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PARLIAMENTARY DEBATES
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HOUSE OF LORDS
OFFICIAL REPORT

ORDER OF BUSINESS

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

Abbreviation	Party/Group
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind 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
UUP	Ulster Unionist Party

No party affiliation is given for Members serving the House in a formal capacity or for the Lords spiritual.

House of Lords

Monday 14 November 2022

2.30 pm

Prayers—read by the Lord Bishop of St Albans.

Introduction: Lord Hintze

2.38 pm

Sir Michael Hintze, Knight, having been created Baron Hintze, of Dunster in the County of Somerset, was introduced and took the oath, supported by Lord Strathclyde and Baroness Kennedy of The Shaws, and signed an undertaking to abide by the Code of Conduct.

Introduction: Baroness Twycross

2.42 pm

Fiona Ruth Twycross, having been created Baroness Twycross, of Headington in the City of Oxford, was introduced and took the oath, supported by Baroness Smith of Basildon and Lord Kennedy of Southwark, and signed an undertaking to abide by the Code of Conduct.

Counsellors of State

2.47 pm

The Lord Chamberlain (Lord Parker of Minsmere): My Lords, I have the honour to present to your Lordships a message from His Majesty the King, signed by his own hand. The message is as follows:

"To ensure continued efficiency of public business when I am unavailable, such as while I am undertaking official duties overseas, I confirm that I would be most content, should Parliament see fit, for the number of people who may be called upon to act as Counsellors of State under the terms of the Regency Acts 1937 to 1953 to be increased to include my sister and brother, The Princess Royal and The Earl of Wessex & Forfar, both of whom have previously undertaken this role."

Death of a Member: Lord Jones of Cheltenham

2.49 pm

The Lord Speaker (Lord McFall of Alcluith): My Lords, I regret to inform the House of the death of the noble Lord, Lord Jones of Cheltenham, on 7 November. On behalf of the House, I extend our condolences to the noble Lord's family and friends.

Government Departments: Communication with Industry and Commerce

Question

2.49 pm

Asked by ***Lord Naseby***

To ask His Majesty's Government what steps they are taking to improve communication between government departments and (1) businesses in the City of London, and (2) industry and commerce in general.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Callanan) (Con): My Lords, departments meet regularly to ensure that government communications with business are clear and consistent. BEIS's primary way of engaging with business is through dedicated sector teams that provide expert engagement with sectors, mainly large companies and trade and professional bodies. Treasury Ministers and officials meet regularly with representatives from financial services firms, including those based in the City of London, on a range of matters from regulatory reform to the broader state of the UK economy.

Lord Naseby (Con): Is my noble friend aware that that Answer and the depth of it will be enormously welcome to the CBI, the City, the chambers of commerce, and in particular some of our huge and expanding companies, because they have not felt part of decision-taking in our country in recent years? Bearing in mind that we need to get our growth rate up as we move forward, will he please ensure that the statement he has made today is implemented on the ground so that when I next contact the various bodies I have mentioned in a year's time, they will say thank you to the Government for making sure that communication is now back on track?

Lord Callanan (Con): I assure my noble friend that communication is very much on track. The first meeting that the new Business Secretary had following his appointment was with the "big five" business representative organisations, which collectively represent around 750,000 businesses.

Lord Bilimoria (CB): My Lords, in my two years as president of the CBI, I saw the power of government, business and the CBI working together, whether it was the furlough scheme or lateral flow tests. Can the Minister reassure us that the Government are listening to the CBI regarding supply-side reforms, which are desperately needed for the 17 November Budget?

Also, the noble Lord, Lord Naseby, talked about business and government. Does the Minister agree on the power of business, government and universities working together, as with Oxford University on the vaccine and Birmingham University on the world's first retrofitted hydrogen-powered train?

Lord Callanan (Con): I am happy to agree with the noble Lord. The CBI was one of the organisations that my right honourable friend the Business Secretary met only last week.

Lord Fox (LD): My Lords, in his Answer, the Minister used "consistent". However, if you talk to businesses, that is not a word that they use. They use "inconsistent". There has been a rotating door of Business Secretaries, a rotating door of Prime Ministers, and an ever-changing policy landscape. How does the Minister expect businesses to know where to invest and how to invest when there is no consistent policy from the Government?

Lord Callanan (Con): The noble Lord is wrong. There is consistent policy from the Government. In a whole range of areas of policy, life continues as it did. There are of course unique challenges facing us at the

[Lord Callanan]
moment—the headwinds of Covid, the energy crisis, et cetera—but this Government have the solutions and will carry on implementing them.

Lord Sikka (Lab): My Lords, businesses associated with the City of London gave us the last financial crash and have also routinely been involved with the mis-selling of numerous financial products. They have been involved in money laundering, tax abuses, frauds, forgery of customers' signatures, and numerous predatory practices. Can the Minister explain when the Government will launch a public inquiry into the City's predatory practices and clean up this industry?

Lord Callanan (Con): The noble Lord is wrong, as he is on so many of these matters. Of course, proper regulation is important, and we will shortly be considering the economic crime Bill, to clamp down on many of those practices. The noble Lord forgets that the City of London is one of the most successful financial centres in the world. It contributes billions of pounds to the British economy. He is always calling for more public expenditure; if he kills the City of London, he will have even less to spend.

Baroness Blackwood of North Oxford (Con): My Lords, we all know that difficult decisions on tax and spend must be made, but 100 business and university leaders recently wrote to the Chancellor making it very clear that cuts in R&D would be a false economy, given the evidence-based role it plays in productivity and competitiveness. Will the Minister make it clear today that the Government will listen to those business leaders and that his department will fight hard to protect R&D spend?

Lord Callanan (Con): I thank my noble friend for her question. I know that she takes the subject of R&D spend passionately and I agree with her, but we will have to wait for the decisions that the Chancellor will announce on Thursday.

Lord Birt (CB): My Lords, there are 1.25 million job vacancies in the economy. There are skills shortages in every sector, every area of skill and every part of the country. We have an immigration policy that is not focused on business need and an underinvested, overstretched infrastructure. Does the Minister accept that we need action, not just communication, to heal our badly broken economy?

Lord Callanan (Con): Of course we need action. I agree with the noble Lord on that, and we will hear the Chancellor's latest proposals on Thursday. It is a difficult issue that needs resolving, but one of the consequences of our record low levels of unemployment is skills shortages. However, we have a skills plan to invest across the whole range of the economy to make sure that we have the skills we need.

Lord Lennie (Lab): My Lords, the Financial Services and Markets Bill received significant submissions of written evidence from business, industry and commerce, including many from the City who welcome the Bill but call for a number of commitments on the transition from EU to UK regulation. Recent government actions have undermined faith in the City, at a time when we need to listen closely to our world-class financial and professional services. What assessment have the Government made of submissions to the Bill and what further steps will they take to engage productively as it continues its passage through both Houses?

Lord Callanan (Con): I agree with the noble Lord on the importance of our world-class business and professional services in the City of London. Perhaps he can have a word with his noble friend about the importance of these industries to the country. Of course, we will continue to liaise with all City firms; we will not always agree on everything, because appropriate regulation is important, but we will continue to liaise with them.

Lord Wigley (PC): My Lords, in view of some of the speculation that took place soon after the new Government came in about their commitment to nuclear power, will the Minister confirm that they are committed to it, particularly to the SMR programme?

Lord Callanan (Con): I am happy to give the noble Lord the commitment he seeks. Nuclear power will be an important component of our energy infrastructure and it is also important that we continue to invest in the SMR programme.

Lord Anderson of Swansea (Lab): My Lords, is the message that the Government seek to convey to the City and to commerce that a Conservative Government are best equipped to clear up the mess that only a Conservative Government could make?

Lord Callanan (Con): I thank the noble Lord for his helpful question. The message we seek to convey is that the City of London is an important component of the UK financial infrastructure. It makes an important contribution to the UK economy. Proportionate regulation is vital to this sector, but we continue to encourage and support it.

