. There should be parity. We have talked a lot about equity, which I shall return to, but it seems that there is no equity.

The short point of this amendment is to try to ensure there is no dispute about standing. Standing sometimes causes very serious difficulties. If, however, the Welsh or Scottish Government felt that the action of the Secretary of State or some authority in England was disadvantaging people or a particular enterprise in Wales or Scotland, they should surely have the standing to bring that to the CAT. If, for the reasons I have already adumbrated, private enforcement is not successful—and the Minister has said nothing to persuade me that it will be—this is even more reason to have more custodians of the public interest looking to ensure that our noble and other Ministers in London actually stick to the principles of the Bill. I beg to move.

Baroness Randerson (LD): My Lords, I will be equally brief. The omission of Ministers of the devolved Governments at this stage of the Bill is stark and astonishing. It immediately begs the question why, because the devolved Governments are specifically mentioned elsewhere in the Bill, although they are not given equality of treatment. Here, they are simply omitted. As indicated by the noble and learned Lord, Lord Thomas of Cwmgiedd, we need clarity here.

We particularly need clarity because there is equality of treatment on issues such as common frameworks. There could well be a conflict between what has been agreed by the UK Government in that context and what is in the Bill. I look forward to the Minister's response.

Lord German (LD): My Lords, I rise to speak to my Amendment 79, which neatly follows the questions of the noble and learned Lord, Lord Thomas of Cwmgiedd, about standing.

On 13 January, the following fanfare was announced from Downing Street:

"Prime Minister to chair new council with devolved governments".

The No. 10 press release described this as a

"Landmark agreement on how UK government and devolved governments will continue to work together",

and how an agreement on this "has been reached". It promised "new ways of working", "Reaffirmed principles" of

"mutual respect, maintaining trust and positive working"

and formalised a "council", led by the Prime Minister, "overseeing strengthened working".

I am going to come to the document that lies behind the press release in a moment. Of the five things the Government say this is going to achieve, they end with the principle about conflict resolution:

"Resolving disputes according to a clear and agreed process".

I am trying to seek consistency in this Bill, which has been severely criticised for the relationships it is trying to and has to build with the devolved Administrations. At the same time, we have another document, setting up more machinery of government, which will look at resolving disputes. I understand that resolution of disputes is in the common frameworks procedure, but there is very little in the Bill about how the devolved Administrations can resolve disputes. I suspect—I am pretty certain—that there will be a lot of criticism over the coming months and years from the devolved Administrations.

In the document which lies behind the Prime Minister's announcement, about the review of intergovernmental relations, there is a two-page section in which the first paragraph states:

"No Secretariat"—

it is an independent secretariat managing the council—

"or government"—

and that is all Governments in the United Kingdom—

"can reject the decision of a government"—

again, that is any Government—

"to raise a dispute."

So this is a dispute mechanism which has clearly been put in place by the Government to provide an opportunity for the Administrations to raise their disputes. I do understand that if it is enshrined in law, if the legislation is there, it makes it trickier, but as the noble and learned Lord, Lord Thomas of Cwmgiedd, asked, what happens when somebody wants or objects to an interpretation, particularly that of the Secretary of State, and this process escalates?

The Bill contains a lot of procedures which could well lead to a dialogue between the devolved Administrations and the Secretary of State. There is also a huge amount of what is called "guidance"—which we shall come to later—and a number of documents are going to emerge which will perhaps put flesh on the bones of some of the things we have been talking about in the Bill.

My question is this: will this arrangement announced by the council and by the Prime Minister, no matter what this Bill comes to and no matter what the processes described in it are, allow, as the intergovernmental relations document states, any Government to bring a dispute before all the other Governments? There are 30 or 40 lines and another page about how that dispute has to be resolved and the use of an independent secretariat.

[Lord German]

If the right relationships as described in the document from the Prime Minister were built into this Bill, I would rather hope that it would minimise the necessity for such a dispute mechanism to arise. My test of this is to ask the Minister the following question. Given the announcement, and given the availability of this procedure, is there anything that he can see apart from the legislation before us that a devolved Administration could not refer to this council? If that is so, there is a strong case for making it easier for the devolved Administrations to engage through the mechanisms of this Bill without having to go through all the processes which would lead to the dispute mechanism outlined by the Prime Minister. I am asking for consistency, and I hope that the Minister can provide it.

Lord Wigley (PC): My Lords, I am delighted to support the amendment put forward by the noble and learned Lord, Lord Thomas of Cwmgiedd, and agree strongly with the points that he made in opening this short debate. The devolved regimes must surely be in a position in which they can be regarded as interested parties. It stands to reason that that must be the case in certain circumstances, and there must be provision within legislation for those certain circumstances to be looked after in the context of this Bill.

I was delighted to have the opportunity to add my name to Amendment 79 put forward by my colleague, the noble Lord, Lord German. I support the points he made in regard to it. The need for some indication to the devolved regimes that they are partners has surely come out of the debates we have had in the last three or four sittings of this Committee. It is time that the Government found some way of indicating that they are prepared to work on a partnership basis. These two amendments pave the way for that, and I hope the Government can respond positively.

Lord Hope of Craighead (CB): My Lords, I put my name to Amendment 69 as well, and I support exactly what my noble and learned friend Lord Thomas of Cwmgiedd said about it.

It is worth noting that the definition of "interested party" has to be read together with Clause 70(1). The point is that to apply to the Competition Appeal Tribunal you have to be two things: an "interested party" and "aggrieved". The definition takes you part of the way there. I am thinking in particular of the Secretary of State, who is an interested party but in order to apply has to demonstrate that in some respect he or she is aggrieved by the making of the subsidy decision.

7.15 pm

I am puzzled by the situation in which the Secretary of State may be aggrieved. I wonder whether the Minister, when he comes to reply, can put a little more colour on this provision so that we understand it. In particular, if it is possible to contemplate that the Secretary of State is indeed aggrieved, it strengthens the case for saying that the devolved Administrations should be included as well, because the chances are that they too could be aggrieved in exactly the same way. Perhaps the Minister can explain how the whole clause is intended to work.

Lord McNicol of West Kilbride (Lab): I have very little to add; it has been covered comprehensively. I was happy and pleased to add my name to Amendment 69.

We have talked a lot about equity and balance, and the final group of amendments probably has even more of the issues raised in it so, rather than repeat everything that has been said, I am more than happy to endorse it. We will then pick up the final issues around engagement and involvement with the devolved authorities and central government in the final group.

Lord Callanan (Con): My Lords, before I speak to the detail of these amendments, this is perhaps a good opportunity to update the Committee on our progress in seeking legislative consent for the Bill, as we promised in our first Committee session on 31 January.

These amendments, and a number of others we have debated, touch on the UK-wide and devolved aspects of the Bill. As we have discussed on numerous occasions, subsidy control is reserved, but there are clauses in the Bill that alter the executive competence of the devolved Administrations. From the very beginning, the UK Government, at both ministerial and official level, have worked closely and extensively with the devolved Administrations in designing the new subsidy control regime. We have worked to secure their support for LCMs for the Bill. I pay tribute to my officials and those in the devolved Administrations for their ongoing efforts in this space.

Our strong preference remains to secure legislative consent, and we will keep all avenues open to achieve this and to remedy the significant concerns of the devolved Administrations. Of course, we also want to ensure the operability of the new regime. Negotiations are still in progress, but I assure noble Lords that I will keep the House updated at the earliest opportunity, without prejudicing the content of those negotiations. I also assure the Committee that, should any amendments be necessary to reflect the outcome of those negotiations, we will table them as soon as possible prior to Report to enable your Lordships' House to consider and scrutinise them with sufficient time.

Lord Purvis of Tweed (LD): I am grateful for that "no progress" update from the Minister. With regard to the current situation in Northern Ireland, including the suspension of the Assembly and the resignation of the FM/DFM, can the Minister state whether any of this legislation will be implemented in Northern Ireland during this suspension?

Lord Callanan (Con): The legislation is UK-wide so it will apply in Northern Ireland but, clearly, the absence of the Assembly will make it extremely challenging to get the Executive's consent. However, we certainly will continue to engage with officials.

I want to give some context on all the engagement we have done. Since July 2020, BEIS Ministers and officials have had 75 meetings in total with their counterparts in the devolved Administrations. These are not just talking shops, as has been implied, but sessions of meaningful engagement. For example, our engagement has included sharing draft objectives and

building-blocks for the new subsidy control regime; sharing both the Government's consultation and the consultation response ahead of publication; and sharing our illustrative guidance and regulations in advance of publication, as well as continued engagement as this Bill passes through Parliament. This engagement will need to continue as the regime is implemented. In fact, at this very moment, officials are working with their counterparts on a memorandum of understanding that formally sets out a mutually agreed process for engagement on the crucial next phase of policy development and implementation.

Moving back to the detail of the amendments before us, I will start with Amendment 69. Again, I thank the noble and learned Lord, Lord Thomas of Cwmgiedd, for moving the amendment, which is supported by a number of noble Lords. It would give the devolved Administrations the ability to challenge any subsidy in the Competition Appeal Tribunal, whether their interests have been affected or not. As was confirmed at the Dispatch Box in the other place, the devolved Administrations—or, indeed, any other public authority—will generally be able to apply to the CAT to review a subsidy decision where the interests of people in the areas in which they exercise their responsibilities may be affected by that subsidy. This would be a good opportunity to correct what I said on Monday: this is not exactly the same position as the Secretary of State.

The fact that the devolved Administrations are not named in this clause is by no means intended to exclude them or any other party whose interests may genuinely be affected by the granting of a subsidy. Clearly there will be limits, and the interests of the devolved Administration or local authority in a particular subsidy cannot be totally tenuous. However, the broad definition in the Bill gives the CAT maximum discretion so that, whatever the facts of the case might be, it can deem the right people as interested parties.

The reason why the Secretary of State has universal standing to challenge a subsidy, in contrast to the devolved Administrations and local authorities, is that he or she—whoever occupies that office—is responsible for the overall operation of the subsidy control regime and, as I keep saying, for the UK's compliance with our international agreements in this reserved policy area. Neither of those reasons apply to the devolved Administrations or local authorities. It is wrong to suggest, as some noble Lords have suggested previously, that simply because the devolved Administrations exist, the Secretary of State's horizons and duty of care are limited only to England.

It is also worth mentioning that the Government expect that the Secretary of State would use this ability only in exceptional circumstances where, in his or her view, a subsidy threatens the whole integrity of the subsidy control framework or our compliance with international agreements. It would be inappropriate to legislate that the devolved Administrations are an interested party in all cases, implying that the Secretary of State does not carry out his or her role as the responsible Minister for the subsidy control regime for everyone in all parts of the United Kingdom.

I turn now to Amendment 79, tabled by the noble Lords, Lord German and Lord Wigley. I am glad that the noble Lords referred to the recommendations of the *Review of Intergovernmental Relations* through the amendment. The UK Government take these co-operation mechanisms with the devolved Administrations, as set out under this review, very seriously, and we are always open to ways of strengthening these relationships. We are open to using the intergovernmental relations structures to resolve any disputes, in accordance with the IGR principles. That said, this amendment would in effect bypass a number of earlier stages in the dispute resolution process, which has already been agreed between the UK Government and all devolved Administrations. Escalation to the Council is the last resort. As I mentioned on Monday, we are also working closely with the DAs to establish a formal process for raising case-specific concerns with the department once the regime is up and running.

Let me also stress that there is no need to incorporate this provision into the Bill for disputes to be able to come under the IGR structures. Moreover, I do not anticipate that there will be any great need to refer matters of interpretation to those structures. It is important to bear in mind that there is of course a distinction between case-specific dispute, which is a matter of legality, and a public authority's compliance with its legal obligations, for which the proper place to resolve such disputes is ultimately the CAT and a dispute or discussion between Governments on their roles and responsibilities.