Lord Kamall (Con): My Lords, while we welcome better communications between government and businesses, how aware are the Government of the concept of rent-seeking, in which businesses may ask for measures that are beneficial to them but detrimental to other sectors?

Lord Callanan (Con): My noble friend makes an important point. We had a lot of experience of this in the European Parliament, as a lot of businesses would lobby for regulation that was favourable to them and would perhaps encourage regulation that was unfavourable to their competitors. We have to be careful to make sure that such practices are not widespread. It is important that we continue to engage with businesses. As I said earlier, we will not always agree, but we need to listen to what they say.

Lord Mountevans (CB): My Lords, businesses in the City of London and industry in general are keen to share their views on how to improve the international competitiveness of the United Kingdom. Can the Government ensure that those views are actively canvassed at an early stage when undertaking consultation as part of developing legislation?

Lord Callanan (Con): I can give the noble Lord that assurance. We have been engaging extensively with the City of London financial services firms in the development of the related legislation that will shortly be before your Lordships.

Baroness Blower (Lab): My Lords, in this Evidence Week, I draw the Minister's attention to the fact that researchers in the University of Sheffield have shown that, between 1995 and 2015, the finance industry—sometimes referred to as the City of London—made a negative contribution of £4,500 billion to the UK economy. Have the Government investigated this, and will a report be published on it?

Lord Callanan (Con): The short answer to the noble Baroness's question is no. I have no idea what she is talking about or indeed where she has got the figures from. The last figures that I saw showed that the financial services industry—which is not just in the City of London—contributes tens of billions of pounds to the UK economy. The noble Baroness and her friends are always talking about more public expenditure and the need to spend more in every sector. Somebody has to earn that money, and one of the principal earners for the UK is the City of London. We should be proud of the contribution that it makes.

Kinship Care

Question

3 pm

Asked by ***Baroness Drake***

To ask His Majesty's Government what assessment they have made of the report by the All-Party Parliamentary Group on Kinship Care *Lost in the legal labyrinth*, published on 16 May; and in particular, the findings that there is a lack of both advice and legal aid for current and prospective kinship carers of children in crisis.

The Parliamentary Under-Secretary of State, Department for Education (Baroness Barran) (Con): My Lords, the Government are grateful to the APPG for its work and its recent report on kinship care and the legal labyrinth. The noble Baroness will be aware that the Ministry of Justice recently laid a statutory instrument widening access to legal aid to private special guardianship order proceedings. We will monitor and assess its impact.

The noble Baroness will also be aware that a series of recommendations was made by the independent review of children's social care, including on expanding access to legal aid for kinship carers. We are considering each of those in detail.

Baroness Drake (Lab): I thank the Minister for her reply. The extension of legal aid to protect special guardians of children in private law cases is clearly a step in the right direction. However, it is not matched in public law proceedings, where the majority of guardianship orders are pursued. Here, children are in a crisis situation, and it is imperative that those who step forward as kinship carers, who are often left to navigate the justice system alone, get the legal support they need. Without it, the risk is that more children will end up in care, away from friends and families. May I push the Minister: when will the Government ensure that the extension to legal aid in private law provision is mirrored in public law?

Baroness Barran (Con): I understand and respect the noble Baroness's point. The Government are committed to making the means and merits testing the same, be it private or public law proceedings. She will also be aware that legal aid funding has been extended so that prospective special guardianship proceedings will also get means and merits-tested legal aid funding.

Lord Laming (CB): My Lords, the Minister will well understand that the state services do not exactly have an unblemished record in taking over the parenting of other people's children. That being so, will the Minister do all she can to ensure that the extended family is considered more in cases of this kind, and that members of the extended family are recognised as having something really personal and important for children who have had the worst start in life?

Baroness Barran (Con): The noble Lord is absolutely right. In the Question we debated last week about the protective effect of family, as picked up by the Children's Commissioner, the same points were raised. The noble Lord will be aware that extensive recommendations were made in Josh MacAlister's review about the role of family. The Government absolutely recognise, value and are grateful to those families who care for an estimated 150,000 children.

Baroness Eaton (Con): My Lords, as we have heard, the legal framework for kinship care is very complicated: there is no single definition in legislation, which can lead to kinship carers missing out on the support they need. Will the Government consider introducing a single legislative definition of kinship care to help ensure that carers can access the right support?

Baroness Barran (Con): My noble friend will be aware that that was also one of the key recommendations in Josh MacAlister's review, so the Government will be responding as part of our implementation plan. More broadly, as my noble friend says, the awareness and value of kinship care could definitely be improved, not just for wider family but for social workers, so that they are always confident in taking it into consideration.

Baroness Armstrong of Hill Top (Lab): My Lords, I am grateful that the Minister is paying attention to this, but she, like me, must be aware since the publication of the MacAlister review that many kinship carers now suffer real harm because of the cost of living crisis and their vulnerability in these legal issues. This

[Baroness Armstrong of Hill Top]
is becoming a crisis for some kinship carers, but we all know, as the noble Lord said in his question, that kinship carers end up being far more effective in their care than the state is. We need to encourage and support kinship carers if we care about those vulnerable children. Will the Minister make sure that the Government respond promptly, because the more time passes the more vulnerable these kinship carers become?

Baroness Barran (Con): The Government take this very seriously. My honourable friend in the other place, the Minister for Children, met recently with a group of kinship carers. She listened hard to what they said and was impressed by the case they made.

Lord Hannay of Chiswick (CB): My Lords, does the Minister agree that kinship care is a cost-effective way of dealing with the problems of children in need and that this is therefore a moment when it should be expanded? There will obviously be constraints on public spending, and kinship care is a cost-effective way forward.

Baroness Barran (Con): I agree that it is cost effective, but I know that the noble Lord agrees that it is also really important because of the stability it offers children. It substantially outperforms other forms of care in educational and employment outcomes.

Lord Storey (LD): My Lords, noble Lords can go on to the charity Kinship's website and look at each parliamentary constituency to see how many children are in care and how many are in kinship arrangements. In Liverpool Wavertree, there are 601 children in kinship care and 330 in local authority care. Does the Minister not think we need to ensure that all those children have the possibility of kinship care? One way to do that is to make sure that financial and other support is available for them; it should not be left to discretionary arrangements by local authorities that may or may not pay. Will the Minister and the Government give real consideration to making sure there is that support for these parents and relatives?

Baroness Barran (Con): At the risk of sounding like a cracked record, the Government are considering all the review's recommendations. More broadly on the noble Lord's point, the variability in the use of kinship care across different local authorities is also very striking. For some local authorities it is as low as 2%; for others it is over a quarter.

Lord Watson of Invergowrie (Lab): My Lords, I know the Minister has a firm grasp of issues across her portfolio, so she will be aware that the charity Kinship's annual report found that over a third of kinship carers have stated that they are unlikely to be able to continue in that role in the next year. I echo the points that other noble Lords have made and I hear what the Minister said about cracked records, but even cracked records have good music at their centre. Will she accept the need for kinship carers to be provided with the same support as foster carers to enable them to continue to provide that role? As other noble Lords have said, the cost of not doing so will be much greater, should those children have to be taken into local authority care.

Baroness Barran (Con): The Government are considering all these issues. I have made it clear that we see kinship care as an incredibly valuable part of the fabric of support for children who, for whatever reason, can no longer live with their birth parents. We are looking at all aspects—not just financial but the information, support and guidance that prospective carers and local authorities receive.

Baroness Finlay of Llandaff (CB): Do the Government recognise that that support has to start urgently? Often, these children are traumatised and may be suddenly bereaved. Kinship leave, similar to adoption leave, may help kinship carers and the child or children adapt to the new situation and come to terms with what has happened.

Baroness Barran (Con): That is definitely one of the issues under consideration.

Baroness Chapman of Darlington (Lab): My Lords, the Minister has said many times that she is considering this, and I trust she is doing so. Will she convey to the department the interest and sense of urgency in the Chamber today, specifically on a legal definition that would unlock so much for kinship carers?

Baroness Barran (Con): I absolutely undertake to do that.

Jet Zero Strategy

Question

3.10 pm

Asked by ***Baroness Scott of Needham Market***

To ask His Majesty's Government what discussions they have had with the Climate Change Committee about their Jet Zero strategy, published on 19 July, and whether it is consistent with the United Kingdom's sixth carbon budget.

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Vere of Norbiton) (Con): My Lords, Ministers and officials regularly engage with the Climate Change Committee and its recommendations were considered alongside other evidence in the development of jet zero strategy. The jet zero strategy is aligned with the Government's net zero strategy, which sets out our economy-wide plan for achieving net zero by 2050 and for meeting our carbon targets.

Baroness Scott of Needham Market (LD): My Lords, the Climate Change Committee recently red-rated the Government's aviation plan on the grounds that it

"relies heavily on very nascent technology scaling up quickly".

Given that the Government's targets are legally binding, will the Minister say what specific policy proposals are being developed to speed it up and to develop a plan B should that not be possible?

Baroness Vere of Norbiton (Con): I appreciate that we do not agree with the Climate Change Committee on the imposition of limits to air travel. We believe the technology-led approach is correct. Within the jet zero strategy there are 62 policy recommendations and we are looking to put them in place as quickly as possible. One will be to support the development of a sustainable aviation fuel industry in this country which we believe could, at least in the medium-term, have a significant impact on reducing carbon emissions.

Baroness Blackstone (Lab): My Lords, several Conservative think tanks have made a number of comments and proposals on managing demand in the aviation industry, including VAT on flights and a frequent-flyer levy. Will the Minister tell the House whether the Government have had any discussions on these proposals? After all, it is very likely that their reliance on new technology is not going to be adequate to meet the targets on climate that they have set in time.

Baroness Vere of Norbiton (Con): As I alluded to in my earlier answer, the Government believe that limits on air travel are not appropriate at this time and indeed would be counterproductive for one of the most significant sectors in our country that is also important for the wider economy. I am aware of various proposals for frequent-flyer levies, and there are many disadvantages to those sorts of interventions. The Government are not considering that at this time.

Baroness Boycott (CB): My Lords, I welcome the fact that the Minister is talking about sustainable aviation fuels, but they are going to have to come from somewhere. I understand from the jet zero strategy that the Government are aiming for 5 million tonnes by 2050. Is that enough to cover the number of flights we need? Secondly, have the Government assessed the impact that growing that amount of biofuel—I assume most of the sustainable fuel will be biofuel—will have on food prices? It seems we possibly have a policy here which risks indirectly subsidising flights with higher food prices, because at the end of the day we have a limited amount of land.

Baroness Vere of Norbiton (Con): Our sustainable aviation fuel policy is very clear that we will not be looking for any feedstocks to come from economically viable land that would otherwise be used for food. The sorts of feedstocks we will be using for sustainable aviation fuels will be black-bag waste—biomass—and we will also look at alcohols. There may be another way that we can do power to fuel by harnessing hydrogen and carbon dioxide from the air. There are many production pathways that sustainable aviation fuels can follow. None of them involves the use of biological outputs from farmland.

Lord Kirkhope of Harrogate (Con): Would my noble friend not agree that it would be a great shame to restrict the freedom of people to travel around the world in this way? Surely it would be much better for us to invest more in looking at these alternative fuels. There is a great interest in hydrogen in the industry. Can my noble friend confirm that the Government are giving as much support as they can to the various research operations in this country and elsewhere to develop that fuel, rather than preventing people travelling?

Baroness Vere of Norbiton (Con): My noble friend is absolutely right. We want to maintain the benefits of air travel and to harness the various technologies out there. My noble friend mentioned hydrogen; after I leave the Chamber today, I shall be going to meet ZeroAvia, a company that has a hydrogen fuel cell-powered aircraft and is looking to scale that up. Indeed, the Government have invested in ZeroAvia and we will continue to invest in hydrogen or other propulsion technologies going forward.

Lord Fox (LD): My Lords, my noble friend talked about reliance on nascent technology. One way of speeding up technology has been through the Aerospace Growth Partnership—which I am sure the Minister knows is a joint industry and government enterprise—and its Aerospace Technology Institute. Can she perhaps tell us how much of the money being spent in the ATI is devoted to technologies that will help deliver the sorts of results that my noble friend is seeking?

Baroness Vere of Norbiton (Con): I do not have the specifics on the exact investment in ATI, but I can tell the noble Lord that, in total, it is £685 million for aerospace R&D. He mentioned working in partnership with industry; that is what is so important and what underlies the jet zero strategy. It is not just the Department for Transport having a think all on its own. We are working with industry and academia, and we have done a consultation that drew 1,500 responses. We will look at the technology; some of it is nascent and some is more developed than that.

Lord Rosser (Lab): For the aviation industry to become net zero, passengers need to be able to access airports through active or public transport. What recent steps have the Government taken to support the building of new rail, bus and cycle links to UK regional airports in particular, and what form has that support taken?

Baroness Vere of Norbiton (Con): As the noble Lord will know, connectivity to regional airports would be the responsibility of the local transport authority, but the Government have invested significantly in active travel and, in addition, in buses. When it comes to rail, I have just come out of a meeting with Manchester Airport, for example, and it is looking in great detail as to how rail services going to and from Manchester Airport will be able to support its development in the future.

Baroness Bennett of Manor Castle (GP): My Lords, the *Jet Zero Strategy* reports:

"Non-CO_2 impacts currently represent around 66% of the net effective radiative forcing"

of aviation—the global warming potential of flying—and notes that the Department for Transport analysis does not take any account of these outputs of water vapour and nitrous oxide at high altitudes. Instead, it commits to a five-yearly review of the evidence. How will the Government deliver net-zero aviation if these effects are found to be significant even with non-fossil fuel aviation fuels?

Baroness Vere of Norbiton (Con): For once, I agree with the noble Baroness. Non-carbon dioxide emissions are incredibly important, yet the science is as yet unresolved. There are significant uncertainties around the impacts of all the different emissions produced by aircraft, particularly at high altitude. We are looking at the research and will be developing policies once we have had more time to consider where the science currently is.

Lord Rooker (Lab): Earlier on, my noble friend Lady Blackstone referred to "Conservative think tanks". The only Conservative "un-think tanks" I have heard about spend all their time attacking net zero. Can we get absolute confirmation from the Minister that the Government will stand firm on this against the lobbying clearly coming from the gang started by the noble Lord, Lord Lawson, which is hell-bent on continuing to use fossil fuels?

Baroness Vere of Norbiton (Con): I am grateful to be able to report that I have had no lobbying at all from anybody who is not in favour of net zero. As the noble Lord clearly knows, it is the law and we will be setting intermediate carbon budgets as we are required to do by law.

Lord Kamall (Con): My noble friend will be aware that in the United States, United Airlines is buying zero-emission electric aeroplanes for commercial flights from 2026. Even if that slips, and it is only for very short-distance hopping, what about the vision for this country? Do the Government have a view on when we can see zero-emission flights, either domestically or internationally, in this country?

Baroness Vere of Norbiton (Con): The Government remain technology-agnostic when it comes to aircraft. It will be up to the airlines to decide which aircraft best suits their need, based not only on the duration of the flight but on the infrastructure. But my noble friend is absolutely right that there are some fairly rapid developments in aircraft at the moment, and both Airbus and Boeing are looking very seriously at how to decarbonise longer-haul aircraft. From the department's perspective, we will shortly be doing a consultation on how we get to net-zero domestic flights by 2040.