There is little scope for that type of confusion over the roles and responsibilities of the UK Government on one hand and the devolved Administrations on the other in this regime. The Secretary of State for Business has responsibility for the overall operation of the regime and the UK's compliance with its international agreements. The UK Government may also create streamlined routes to encourage subsidies that further their strategic priorities. In all other respects, UK government departments and the Secretary of State himself are in the same position as the devolved Administrations. They are public authorities within the scope of the Bill. UK government departments are treated in exactly the same way as any other public authority. All public authorities are similarly subject to the Bill and empowered by it.

As I said earlier, my officials continue to have a regular set of meetings with their DA counterparts on all subsidy control matters; these will continue, along with regular ministerial engagement. Where there is a need for dispute resolution, that dispute will come into the ambit of the agreed intergovernmental relations process.

I recognise the strength of feeling in relation to Amendment 69 in the name of the noble and learned, Lord Thomas, but I simply do not agree that either that amendment or the other would be a necessary or useful addition to the Bill. Therefore, with respect, I urge the noble and learned Lord to withdraw his amendment.

Lord Thomas of Cwmgiedd (CB): I thank all noble Lords who have spoken in this short debate; I do not want to lengthen it with a long reply. I will say only

[Lord Thomas of Cwmgiedd]
one thing. The Minister has not really answered my noble and learned friend Lord Hope's question as to the meaning of "aggrieved". It seems to me that one area in which the devolved Administration may wish to get involved is where a decision is made that does not directly affect their interests but they feel that the decision is wrong in principle and may set a bad precedent. It is that reason—their interest as Governments in upholding the rule of law and the operation of this—that I do not believe was answered by the Minister's statement, but I will read it carefully. In the meantime, I beg leave to withdraw my amendment.

Amendment 69 withdrawn.

Clause 70 agreed.

Clause 71: Time limits for applications under section 70

Amendment 70

Tabled by ***Lord McNicol of West Kilbride***

70: Clause 71, page 40, line 37, leave out "one month" and insert "three months"

Member's explanatory statement

This amendment would extend the time limit for applications to the tribunal under Clause 70 from one month to three.

Baroness Blake of Leeds (Lab): My Lords, I rise to move Amendment 70 in the name of my noble friend Lord McNicol. I am sure that we can be brief on this matter and that, given the complexity of the other amendments we have been discussing, it is one that the Minister will be able to consider with a good outcome.

We are looking to extend the time limit for applications to the tribunal under Clause 70 from one month to three months. Of course, we have touched on this area several times through our many discussions over the last three sessions and, indeed, today. There is a real concern that the Bill does not provide enough oversight for the new subsidy regime; we have heard different elements of this through the amendments that have been put forward. As noble Lords have observed, there is a significant disparity between the time given to authorities to publicly disclose their subsidy decisions and that given to interested parties to refer matters to the Competition Appeal Tribunal. Only interested parties and the Secretary of State can legally challenge subsidies, and must do within one month of the new subsidy being published. Our contention is that this is unreasonable.

7.30 pm

Amendment 70 seeks to extend the current one-month period to three months. This would still remain a modest time period given that, as things stand, there will be either six or 12 months for subsidies to be uploaded on to the database. It is quite possible that different interested parties and enterprises might have entirely valid complaints that would be upheld by the CAT but, for any number of reasons, they might be unable to refer the matter to the CAT within the one-month time limit.

I hope that this amendment will be agreed to but, if the Government are unwilling to extend the current arrangements, can the Minister at least commit to allowing referrals outside that window in certain cases? I beg to move.

Viscount Chandos (Lab): My Lords, I will speak briefly in support of the amendment in the name of my noble friend Lord McNicol, spoken by my noble friend Lady Blake. It is one of the most important amendments that the Committee has considered. In my speech at Second Reading, I made the point that the combination of transparency and comprehensiveness of the data that is provided and the time period allowed to interested parties to appeal it lies at the core of the effectiveness of any new regime. As my noble friend Lady Blake pointed out, there is asymmetry between the length of time given to public authorities to put data into the public domain and the very short time period proposed for interested parties to appeal it. Can the Minister name any instance where the Government are subject to a one-month deadline for a significant decision that they have to make?

I do not even think that the one-month deadline is particularly helpful in reducing the workload that may come to the tribunal because, the shorter the deadline, the more an interested party may feel that it has to submit an appeal without having had the time to do the work fully to assess the position. So I urge even more strongly than my noble friend Lady Blake that the Minister considers the case for a change to three months, and I ask him to say, if he is not willing, why he thinks that the one-month deadline is fair and effective.

Baroness Randerson (LD): My Lords, I am pleased to speak in support of this modest amendment. As the noble Baroness said, the issue has been raised before, and one month is a totally unrealistic timescale. To my mind, it indicates a clear governmental preference to reduce scrutiny of decisions on subsidies that are made in general.

It is especially an issue because this also involves agricultural subsidies and agriculture is, in large part, based on small businesses. I shall give you a picture: farmers in Wales are not commonly monitoring the decisions taken by local authorities in, for instance, eastern England, which might cause them to feel aggrieved. It might take them some time to get up to speed on the implications of those decisions. It might surprise some people, sitting in the centre of London, to know that wi-fi in the centre of Wales is not wonderful. Many communities still rely on the postal service and weekly newsletters, for example from the farming unions. There can be lots of reasons why information that would worry small businesses affected by a subsidy decision would take some time to filter through.

In general, I can think of a host of reasons why one might miss this deadline—for example, summer or Christmas holidays provide an interruption of several weeks to ordinary business. I join the noble Viscount in his point that it could simply be counterproductive. People may think that, if in doubt, they should lob in an appeal to the tribunal because, in reality, they would not be able to find all the information required

in the timescale this Bill provides. On a previous group of amendments, the Minister referred to the pre-action information request process. I believe that process will find itself exceptionally heavily used, if the Government do not see that this timescale is far too tight to be practical.

Baroness Altmann (Con): I rise briefly to add my support to the concerns expressed by other noble Lords that a one-month timeframe, especially for smaller companies, is not only challenging but potentially unachievable and could cause significant detriment to our promising smaller companies. They may be harmed by a subsidy, possibly unintentionally, and this could deny them the opportunity to appeal against that which could be harmful to their business. I urge my noble friend to consider the reasonableness of this amendment. If he is not able to accept it now, could he explain to the Committee how, in practice, this one-month timeframe is reasonable and could reasonably be met by those potentially affected?