Sewage Discharges

Question

3.20 pm

Asked by ***Baroness Jones of Moulsecoomb***

To ask His Majesty's Government what assessment they have made of the reasons for the delay in water companies producing plans for dealing with sewage discharges.

The Minister of State, Department for Environment, Food and Rural Affairs (Lord Benyon) (Con): My Lords, in August the Government published the *Storm Overflows Discharge Reduction Plan* to tackle the unacceptable use of storm overflows. The plan will see £56 billion of capital investment over 25 years. We have allowed water companies slightly more time to develop their drainage and wastewater management plans to incorporate the new strict storm overflow targets. Water companies remain on track for developing their plans for the next price review period and for commencement on 1 April 2025.

Baroness Jones of Moulsecoomb (GP): That is a bit odd, because the water companies have already had all the money they needed for infrastructure improvements but did not use it for that; they gave it in dividends to their shareholders. The Minister knows that I like to help the Government if they are floundering around, confused and out of ideas, so perhaps I may suggest to his department that it instructs Ofwat to ensure that no dividends are paid to shareholders or large bonuses to senior executives until further notice, until this problem is fixed and water companies stop pumping sewage into our chalk streams and rivers and on to our beaches.

Lord Benyon (Con): The noble Baroness will be aware of the very strict new conditions set by Ofwat on water companies about how they reward their senior staff and shareholders, and of the absolute imperative, driven by the regulators and the Government, to reduce massively the effect of storm overflows. The letter that Ofwat wrote in October sets out quite clearly that:

"Company plans on storm overflows are lacking";

there is "insufficient evidence" to support the positions that they have previously taken; and there is a "lack of ambition" and

"a lack of focus and maturity in partnership solutions."

We are therefore giving them an extra two months, from March to May, to come up with better plans, and we will make sure that they are implemented on the original timescale as the next price review period starts.

Lord Dubs (Lab): My Lords, I shall take a somewhat harder line than the noble Baroness, Lady Jones. When there are repeat offenders, we should not condone them but punish them. Surely the water company heads should be sent to jail, not have a gentle ticking off. Is it a lack of power on the part of Ofwat or a lack of willingness to do something about it? We cannot sit by as beautiful places like Lake Windermere are polluted beyond use.

Lord Benyon (Con): The noble Lord will be aware of some very extensive fines issued to water companies. A £90 million fine was imposed on Southern Water recently. There are 100,000 reports a year to the Environment Agency of allegedly illegal outflows. Those are investigated and action is taken. The Environment Agency has taken severe actions against them. Those fines cannot be dumped on the customer; they have to be paid for out of what would have gone in dividends or indeed in pay.

The Duke of Wellington (CB): My Lords, although I thank the Minister for his answers and I am pleased that Ofwat appears to be becoming more active, does he share my frustration and that of many others in this House that there has been so little progress since the passing of the Environment Act last year in reducing storm overflows and various other sewage discharges into our rivers? This seems to continue despite the efforts of the Government. We must introduce a greater sense of urgency about this matter.

Lord Benyon (Con): I assure the noble Duke that there is a great sense of urgency in my department. It is an obsession of Ministers; my wife tells me I talk sewage all the time, but I may have misunderstood the point she was making. There is an absolute determination to resolve this matter. We have to recognise that it is not just water companies. There are point source and diffuse pollution incidents caused by farming, individual households with poor connections, poorly maintained septic tanks and individuals pouring chemicals, paints, oils and greases down drains—which they should not do. It is a much more complex issue than just water company bashing. Ministers are prepared to give water companies a bashing where it is necessary and that is what we are doing, in incentives and enforcement. It is absolutely vital that policymakers are looking right across the piece when it comes to the quality of our waterways.

The Lord Bishop of St Albans: My Lords, this is not just causing devastation in our rivers—not least in our wonderful chalk streams in Hertfordshire and Bedfordshire in my diocese—it is also a public health issue. Noble Lords may have seen the story of Jayne Etherington, a 22 year-old who went swimming in Pembrokeshire, caught E. coli from sewage and landed up in hospital with serious damage to her organs. What does the NHS think about this as a health hazard which is affecting a significant number of people and stopping them getting exercise by swimming in the sea?

Lord Benyon (Con): The right reverend Prelate's question is very well linked to the point made by the noble Duke, the Duke of Wellington. The urgency of these matters is reflected in the urgency with which we are intending to deal with them. I would hate any noble Lord to be of the view that some of the dates in legislation, such as the Environment Act and in other measures to control this, mean that we are going to continue to allow pollution in the belief that it is suddenly going to drop off a cliff at the end. We are tackling the most important public health areas, such as bathing waters, the chalk streams that the noble Baroness, Lady Jones, mentioned and the most precious environments—some of which have overlaying international designations. It is right that we have public health to consider, but we also have the health of our natural environment. We are tackling the problems where they are worst and where we can make the most difference as quickly as possible.

Baroness Hayman of Ullock (Lab): My Lords, the noble Duke, the Duke of Wellington, talked about the lack of progress and frustration. The Minister talked about the storm overflow reduction plans, but they are not due to be completed until 2050. This is hardly "urgency". Why do the Government seem happy to crack down more heavily on environmental protestors than they do on environmental polluters?

Lord Benyon (Con): The noble Baroness is usually much more devastating in her attacks than that. She knows that 2050 is a date by which we hope to see the problem completely resolved. We are going to move very fast on many of the areas where the problem is greatest. As for the idea that we are going to continue to leave this to future generations, that is not the case. The Environment Act is one of the most progressive pieces of environmental legislation anywhere. It has water quality at its heart. The drainage and wastewater management plans will be reviewed again in 2027 to see if our ambitions are being fulfilled. We can change them with government direction through the water regulators, the Environment Agency, Ofwat and the Drinking Water Inspectorate, to make sure that we are getting this problem sorted. It is not a question of making a decision between people gluing their fingers to a road and solving this. This is a problem we can solve now, and we are doing so.

Baroness McIntosh of Pickering (Con): My Lords, will my noble friend agree that water running off the roads into the combined sewers is contributing to sewage going into watercourses? Will he make sure that the highway authorities are held responsible for rainwater run-off?

Lord Benyon (Con): My noble friend makes a good point. The recent outflow at St Agnes in Cornwall, which rightly had a lot of publicity, lasted for 10 minutes, and there may have been some sewage in it. After 12 hours of rain, the vast majority was probably soil run-off from farms and run-off from roads. We are bringing in measures to continue to improve farming policy and soil management, and we are putting a lot of resources into this. But she is absolutely right that highways authorities and others have responsibilities to make sure that we look at this holistically, not just in one particular sector.

Baroness Bakewell of Hardington Mandeville (LD): My Lords, despite heavy fines, water companies carry on discharging sewage into our waterways. Communities affected by this practice are at their wits' end. There is a danger to aquatic wildlife and children playing close to infected water. Fines do not appear to be a sufficient deterrent. I have heard the Minister's reassurances, but surely the timeframe is far too long to solve this noxious problem.

Lord Benyon (Con): I would like to know when the noble Baroness thinks we should precisely say we will end this. We have had a piece of research that says that we can resolve this in its entirety if clean water is divided from dirty water—but the water flowing off our roofs and driveways is going into sewers. If we do that, it would have an impact of £800 on the average bill, taking water bills from just over £400, or more than that, to about £1,230 a year. We have to think of people, particularly those who are nervous at a time of increasing household costs, and we have to get this right. It is easy to come here and say that Ministers should be doing more, faster. We are working really hard to resolve this problem, but we have to be mindful of people's bills.

Higher Education (Freedom of Speech) Bill

Committee (3rd Day)

3.31 pm

Relevant document: 3rd Report from the Constitution Committee

Clause 4: Civil claims

Amendment 48

Moved by ***Lord Etherton***

48: Clause 4, page 6, line 19, after "person" insert "who is within one of the categories specified in section A1(2) and has suffered loss caused by a breach of the duties in (a), (b) or (c) in this section"

Member's explanatory statement

This amendment narrows and provides certainty as to those entitled to enforce the statutory tort by limiting enforcement to a person for whose benefit there is a duty to secure freedom of speech and, consistent with the Explanatory Notes, only if that person has suffered loss caused by breach of the duty.