Lord Berkeley (Lab): I intervene briefly to strongly support my noble friend's amendment and other noble Lords' comments. One solution that the Minister might be tempted to suggest is to allow them to get it in within a month but add more documentation later. That would be easy.

I refer the Committee to the proposed new rule 98A(7) of the Competition Appeal Tribunal Rules:

"The Tribunal may not extend the time limits provided for in this rule unless it is satisfied that the circumstances are exceptional."

Probably none of the things that noble Lords mentioned would be classed as exceptional, which confirms that one month is hopelessly short. I very much support three months or even longer, if anyone has a better idea.

Lord Callanan (Con): My Lords, I thank the noble lord, Lord McNicol for this amendment, and the noble Baroness, Lady Blake, for speaking to it. I also thank the contributions of other noble Lords—and the noble Lords, Lord Fox and Lord Lamont, reflected on this issue during the Monday's session.

An interested party, which is anyone whose interests are affected by the subsidy, may apply to the Competition Appeal Tribunal for a review of the subsidy within one month of the subsidy's upload to the transparency database, if there has been a post-award referral to the CMA within one month of that report, or if a pre-action information request has been made within one month of the response to this request. The limit has been set at one month so that we can give legal certainty to public authorities and subsidy beneficiaries as swiftly as possible. It is important to avoid creating such prolonged uncertainty that it acts as a brake on legitimate subsidies.

We must also ensure that interested parties have sufficient time to consider a subsidy before asking the CAT to review it. That is just what this Bill does. An interested party, perhaps a competitor who is thinking of approaching the CAT to review a subsidy, can make a pre-action information request to a public authority. The limitation period is then extended until one month after the public authority has responded. Since the pre-action information request gives the public authority up to 28 days to respond, in practice, the limitation period can run for two or three months after the publication of the subsidy or scheme on this database.

Lord McNicol of West Kilbride (Lab): If the argument is that we are only giving one month to raise a complaint or to look into this, why are the uploading timeframes six months and/or one year? If the Government want to create legal certainty for the organisation that is giving the subsidy, surely, as the noble Lord, Lord Lamont said on Monday, what is good for the goose is good for the gander. If they want that legal certainly, deliver that within the one month in terms of the upload to the database. Then there is parity and legal certainty.

Lord Callanan (Con): As the noble Lord, Lord McNicol suggested, we explored this point fully last week. There are good reasons for it. If it is a tax subsidy, the full amount might not be clear. It might be variable, based on a number of different reasons, and the fact of giving a subsidy may well be published in other transparency obligations that local authorities or the devolved Administrations already have. However, I understand the noble Lord's point.

In response to the noble Baroness, Lady Blake, Clause 71 also makes it clear that in exceptional circumstances, the tribunal may extend the time limits for bringing a challenge. This amendment would extend the general window for bringing a challenge from one month to three months, which is too long. It is longer than the challenge periods available in other areas where business decisions are dependent on the decisions of public bodies, such as procurement and planning decisions, where the limitation periods are 30 days and six weeks, respectively. In those areas, the harmful effects of prolonged uncertainty have been recognised through the shorter challenge periods available. The same reasoning applies in the subsidy control context. If the general limitation period for challenging subsidy decisions was extended to three months, as this amendment proposes, public authorities and subsidy beneficiaries could in practice have to wait as long as five months before having reasonable legal certainty about a subsidy that they have granted.

There is a risk that this could have a chilling effect, not only on the giving of subsidies but on the timely use of them by beneficiaries. For example, a subsidy could take the form of a loan guarantee for a capital investment, such as buying new machinery. Your Lordships will appreciate that some beneficiaries may be reluctant to go ahead with purchasing that machinery for as long as there is a possibility that the subsidy decision could be quashed and a recovery order made.

The noble Baroness, Lady Blake, and the noble Lord, Lord McNicol, asked how the Government can justify giving public authorities six months to fulfil their transparency obligations but providing interested parties only one month to challenge a subsidy. I recognise the strength of feeling on the length of time on the transparency deadline and how this compares with the limitation period. During Monday's Committee, I set out the reasons why the deadline is set at six months: it allows for better-quality data where subsidies are based

[Lord Callanan]
on an estimate, and it gives public authorities greater ability to upload their subsidies in bulk, and therefore to reduce administrative burden.

7.45 pm

In contrast, the limitation period is set at one month to strike a balance between the opportunity for challenge and providing legal certainty. It is that desire for legal certainty that means it is firmly in a public authority's interests to make a transparency upload as quickly as possible, as of course the limitation period does not start until it does. In practice, the limitation period will rarely be just one month. When someone thinks their interests may be affected by a subsidy and needs more information, they will make a pre-action information request, which prolongs the limitation period for up to two months.

While I continue to believe that the time limits provided for in this clause strike an appropriate balance between offering an opportunity for challenge and providing legal certainty for beneficiaries, I have heard the strong feelings expressed by all parts of the Committee and will have a look at it before Report. I hope the noble Lord, Lord McNicol, will feel able to withdraw his amendment.

Lord Fox (LD): I am interested in this concept of a chilling effect. What evidence is there for that, and what consultation has there been? There may or may not be a chilling effect. It seems like more of an idea than a practical reality. I have a suggestion that might help. The Bill could start out with a longer reporting time—perhaps 60 days, or something along those lines—and the evidence, or otherwise, of a chilling effect could be gathered. If necessary, and if the reality of a chilling effect actually emerges, the Government could come back and reduce that period by statutory instrument.

Lord Callanan (Con): I think that is the first time the Liberal Democrats have proposed giving the Government more secondary legislation powers, but I understand the noble Lord's point. As I said, I have heard the strength of opinion on both sides of the Committee and will reflect further on this matter.

Baroness Blake of Leeds (Lab): I thank the Minister for those final comments, which I think are a measure of the contributions we have heard tonight and the strength of feeling on this issue around the Room. My noble friend Lord Chandos really put his finger on it. He is absolutely right that the unreasonableness of this time limit will lead to people putting in appeals just in case more information comes to light. That is a very real proposition.

The case against the one-month limit has been very well made. I thank the noble Baroness, Lady Randerson, for her insight into rural areas and the aspect of holidays, and the noble Baroness, Lady Altmann, for highlighting the real aspect of it being challenging and unachievable. There are so many elements in this that need to be taken away. I thank noble Lords for listening to the arguments that have been made with this amendment today and over a period of time. With those comments, I beg leave to withdraw the amendment.

Amendment 70 withdrawn.

Clause 71 agreed.

Clauses 72 and 73 agreed.

Amendment 71 not moved.

Clauses 74 to 77 agreed.

Amendment 72 not moved.

Clause 78: Subsidies and schemes in primary legislation

Amendment 73

Moved by ***Lord Callanan***

73: Clause 78, page 45, line 15, leave out from second "of" to end of line 16 and insert "financial assistance provided, or schemes for the provision of financial assistance made, by means of primary legislation.

(2) Nothing in this Act applies to the giving of any such assistance, or to the making of any such schemes, except so far as provided for by that Schedule."

Member's explanatory statement

This amendment clarifies that the subsidy control requirements under the Bill apply in the case of financial assistance provided directly by primary legislation only so far as provided for by Schedule 3 to the Bill.

Lord Thomas of Cwmgiedd (CB): My Lords, I rise to speak to two amendments that have a relationship I shall endeavour to explain as rapidly as possible, bearing in mind the hour. Amendment 73A relates to Schedule 3 and deals with the very extraordinary powers in this Bill, giving the High Court the power to overrule primary legislation of the devolved legislatures. This is a very real problem. I shall speak largely from the point of view of the judiciary and what we are intending to do.

Before I turn to that, I would say that, if we look at agriculture or anything else where there is an attempt by the four Governments of the UK to agree something that deals with the support of subsidies, it is extraordinary that anything that is legislated for in England is exempt, but what is legislated for elsewhere is not. There is a constitutional reason for that, and I know what the Minister will say, but it is not a matter of practical reality or public perception. It is important that we consider this.

The first extraordinary part of this is that power is given not to the Competition Appeal Tribunal but to the High Court or the Court of Session in Scotland. To my mind, it is worrying that you give to a first-instance court the power to overrule a decision and an Act of a democratically elected primary legislature. Normally, these matters would go to the Supreme Court. Secondly, and much more importantly, is it right that we should put our judges in a position to make decisions about what are effectively the principles in the Bill? People may remember something called the Human Rights Act and the very broad powers it is said to give judges to make decisions. That has had a degree of criticism.

Why do we want to do this in a piece of legislation where the phrases are so ill defined? I shall come to that in the second amendment I intend to speak to. We should exercise the greatest degree of care in giving judges the right to overrule the legislature. I am not certain about the extent to which there has been widespread consultation with the judiciary about this, or with others, but this is the first and very significant step.

There is an extraordinary constitutional provision that has to deal with whose rationale is looked at. I do not want to go into the details of that, because that is more a subsidiary point, and I bear in mind the time—but there is an extraordinary constitutional innovation in the clauses in this part of the schedule.

Of course, it might be said of these principles—and I think this is possibly the Minister's line—that all of this is very vague and there are not going to be many challenges, so do not worry. However, I am afraid people have left provisions in legislation on that basis and it has come back to bite them. What would worry me about this is if something enshrined in the decisions of the Scottish, Welsh or Northern Irish Parliaments or Assemblies, is challenged by someone. What about it happening in the field of agriculture? Someone who is importing goods would have the right to initiate this sort of action, with its very serious constitutional consequences, whereby a judge would have to make a decision, quite often, I imagine, in relation to the principles that are so ill defined.

That takes me neatly to my second series of amendments, which deal with the definitions and status of guidance. I will leave the noble Lord, Lord German, to deal with the question of whether the guidance is binding. It seems unarguable to me that it is not binding.

What I am much more interested in—this highlights the difficulties caused by Schedule 3 and the construction of the Bill as a whole—is the Minister's power to give guidance as to the meaning. Ordinarily, it is Parliament that decides what something means and, if it does not, it leaves it to the judges. Sometimes, it is put in secondary legislation. However—this is extraordinary—here we are putting the meaning of the wording into guidance.

There are two fundamental problems with that. First, we have visited the word "equity" on a number of occasions—I might call it a word for all seasons—but, even at this late hour, I feel that I ought to refer to John Selden's famous note about equity. He said:

> "Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience."

I refer to that because it is the essence of the problem with the word "equity". With the utmost respect, I believe that this Committee ought not to shirk its responsibilities in defining what is meant by this and how it applies in certain circumstances. It might be said, "Well, we are constrained by the fact that these are taken directly from the TCA", but is that in fact a constraint—or do we hanker for the way in which these vague principles were left to the judges in Luxembourg? Do we want to give our judges that pleasure as well? I doubt it, but I am not sure that it has been fully thought through.

It therefore seems to me that we ought to look at this very carefully. There is the constitutional principle in relation to the Minister being able to give guidance on meaning; it plainly is not binding but he should not be giving such guidance because that is a matter for the courts or Parliament. Parliament should not shirk its responsibility to define what some of these things mean. We should not leave it to judges—unless, of course, there is a hankering for, as they do in Europe, leaving things to the judiciary in Luxembourg. This time, however, it would be the judiciary in Westminster, Edinburgh or possibly Belfast—but not possibly in Cardiff.

Lord German (LD): My Lords, it is always a pleasure to talk after the noble and learned Lord, Lord Thomas of Cwmgiedd, who manages to enlighten us all with observations that might have passed us by if we had not had the wonder of his words.