Lord Etherton (CB): I declare my interest as a visiting professor at Birkbeck, University of London. My amendment is not directed at anything other than technical—but important—deficiencies in Clause 4. I am concerned about the appropriateness of this provision as it stands. I am sure that many here will say that it is neither appropriate nor necessary for Clause 4 to be there at all, but that is not my purpose: my purpose is to make it work if it stays. The Minister will be aware of my concerns about this provision.

There are two critical deficiencies at the moment. The Explanatory Notes state:

"Clause 4 … creates a new statutory tort".

My first question is whether damage or loss is necessary to make the statutory tort enforceable. Briefly, some torts, such as negligence or nuisance, require loss or damage to give rise to an enforceable legal right, but others, such as trespass, are actionable without proof of loss or damage. The clause, as it stands, does not indicate whether loss or damage is required for anybody to enforce this new right. The Explanatory Notes indicate in two paragraphs that the intention is that there should be "compensation for loss". If that is the intention, that must be included somewhere in the definition of the tort itself to make it viable. I should add that, if loss or damage are not critical—if it is actionable, as it were, without loss or damage—it is extremely difficult to see what kind of order a court could make in practice that would deal with the situation that has arisen in relation to the non-securing of freedom of speech.

The second deficiency is that there is no description of the category of persons entitled to enforce this civil wrong. It is not limited in any way to any particular group of people, but I assume that the intention is that the category of people entitled to enforce the proposed new statutory tort are those to whom the providers of higher of education owe

"a duty to secure freedom of speech".

Therefore, that point is also included in my amendment.

I finish simply by saying that if the clause and the new tort are to remain, it is critical that the latter becomes a recognisable and legally enforceable tort with those additions.

Lord Grabiner (CB): My Lords, the premise of the amendment moved by the noble and learned Lord, Lord Etherton, is a presupposition that the clause remains. I will be a little more ambitious by arguing that the provision is in fact otiose and we would do well to get rid of it.

I support the view that the clause should be deleted—as I think the Minister is aware—because three points seem to militate against the introduction of this brand new civil cause of action. First, it should not be assumed that the ability to invoke the civil court process will operate as some sort of universal panacea which will resolve this problem at a stroke. Often, the legal process, especially a new-fangled one, confuses and undermines well-intentioned purposes. It is also often the case that the introduction of lawyers and the courts merely fuels increased tension. Speaking from my narrow professional perspective, the only guaranteed positive outcome is that the financial condition of both sides of the legal profession will be enhanced if Clause 4 is enacted.

Secondly, in this case, the Office for Students, and the OIA—as regulators with suitable powers and, as should be the case, an in-depth understanding of the higher education world—would be far better placed than a judge of the High Court to deal with the matters dealt with by the Bill. In principle, it should not be necessary to have a regulatory structure concurrently in place with a specially devised civil court process. The scope for confusion, and what I call trouble-making, is obvious.

Against that, I believe it is suggested that Clause 4 is necessary as some sort of backstop to the regulatory regime. The unsatisfactory implication from the backstop argument is that the regulators may not be up to snuff—for example, because they lack funding, expertise or the necessary powers.

The backstop argument is unprincipled and illogical. If, for whatever reason, the regulators are not good enough, that should be the focus of repair and improvement. We should not be in the business of bolstering the deficiencies of the regulatory structure with the court process contemplated by Clause 4.

In this connection, the Bill wholly fails to address the relationship between the regulatory regime and the new proposed civil action. Should one be exhausted before the other? If the complainant fails before one, should he, she or it be entitled to have a second bite of the cherry? Suppose the complainant succeeds before one, should the loser be entitled to seek declaratory relief from the other, to the effect that the first decision was wrong? The scope for confusion and what I call mischief-making is significant. My sense is that these potential complications have not been thought through or, if they have been, they have not been addressed in the drafting of the Bill.

My third point is that there will inevitably be pressure groups and mischief-makers who will wish to use the court process publicly to embarrass universities, colleges and student unions to advance their own branded ideology or view of the world. The potential for this sort of behaviour, particularly in this context, is boundless, I am afraid.

On Second Reading, in the Minister's very clear explanation of the structure and content of the Bill and, in particular, in closing, he made three points in support of, or by way of justification for, Clause 4, and I should like to address these points. I would not and could not put words into the Minister's mouth, but his position can fairly be summarised as acknowledging the objections to Clause 4 as seriously held opinions but that, in his view, the concerns expressed were, on analysis, and for the three reasons he gave, more imagined than real. I cite *Hansard* of 28 June, col. 633.

The Minister said, first, that it would be very difficult for a claimant, especially a vexatious one, to establish the requisite duty of care without which the statutory duty could not be said to be breached and the claim would swiftly be dismissed. Secondly, he said that it would be necessary for the claimant to prove what he called "genuine and material loss", by which I assume he meant financial loss. The Minister said that this would be a tough hurdle, which few claimants could clear. Thirdly, he said the claimant would find civil proceedings expensive, especially if he lost and ended up having to pay his own and a significant element of the fees incurred by the university, college or student union, as the case may be.

I should like to deal with each of those points because, in my view, none of them withstands detailed analysis. First, the persons to whom the proposed duties would be owed are identified in the Bill, in new Section A1(2) in Clause 1, as staff, members, students and visiting speakers, and in new Section A5(2) in Clause 3, as

> "members of the students' union … students … staff of the students' union … staff and members of the provider and … visiting speakers".

Potentially that includes a lot of people, as well as organisations with which they may be associated. It is also the case that, as has often been said by judges at the highest level, the categories of duty are never closed. The common law develops piecemeal through changing circumstances; it is a living thing, and there is every reason to suppose that, ultimately, these duties will be held to be owed to persons or organisations whose behaviours and beliefs will or may be regarded as lawful but nevertheless deeply offensive to many listeners or observers. If the claimant presents an arguable case that he, she or it is owed a duty of care, the claim will be permitted to proceed; it will not be struck out at the preliminary stage.

The second point, to the effect that the claimant would have to show "genuine and material loss" needs careful scrutiny. The impression given by those words is that it means significant financial loss—that is, in order to succeed, the Clause 4 claimant would have to prove that he had suffered a real level of financial loss as a consequence of the breach of duty. I would be most grateful if the Minister would explain to us what they mean, if not that type of loss.

Before getting into the meaning of genuine and material loss, there is an important anterior question. Most torts in our law are not made out without proof of some damage but some, such as nuisance, trespass to land and libel, are actionable per se. The noble and learned Lord, Lord Etherton, made some reference to this a few moments ago, which is to say: without the need to allege or prove any damage. Clause 4 is interesting because it specifically makes no mention of damages or financial compensation for the claimant. I think that is what the noble and learned Lord's amendment, or part of it, is directed at.

3.45 pm

By contrast, in the financial services legislation with which I am familiar, the Financial Services and Markets Act 2000, Section 150(1) of that Act specifically provided that the breach will be

> "actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty".

That provision was repealed by the Financial Services Act 2012 and replaced with a new Section 138D, which is in very similar language. In that example, the statutory tort is created but a specific right to claim compensation is expressly provided for. However, that is not found in this legislation, which is what drives me to the conclusion, or at least the submission, that this is a statutory tort, which would be actionable without proof of damage. In my view, that is at least a very serious argument that Clause 4 creates a tort which is actionable per se. There would be no need for the claimant to prove any damage at all which, with respect, would significantly undermine if not destroy the second point of justification suggested by the Minister.