In Amendment 74 in my name, which would amend Clause 79, I treat "non-binding" as a sine qua non. The reason I put it in was to allow us to have a discussion and debate about the whole extraordinary clause on guidance. All I seek, of course, is for the Minister to agree that it is non-binding. I am sure that he will do so because all the facts speak for themselves, but there is a high head of steam building up in this Committee about the way in which guidance is being used. I will come back to the spearheading on that and how it has moved on but, basically, this Bill has what we call—Parliament also uses this phrase—"have regard to" guidance. This is a problem because it places an expectation that the guidance will be followed unless there are cogent reasons for not doing so.

Subsections (5) and (6) of Clause 79 give the game away a bit. Clause 79(5) says

> "the Secretary of State must consult such persons as the Secretary of State considers appropriate"

before making the guidance. What is appropriate is not specified. Clause 79(6) says:

> "A public authority must have regard to guidance issued under this section."

"Must" is very important in this respect.

8 pm

When the Minister introduced the Bill at Second Reading, he said:

> "This guidance will support public authorities to ensure that subsidies deliver strong benefits and good value for money for the UK taxpayer, and ensure"—

again we have the use of that word "ensure"—

> "that subsidies are being awarded in a timely and effective way, to give businesses the certainty and confidence that they need."

This sentence is very important:

> "The guidance will also ensure that public authorities fully understand their legal obligations, and make clear which subsidies are permitted and which are prohibited."—[*Official Report*, 19/1/22; col. 1710.]

If the guidance goes to that level of explanation, it is clearly not appropriate to be guidance; it should be something over which this Parliament has its say.

[Lord German]

That is the primary problem we are facing: once we have cleared this Bill, we will have no further say about this guidance in Parliament.

Subsections (5) and (6) are the escape clauses, and use of the word "must" is critical all the way through. That gives a lie to having regard to guidance, placing an expectation that this guidance will have to be followed unless there are cogent reasons not to.

This Parliament should have consultation on all these matters. Perhaps we should share with the Minister the fact that there was a debate on these issues in this House, when Parliament was of the view that the meaning of these words should be explained. In a succession of Bills, the distinction has been blurred between what is true guidance, which helps people to understand, and regulations that lay out the details of the procedures that people are obliged to follow.

The Delegated Powers and Regulatory Reform Committee stated in its most recent report that

"the fact that guidance would be produced after consultation with interested parties cannot be a reason for denying Parliament any scrutiny role".

Earlier in Committee, I asked the Minister whether the guidance would be produced in draft before the Bill's passage through the House is completed. I was given no reassurance on that, so I will repeat the question: will draft guidance be produced in advance of the Bill concluding its passage through this House?

Two other committees of this House, the Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments, have also reported on these matters. The Government's response to the Constitution Committee in January 2019 said:

"The Government agrees that guidance should not generally be used for the purposes of interpreting legislation."

The Joint Committee on Statutory Instruments said:

"A key element of the rule of law is for legislation to be clear. Where legislation has been drafted so as to leave gaps in the law or areas of uncertainty, guidance (and particularly non-statutory guidance) cannot be used to fill those gaps as if it were the law itself."

There is a head of steam building from what committees have said—the Constitution Committee, the DPRRC, the SLSC and the Joint Committee on Statutory Instruments. I am trying to remember all the acronyms. Four committees of this House have said that this is not the way to proceed.

This head of steam is building in this House and a campaign is emerging, spearheaded by Conservative Members. I hope the Minister will not allow this Bill to fall into the "naughty list" category that they are assembling. I look forward to his explanation of the significant use of guidance in the Bill and particularly the recognition that this guidance is expected to be followed.

Lord Wigley (PC): My Lords, I was delighted to hear the speech of the noble and learned Lord, Lord Thomas, who raised matters of considerable importance to which we will undoubtedly have to return on Report. I support the comments made by my friend, the noble Lord, Lord German.

I shall not speak at length. We have been over and over, time after time, the question of the relationships with the devolved institutions, so I ask the Minister this simple question: will the Secretary of State give an assurance that, in every instance where guidance may have an implication for the Welsh, Scottish or Northern Ireland Governments, he will actively consult them prior to issuing the guidance?

Lord Berkeley (Lab): My Lords, I rise to speak briefly to my Amendment 80, which is a probing amendment. It is grouped with this lot of amendments, but it is a different subject, and I will try to be as quick as I can.

It relates to Clause 85, headed "Crown application", which provides that the Act will apply to the Crown, but excluding Her Majesty in her private capacity, Her Majesty in right of the Duchy of Lancaster, and the Duke of Cornwall. I am afraid that this continues the debate about the uncertainty of the role of the Duke of Cornwall and the Duchy. It is one little hobby-horse that I have been pursuing for many years, and I apologise for that. I refer noble Lords who want to get into the detail to the Second Reading of my Private Member's Bill, the Duchy of Cornwall Bill, on 26 October 2018, which seems a long time ago.

Since the Duchy of Cornwall says that it is in the private sector—I am assuming that the Duke and Duchy are synonymous—why should the Duke of Cornwall or the Duchy be given special treatment in this Bill? No other big landowner or property owner is allowed special treatment. I understand why Her Majesty in her private capacity and the Duchy of Lancaster are, but the Duchy of Cornwall says on its website:

"The Duchy of Cornwall is a … private estate … established by Edward III in 1337."

This was confirmed in the second-tier tribunal in 2016, after a Mr Michael Bruton had claimed that the Duchy was in the public sector and therefore needed to do an environmental study on putting Japanese oysters into the Helford river in Cornwall, which it owned. In the First-tier Tribunal, Mr Bruton had won, largely because the Duchy's representative said, "To all intents and purposes, we believe we are above the law", which is quite an interesting statement. Of course, the Duchy then appealed to the next-tier tribunal and, not surprisingly, with all the free legal advice it gets from the Government, it won. The tribunal's decision was:

"The Duchy of Cornwall is not a public authority for the purposes of the Environmental Information Regulations 2004."

Why should the Duchy of Cornwall be treated differently from anyone else—any of us—to whom this Act will apply? If the Minister is not able to answer that question today, perhaps he could write to me. He might want to contact the Duchy itself. I warn him that the last time I raised this, in the leasehold reform Bill debates about three or six months ago, the Minister agreed to write to the Duchy of Cornwall, the Duchy of Lancaster and the Crown Estates about the leasehold reform Bill. We got good responses from the Duchy of Lancaster and the Crown Estates but, as far as I know, no response from the Duchy of Cornwall.