When your Lordships have regard to the context of the Bill, freedom of speech, you would not ordinarily expect the claimant to have suffered any financial loss at all—for example, compared with the damage suffered by a claimant in a personal injury case or somebody who is the victim of a fraudulent misrepresentation. That rather supports the proposition that it will not be necessary to prove damage to make a Clause 4 claim. If that were necessary, the Bill could and would have said so in terms. This makes it much easier for the provision to be deployed by unmeritorious claimants.

In my view, the "genuine and material loss" formula involves a misunderstanding of the true nature of this Bill. In a typical case, Clause 4 is not about compensating

[LORD GRABINER]
a claimant who has suffered monetary loss; it is about protecting a claimant from being deprived of an opportunity freely to express lawful opinions. If made out, such claims will rarely, if ever, result in substantial damages or compensation. How do you value these matters in monetary terms? It is more likely that the claimant will seek a declaration from the court that the university, college or student union has breached the duty. That might also be coupled with an injunction application to prohibit similar future behaviour. In short, I do not believe that the second point mentioned by the Minister arises in the context of this Bill and Clause 4.

The Minister's third point is to the effect that the costs associated with bringing a claim under Clause 4 would be prohibitive and dissuade vexatious claimants. I do not accept that argument, with respect. First, there are some very well-heeled trouble-makers for whom the costs issue would be of no concern at all. Secondly, there are also trouble-makers with no financial resources beyond the ability to finance the fairly nominal cost of issuing a claim form. They would be entitled to represent themselves, or by having a friend do so, and if they were ultimately to lose would not in any event be able to meet any costs order made against them. There are potential claimants who well understand these things. In short, I am not persuaded that there is any real justification for Clause 4.

I was going to sit down at this stage, no doubt to the relief of all those listening, but I have been in email contact for part of the day with the noble and learned Lord, Lord Hope. As of midday today, or a bit after, he was unfortunately still sitting on an aeroplane in Edinburgh Airport, waiting for the fog to clear in London so that he could come and participate in this debate. He has asked me to explain his position. The points that I am now going to make—I promise that I will be as brief as possible—are all down to the noble and learned Lord, Lord Hope, but what they actually do is to devastate Clause 4, as you would expect.

The noble and learned Lord asks me to explain his point, which is that he takes the view that Clause 4 is otiose because you do not need the statute to tell you that you have a right of access to the court. The critical point to understand is that this Bill introduces three duties. It imposes duties upon colleges and universities, upon student unions and so on. Having created the duties, the point from the noble and learned Lord, Lord Hope, as I understand it, is that you do not need to be told in a statute that you are able to sue for breach of that duty. He therefore says that Clause 4 is completely unnecessary.

The noble and learned Lord prays in aid, first, the provisions of Article 6 of the European Convention on Human Rights, which says pretty much that about access to the courts. He also says that, if you need a statutory authority for that proposition, it is that you do not normally find in a statute an expression of the entitlement to bring an action; on the contrary, what you normally find is that, if your cause of action or your access to the courts is to be restricted, that is set out in the statute. He gives the example of Section 47 of the Health and Safety at Work etc. Act 1974. The implication is that, absent a restriction in the legislation, you do not need anything in the legislation to give you that ability to access the court, because it is already there. There is a bootstraps element to it because of the duties that will be imposed if this Bill becomes law. It would give an individual the cause of action and the ability to come to the court without more.

For what it is worth, I believe that there is obvious force in that argument. I nevertheless still wish to see Clause 4 deleted. Let me explain why. It would leave the possibility of a common law cause of action. The duties would be there and somebody outside could come along and bring a claim for breach of that duty without the need to point to a provision in the Bill—or, by then, the statute. It would not be in the Bill, so it would be less prominent. For that reason alone, I would be in favour of getting rid of Clause 4, even apart from the separate point that the noble and learned Lord, Lord Hope, makes, which is that it is otiose.

Another problem comes out of this discussion. It takes us back to the position of the regulators. Should the Office for Students be given powers to enforce the duties? This issue is not currently addressed, which gives rise to some serious problems. If a private claimant is not going to have the ability to bring a claim for damages—which is my preferred position—then somebody has to be responsible for ensuring that these duties are properly performed. The obvious person to do that is the regulator, but at the moment there is a huge hole in the Bill because that question is not addressed. I am sorry for having taken so much of your Lordships' time.

Lord Sandhurst (Con): My Lords, I speak to Amendments 49, 50 and 52, which are premised upon Clause 4 surviving—I start from there.

Amendment 49 would add some additional subsections to Clause 4. The effect of these would be to add employment tribunals to the definition of civil courts that can hear disputed issues. Proposed new subsection (5) would provide that, in addition, where there is a dismissal of an academic who is held to have been dismissed for exercising academic freedom, that will be automatically unfair, with the usual consequences.

Amendment 50 would introduce a procedure for staying claims so that, when one is brought, either party can apply for it to be stayed—particularly, one might think that the education provider would apply for it to be stayed—to go to mediation by the regulator in the way that employment tribunal proceedings are stayed to be mediated by ACAS.

Employment tribunals have these advantages: they are more informal, they are quicker and they are more accessible to those who wish to pursue a claim. Importantly, they operate within strict time limits. The sort of claims we are looking at here are claims for unfair dismissal or similar. In any event, they need disposing of without long delay; we do not want a six-year period in which someone can bring one of these claims. In the employment tribunal, by way of example, unfair dismissal claims must be brought within three months, less one day, of the effective date of termination. In a contract claim, it is three months from the date of breach. Although it is not in my

amendment, it would follow, I would hope, that if the principle were adopted, the employment tribunal rules would be amended to ensure that similar provisions applied to such claims. In contrast, as I have already observed, a claim in tort has a six-year life before it is timed out.

The provision in Amendment 50 mirrors ACAS early conciliation and is similar also to provisions in Section 148 of the Pension Schemes Act 1993, under which either party can seek a stay to the Pensions Ombudsman. Whichever model we take—I leave it to the Government to consider the precise wording, but the idea is clear—there should be a reference to the Office for Students, so that the matter has every chance of being disposed of and resolved there by the regulator.

In short, these proposals would encourage settlement. They address many of the arguments raised against the statutory tort. It would certainly be simpler and quicker if it was dealt with in the employment tribunal, and there would therefore be the great benefit of dispatch. There is every hope that, using this combined process, a stay would be ordered and the case resolved swiftly, cheaply and sensibly. In other words, it would bring accessibility, speed and efficiency.

Finally, the introduction of proposed new subsection (5), in addition to the statutory tort, as I explained, would make it plain that where a member of academic staff has been dismissed and the tribunal hearing it finds that this has been for rightfully exercising his or her academic freedom, it should be deemed to be automatically unfair.

Amendment 52 would make a series of technical amendments to ensure that the rights apply effectively to the range of persons whom it is intended may avail themselves of the tort. It therefore removes the requirement for a two-year qualifying period for which employees would normally have to qualify to claim for unfair dismissal. It removes any cap on compensation and it provides for access to interim relief, in special cases, for re-engagement pending a final hearing—this is for dismissal cases. This would give an academic, or someone in an academic post who has not been there for two years but has been dismissed for exercising freedom, equivalent protection to that given to whistleblowers.

I conclude by saying that these amendments would provide strong protection of the sort I believe the Government are really aiming at. It would marry the OfS scheme to that which already exists in ordinary employment tribunal cases and would enable matters to be disposed of efficiently and economically.

4 pm

Lord Pannick (CB): My Lords, I agree with the powerful speech of the noble Lord, Lord Grabiner, with the possible exception of his surprising suggestion that the introduction of lawyers is generally a mischief.

I will add a few words on why Clause 4, in my view, should be removed. The duties under the legislation—it is a very sensitive area—should be regulated and enforced by a statutory regulator. The regulator should have sufficient power to resolve disputes and to give a declaration or a statement which will set standards which will then inform all relevant persons of what the requirements are in this context. That will be speedier than civil litigation; it will be less expensive than civil litigation; and it is highly likely to produce a more acceptable result than civil litigation. Despite their many skills, His Majesty's judiciary is not the best body to determine these sensitive issues. A regulator will have far greater expertise and is far more likely to produce an acceptable result.

I am not persuaded by the views attributed by the noble Lord, Lord Grabiner, to the noble and learned Lord, Lord Hope, as to why Clause 4 is otiose because it will be the law in any event. I have two answers to the concerns of the noble and learned Lord, Lord Hope. The first is that Article 6 of the human rights convention would be satisfied by the ability of someone dissatisfied with a regulator's decision to bring a judicial review. That would meet Article 6 concerns. Of course, that would have very considerable controls: any person seeking judicial review has to get the permission of the court to bring the claim. They have to bring the claim within a very short period of time—three months, unless there are exceptional circumstances—and judicial review would be available.

The other point that I understand the noble and learned Lord, Lord Hope, to be concerned about is that there is a right to a civil claim whether or not a statute says so. My understanding is that when the court assesses whether a statute confers a right to damages for a breach of the statutory duty, the court asks itself the questions: "What did Parliament intend?" and "Did it intend in this statute, in all the circumstances, to confer a right to damages?" If Parliament were to remove Clause 4 and there were to be an effective regulator with a right to bring judicial review, I would have thought that more than sufficient to rebut the suggestion that you can go to court and seek damages in any event.

Lord Willetts (Con): My Lords, I hesitate to intervene in this debate as I am not a lawyer. We have heard four very powerful interventions from Members of this House with formidable legal expertise. Already, Clause 4 is looking rather vulnerable in light of the arguments that they have deployed so powerfully with their legal expertise. The noble Lord, Lord Stevens, who sadly cannot be with us today, and other noble Members of this House—including me—signalled our intention to oppose the question that Clause 4 stand part of the Bill. Our doubts are reinforced by the formidable interventions we have already heard.

Perhaps I could add, as someone with an interest in public policy in this area, an explanation of where we are coming from. To be fair to the Minister, the case for this Bill is that it backs up the general right to freedom of speech with an attempt to provide more enforceable rights and compensations. The question is whether this provision of a statutory entitlement to tort helps serve that cause at all or whether the Government can achieve their objectives without this new route of civil litigation. The risks are considerable, including, clearly, of promoting vexatious litigation.

There is another significant risk that has not been mentioned so far. For those of us who want to see free and lively exchange of conflicting ideas in higher education—I hope we all do, on all sides of the House—there is a danger that that this type of provision

[LORD WILLETTS]
has an opposite effect from the one intended, in that people who are thinking of potentially inviting speakers or organising events at their university are inhibited from doing so for fear that they could potentially find themselves caught up in complicated and demanding legal action; in other words, this could have exactly the opposite effect to the one intended.

I hope that the Minister will also be able to explain to the House why he does not believe that the current arrangements and other arrangements set out in the Bill will not themselves tackle the problem that he is concerned about. Will he accept that with the Office of the Independent Adjudicator there is already a clear process whereby any student who has a concern about the way their university is functioning, including potentially suppressing their freedom of speech, has a right to go to the Office of the Independent Adjudicator, and, beyond that, that ultimately those decisions are of course justiciable? Does the Minister also accept the point that he himself made in earlier debates on this legislation, that there is a framework of employment law which provides protections for academic staff? Indeed, ironically, especially given the preoccupations of my side of this House with a liberal and lightly regulated labour market, one of the best protections we seem to have from the worst of American cancel culture is precisely that we have a stronger framework of employment rights in this area; they could be extended, and we have heard interesting suggestions on that.

If it is not the OIA or employment law, there is indeed the Office for Students. The Government clearly intend that the Office for Students should have new powers to investigate potential infringement of people's rights to freedom of speech. Often, when we have been confronting other public ills for which we are trying to find a solution, we have turned to an effective regulator. We have already heard powerful interventions this afternoon about the need for an effective regulator in this space. When we have a regulator in place whose powers can be extended in the Bill and, as we have heard so powerfully this afternoon, very carefully defined and set out with greater rigour than we have had so far, it seems odd and completely unnecessary that we feel the need in parallel to create this new tort route as well despite that route being available.

Finally, I return to the dangers in this approach. We had the wonderful observation from the noble Lord, Lord Grabiner, that perhaps lawyers on all sides of the case would find that at least their income rose, and I guess that you can imagine a well-funded litigant and a well-funded university. However, students and student unions are not well funded. There would be a real risk for student unions, which have themselves faced increased legal responsibilities under this provision and would not have the resource to engage in defending themselves against litigation. They are an important place in which students with a wide range of political views have their first experience of organising debates, exchanging ideas and disputing. For the threat and shadow of potential litigation which could bankrupt their student union to hang over them is not a service to the cause of freedom of speech in our universities.

Lord Blunkett (Lab): My Lords, I declare my registered interest in the universities sector. Like the noble Lord, Lord Willetts, I am not a lawyer, but I often find myself—this is an embarrassment for him—agreeing with every word he says. I commend the forensic contributions made by those who do have legal expertise, including my friend, as I think I can describe him, the noble Lord, Lord Grabiner.

We should take a step back and ask what we think we are doing with this legislation. Thank God we are not America. Thank God that, normally, we can sort things out without recourse to the law or to a regulator. Normally we can apply common sense, but let me clarify a case where common sense does not apply.

Let us call someone Kathleen. She must put up with the totally unacceptable behaviour of those extraneous to a university and of some colleagues inside it. She is not dismissed but is put in a position surely intolerable to all right-thinking people, except those who are fanatics for a particular cause and acclaim it as being all about equality and justice, only then to deliver the exact opposite. In this case, would she be entitled to claim constructive dismissal? If she would, there is a remedy already in the system. I take the point about the amendments to do with the employment tribunal system: you cannot bring a case if you have not been employed for two years. Let us say, however, that Kathleen has been employed for 16 or 20 years. Would she succeed in a claim for constructive dismissal in these circumstances? If she would, there is no cause for increased nightmarish leviathan legal structures. If she would not, this clause and the Bill do not assist her.

We have the OIA and the Office for Students. Now, under civil law, we want this engagement of tort to deliver something that either can be delivered under existing legal structures, or cannot be and which the Bill does not deal with either. It is a nonsense. The whole Bill is a nonsense. There are other ways of going about this in a civilised democratic society, for people to stand up to those who intimidate or to what might be described as cancel culture. It is time for people with a commitment to democracy and freedom to do that, rather than rely on regulators or the law.

I speak from experience. When, as Secretary of State for Education and Employment, I introduced the first tranche of fees in higher education, I was driven out of university premises. We just met outside them. We continued to have those meetings and that dialogue, irrespective of those trying to shut down free speech. Therefore, I have had a bit of it, though nothing like the example of someone we might call Kathleen, which sees people's lives destroyed. We need a society that stands up for what is right and not a Bill that will cause even more confusion, difficulty and regulatory nightmares. On Report, we should eliminate this clause—and, in the end, we should eliminate the Bill.

Lord Macdonald of River Glaven (CB): My Lords, I strongly sympathise with the Government's intention in pressing Clause 4, which is precisely to protect people such as Kathleen Stock. That is its purpose but it goes about it in the wrong way. Speaking as a former academic administrator, I see two particular problems, both of which have been alluded to briefly in this debate.

The first is vexatious litigation. Whenever a free speech row arises in a university, pressure groups are not slow to get involved. Some come from a standpoint of complete integrity and their interventions are helpful. Others are more politically motivated and, as I have seen frequently, in the fight to cause mischief. Some of these pressure groups are very well funded. Some are religious organisations, some political organisations. I fear that one result of this clause, were the Bill to become law, would be to place a significant burden on universities in fighting off vexatious claims. That is highly undesirable.