I do not think that right, because the Duchy of Cornwall must have given views on this Bill and I would like to know what it said. Did it send a letter? Did the Minister have correspondence? If so, can he

put it in the Library? If he did not, how was this decision made? I think it very unfair that the Duchy of Cornwall—probably uniquely among big estates in this country, whatever their rights and wrongs—should be given this special treatment, for it means an exemption to the Bill.

Lord McNicol of West Kilbride (Lab): My Lords, I think we have a hard stop in 20 minutes, so I will be very brief. I am grateful to noble Lords who put down amendments in this group, including the Minister; I hope there will be lots more to come from the Minister. My Amendment 75 has been signed by the noble and learned Lord, Lord Hope of Craighead, and the noble Lords, Lord German and Lord Wigley, and I appreciate their support on this, as well as in the debates on many other devolution-focused amendments.

I was going to say, judging by the previous responses on the devolved authority amendments, that I did not think we would hear much change, but actually the Minister's response to the last debate was heartening, so hopefully this amendment regarding the devolved authorities will receive the same response. I will leave it there. As we finish Committee, I note that the comments made in the DPRRC report were very telling, and I look forward to discussions with the Minister and officials between now and Report. I hope that we can address some of the DPRRC's concerns.

Lord Callanan (Con): My Lords, I am pleased to say that we are now on the final group of amendments. I have made it through thanks to the supply of copious quantities of cough lozenges, so I thank Ruth for those.

I first thank the noble Lord, Lord German, for tabling Amendment 74, the noble and learned Lord, Lord Thomas of Cwmgiedd—

Noble Lords: Hear, hear!

Lord Callanan (Con): I have had some expert advice from the Whips here. I thank the noble Lords for Amendments 73A, 74A and 74B, the noble Lord, Lord McNicol, for Amendment 75, and the noble Lord, Lord Berkeley, for his fascinating Amendment 80, which I will come to.

Amendment 73 is my amendment, the government amendment to Clause 78. This is a minor and technical amendment that will provide greater clarity in the Bill as drafted. It clarifies that the provisions in Schedule 3 to the Bill are to apply to subsidies in devolved primary legislation and primary legislation made by this Parliament. This is because the word "subsidy" is defined as something given by a public authority excluding a legislature. Nothing else is added into scope by this amendment; it simply makes absolutely clear how the provisions in Schedule 3 apply, for the avoidance of any doubt.

Secondly, the amendment makes it clear that it is only the provisions in Schedule 3 that apply to primary legislation made by this Parliament and devolved legislation, and not other provisions of the Bill. Again, this does not make any amendments to the substance of the Bill but just provides clarification.

Amendment 73A was tabled by the noble and learned Lord, Lord Thomas of Cwmgiedd, who wishes to probe the purposes of Schedule 3 with regard to the devolved Administrations. Clause 78 applies the provisions in the Bill to subsidies made by means of primary legislation, as set out in Schedule 3. Because of the specific nature of these subsidies, the obligations on those responsible for them need to be set out separately. To respond to the concerns of the noble and learned Lord, I will set out my belief that Schedule 3 as a whole ensures that the subsidy control regime will be comprehensive and robust, while at the same time taking into account the UK's fairly unique constitutional make-up.

8.15 pm

This also implements the provisions of the TCA, which itself recognises the sovereignty of Parliament but requires us to apply the subsidy control principles to devolved legislation. We would not be compliant with our international requirements if we introduced further exemptions for subsidies in devolved primary legislation. The schedule applies to subsidy control principles, prohibitions and other requirements and exemptions made under this Bill to subsidies granted or subsidy schemes made by means of devolved primary legislation. The schedule also deals with referrals to the subsidy advice unit for both devolved and Westminster primary legislation. Notably, the provision does not include any provision for mandatory referrals. This is because of the unique legislative provision and the procedure for these subsidies. This means that there will be procedural delays or disruption to the progress of primary legislation.

Finally, the schedule makes provision for a review in the courts where a challenge is brought, as the noble and learned Lord, Lord Thomas, set out, considering that the lawfulness of provisions in devolved primary legislation is a sensitive task. Given their expertise in sensitive tasks, the appropriate courts to review such subsidies would be the Court of Session in Scotland, the High Court in England and Wales, and the High Court in Northern Ireland.

Turning to Amendment 74, tabled by the noble Lord, Lord German, Clause 79 gives the Secretary of State the power to issue and update guidance on the practical application of provisions in the Bill. This will support public authorities and businesses to understand the key elements of the new subsidy control regime. As I have already set out, the Government have published a portion of illustrative guidance to give an indication of our intentions here, and to invite feedback from your Lordships and other interested parties. This amendment would specify that the guidance issued under Clause 79 was non-binding in nature. This probing amendment raises some interesting questions around the degree to which guidance is legally binding.

Clause 79 places a duty on public authorities to have regard to the guidance when designing a subsidy scheme or giving an individual subsidy. This gives the guidance more prominence and what we consider to be the appropriate role in this regime. While statutory guidance is quite rightly not the law, public authorities are none the less used to having regard to such statutory guidance to help them understand and implement

[Lord Callanan]
legal requirements. Guidance cannot change the law that it is anchored to and expands upon but, in setting out what public authorities should do to comply with the law, it has an important role in explaining the legislation.

As Clause 79 states, public authorities should have regard to the guidance so far as it is applicable. In that sense, it is clear that the guidance is not binding and that public authorities may depart from it, but only where it is not applicable. However, where they do so, they must have good reason, and their reasoning may be challenged and may need to stand up to scrutiny through the courts.

In response to the question asked by the noble Lord, Lord German, on whether draft guidance will be available during the parliamentary passage of the Bill, I highlight again that the Government have provided illustrative guidance during parliamentary passage. The final guidance will be made available sufficiently in advance of the new regime's commencement to enable public authorities to understand it and prepare for the new regime.

Amendments 74A and 74B would prevent the meaning of the subsidy control principles and the energy and environment principles from being dealt with in guidance rather than in the Bill. The power to issue statutory guidance, as is currently provided for in Clause 79, will allow the Government to offer detail to public authorities on how to comply with the subsidy control requirements. As such, the guidance will play a central role in the effective functioning of the new regime. The Committee in the other place heard from a number of witnesses highlighting this fact and the importance of public authorities having appropriate guidance to understand the practical application of the Bill. It is not the Government's intention to change the meaning of the subsidy control or energy and environment principles through guidance. As I have said, this would not be possible. Guidance will instead have the purpose of explaining and clarifying the regime, in ordinary language, for the benefit of those who will need to use and understand the practical effect of the Subsidy Control Bill.

Amendment 75, tabled by the noble Lord, Lord McNicol, would

"require the Secretary of State to seek the consent of the devolved administrations before issuing guidance under Clause 79".

As I have already set out, we have engaged extensively with the devolved Administrations in developing the policy for the new subsidy control regime and, of course, we will continue to do so, including for the statutory guidance. We greatly value the input from the devolved Administrations. It is in all our interests to ensure that the regime works for the whole of the UK and enables the UK's domestic market to function properly.

I note that there is already a requirement in the Bill for the Secretary of State to consult such persons as they consider appropriate before issuing guidance. Sadly, I cannot accept the amendment. A formal consent mechanism could slow down and inhibit the issuing and updating of statutory guidance. In my view, it is important that the Government are able to update guidance quickly should circumstances change, for instance due to the development of any new UK case law. Delaying changes would be unhelpful for public authorities and subsidy recipients alike. As I have already said, it is my view that it is simply not necessary.

Clause 79(5) places a duty on the Secretary of State to consult such persons as appropriate before issuing the guidance. These persons may include the devolved Administrations, businesses and public authorities. Amendment 76, which I have tabled, would ensure that the requirement in Clause 79(5) is met by consultation on the guidance carried out before the Act comes into force.

The Government will engage on the shape and content of the future statutory guidance in the coming months, building on the public consultation we carried out last year before the introduction of the Bill. With a view to this, illustrative guidance was published in January, which gives a sense of what the final guidance on the practical application of the subsidy control principles will look like. This is intended to enlighten stakeholders as to the proposed structure and contents of future guidance and will, we hope, act as an aid for future discussion and engagement.

I entirely agree with the view of the other place that the guidance should be made available in advance of the commencement of the regime. To this end, any consultation will necessarily need to take place before Clause 79 commences. I think it prudent to put beyond doubt that the duty under Clause 79(5) would be met in those circumstances. For this reason, I hope that the Committee will feel able to accept my amendment.

Finally, I come to the fascinating Amendment 80 from the noble Lord, Lord Berkeley. I thank him for tabling it because it opened a new area of discussion that I had not really considered before. I understand that the noble Lord intends it also to be a probing amendment; I will treat it as such. Clause 85 establishes that the Bill applies in full to the Crown. As part of this customary provision, the Crown does not include Her Majesty in her private capacity, Her Majesty in right of the Duchy of Lancaster or the Duke of Cornwall. The noble Lord, Lord Berkeley—I know that, as he said, he has a long-standing interest in the affairs of the Duchy of Cornwall—explained that the amendment has been designed to probe the application of the Bill to the Duchy of Cornwall. I can confirm to him that the Duchy of Cornwall is a possession of the Duke that provides personal revenue. The Duke of Cornwall is not a public authority unless he is exercising functions of a public nature.

Lord Purvis of Tweed (LD): Such as opening something?

Lord Callanan (Con): It's interesting stuff, this. I suspect that the noble Lord, Lord Berkeley, is not going to get an invitation to an investiture.

Anyway, the ownership of the Duchy of Cornwall is a private matter. Where the Duchy operates on a commercial basis, depending on the specific facts at hand, it may meet the definition of an enterprise in Clause 7; lawyers have had fun drafting this. None the less, and importantly, the Duke's relationship with the Duchy as its owner is not the exercise of functions of a public nature. It therefore falls outside the scope of the Bill.

To close, I hope that, with the explanations I have been able to provide, noble Lords will feel able not to move their amendments and to accept my Amendments 73 and 76. As we have now reached the end of the final grouping of amendments, marking the end of Committee, I express my sincere thanks to all noble Lords who have taken an interest for their thoughtful, insightful and probing discussions on this important Bill. Lastly, I thank the team of officials who have supported us in so doing. I can give an assurance that my department and I will of course reflect closely on all the points made by noble Lords, and I look forward to further engagement in advance of Report.

Amendment 73 agreed.

Clause 78, as amended, agreed.

Schedule 3: Subsidies provided by primary legislation

Amendment 73A not moved.

Schedule 3 agreed.

Clause 79: Guidance

Amendments 74 to 75 not moved.

Amendment 76

Moved by ***Lord Callanan***

76: Clause 79, page 46, line 13, at end insert—

"(7) The requirement in subsection (5) may be met by consultation carried out before this section comes into force."

Member's explanatory statement

This amendment ensures that the requirement in Clause 79(5) to consult on the guidance issued under Clause 79 may be met by consultation on the guidance carried out before the Act comes into force.

Amendment 76 agreed.

Clause 79, as amended, agreed.

Clauses 80 and 81 agreed.

Clause 82: Gross cash and gross cash equivalent amount of financial assistance

Amendment 77

Moved by ***Lord Callanan***

77: Clause 82, page 47, line 35, at end insert—

"(e) provision in regulations or schemes made under this Act."

Member's explanatory statement

This amendment ensures that regulations made under Clause 82 may make provision about how the gross cash amount and the gross cash equivalent amount are to be determined for the purposes of regulations or schemes made under the Act.

Amendment 77 agreed.

Clause 82, as amended, agreed.

Clause 83 agreed.

Amendments 78 and 79 not moved.

Clause 84 agreed.

Clause 85: Crown application

Amendment 80 not moved.

Clause 85 agreed.

Clauses 86 to 92 agreed.

Committee adjourned at 8.28 pm.