This leads to the second real problem with the clause. In reality, far from encouraging free speech, which I am certain is its intention, it will have the opposite effect, as the noble Lord, Lord Willetts, said. Universities, unions and university societies will fear the heavy hand of litigation and the effect will be a chilling one. Universities will be less likely to host controversial, vibrant events if a tort of this sort is pressed by this Parliament, than they would be if no such action is taken. I strongly oppose this clause for those two reasons—and others, but for those two in particular: vexatious litigation and the clause's chilling effect on vibrant debate in our universities.

4.15 pm

Lord Cormack (Con): My Lords, I shall speak briefly in following the noble Lord, Lord Macdonald of River Glaven. I very much agree with what he and others have said. We have heard a great deal of common sense. I am sorry I was not able to take part in the earlier Committee debates in the Moses Room, but I was taking part in the Northern Ireland Protocol Bill, which was going on at the same time in the Chamber. I spoke at Second Reading, however, so I hope your Lordships do not mind my speaking now.

A very wise man once said to me, shortly after I was elected to the other place in 1970, "The first thing you should always ask yourself, when the Government of the day present legislation, is, 'Is it necessary?' Look at the statute books and see whether there is another way of dealing with the matter, rather than cluttering up those statute books with further unnecessary legislation."

Literally thousands of pieces of legislation went through Parliament during the long, illustrious reign of Her late Majesty Queen Elizabeth. Many have never been used and others were indeed otiose. We have had a master class this afternoon from the noble Lord, Lord Grabiner. He must not apologise for speaking at some length; it was a treat to hear him and he said some extremely wise things. Just because there is a problem with free speech—and there is—the answer is not necessarily new legislation. I believe we should look at this extremely carefully, as we conclude Committee and move towards Report.

We want a slimmed-down, not fattened-up, statute book. I very much agree not only with what the noble Lord, Lord Grabiner, and my noble friend Lord Willetts said about Clause 4, but with the noble Lord, Lord Blunkett, in questioning the need for this. If the Bill is to go through, it must certainly be a slimmed-down version.

Lord Johnson of Marylebone (Con): My Lords, I rise to support my noble friend Lord Willetts, who seeks to prevent the creation of a new statutory tort. We have heard a couple of criticisms of the tort that are a little inconsistent. We heard that it will, on the one hand, lead to a flood of vexatious claims that will bog up our legal system and be very costly for our universities; and, on the other, that it is otiose, because the right for people to make claims to the courts already exists. It surely cannot be both at once.

My objection to Clause 4 is that I think it will undermine the regulator, the Office for Students. I speak not as a lawyer or an expert jurist, so I enter into this terrain with great trepidation. From a very practical point of view, my concern is for the work of the director for free speech and the authority of the Office for Students if we put this new statutory tort into law.

Having been involved in helping to set up the Office for Students through the Higher Education and Research Act with my noble friend Lord Younger, I am acutely aware that we have already created a very powerful regulator. The reporting structure that this Bill creates around the director for freedom of speech is none the less extremely useful. That is why I support this aspect of the Bill, which creates this new position in the leadership team of the Office for Students.

However, once the director for freedom of speech's position is created, his or her position will be very strong and he or she will have sufficient powers to do the job that we expect him or her to do in promoting freedom of speech in our system. That is because the director for freedom of speech will be able to impose conditions of registration on any provider that falls short of the enhanced duties created by this Bill.

These conditions of registration are an extremely powerful regulatory tool, because they consist of far more than just the nuclear option that HEFCE used to have, which was just to withhold funding from a provider. The Office for Students has a very subtle suite of regulatory tools at its disposal. They run a full range from simply seeking an action plan from a university all the way through to imposing fines on an institution if it does not deliver on the action plan it has agreed with the director for freedom of speech. They do not need to consist simply of suspending a provider from the register and therefore effectively dooming it to failure, or taking away its university title. Those are nuclear options that no regulator really has any credibility in threatening, but the director for freedom of speech will have many other more useful tools at his or her disposal.

A statutory tort on the statute book will not help the regulator in any way at all; it already has the tools it needs. I strongly support my noble friend Lord Willetts. I hope the Government will listen to the debate and the excellent interventions that we have heard this afternoon and accept Clause 4's removal from the Bill.

Lord Triesman (Lab): My Lords, it is a pleasure to follow the noble Lord, Lord Johnson. Like so many other people in the debate, I strongly agree with the comments made, from the speech by the noble Lord, Lord Grabiner, onwards. I also do not believe that this clause should remain. I do not believe it will do the job

[Lord Triesman]
it is supposed to, and it will almost inevitably lead to the chilling effect that the noble Lord, Lord Willetts, and others have described.

My noble friend Lord Blunkett asked why the not entirely fictitious person Kathleen could not pursue an action for unfair dismissal because she was compelled into a position that was intolerable. I believe that there was a time when she would have been advised to do that, would probably have done so, and could have counted on the support of her trade union in pursuing that course of action—I can say this directly, as my interest has been declared any number of times. Of course, she found that she could not count on the support of her trade union. I submit to your Lordships that one of the reasons she could not now count on its support is precisely the reason that my noble friend described. If you go back seven, eight, certainly 10 years, the battle that would have taken place in that union to make sure that someone's employment rights had been sustained without having to resort to any other regulator or court would have been absolute. It would have been the determined position of that union. Some may say that if that would no longer happen, maybe we need something else.

I submit that the "something else" we need is certainly not Clause 4 and this tort. There are those who might say that they are not so concerned about the chilling effect because they do not believe that enough of these things will happen. I say to your Lordships' Committee that if it wanted to hand-pick a group of its fellow citizens who would argue in the most tortured way about absolutely anything, it should go to one of our universities. There they are: serried ranks of people whose day-by-day enjoyment is to have furious arguments about matters of little consequence. [*Interruption.*] I have been one for many years.

I will tell the noble Baroness, Lady Smith, that at Cambridge University, after the faculty of economics was redecorated, I was inveigled into taking part in a debate as to the order in which the portraits of its Nobel prize winners should be rehung and whether it should be Marshall or Keynes in the pre-eminent position. I left that debate after eight hours. No one was an inch further down the line of resolving it and, to my knowledge, the portraits have never been hung, because 20 years later no one is any further down the path of resolving it. I hate to say this: the only place where I have seen disputes followed with the same tenacious interest and complete unwillingness to give an inch is in my synagogue, but that is because it largely comprises lawyers. I do not make this point to be frivolous or humorous. The truth is that this is a most vexatious and disputatious group of people. They are employed to have arguments with each other; it reaches into every corner of their lives. If we think that they are unlikely to do so in these circumstances, we mislead ourselves completely.

Some people will be very well backed in pursuing this course of action. I think the noble Lord, Lord Willetts, made the point that some will be at a great disadvantage financially. The student unions that we are talking about are usually run by a small group of young people with no experience whatever of the law. Generally speaking, they are unable to exert any control over all the clubs that form the diaspora of their organisation—the Minister made that point. They will be put in a position that they cannot afford or control, and to which there will be no satisfactory long-term resolution.

All this brings me to say that the points that have been made, including by the noble Lord, Lord Johnson, about having a regulator that can manage these things, and build on knowledge of how to manage them, is a route to a sensible solution. The rest of it—and I apologise if this is thought to be offensive; I do not mean it to be—is completely fanciful, and anybody who has spent more than a few weeks working in a university will know it.

Baroness Fox of Buckley (Non-Afl): My Lords, I have a huge amount of sympathy with the fears about the chilling effect of Clause 4 and the points that the noble Lord, Lord Willetts, started off making. Basically, I am torn on Clause 4; I do not quite know where to go.

A number of people have discussed the potential of vexatious litigation. I think that is rather cynical. We keep hearing about all these bad-faith players. I am simply worried about litigiousness full stop, even by good-faith players. We know that a dependence on law courts to resolve problems can tangle us up and subsume the matter of fighting for freedom and free speech in legalese, lawyers and so forth, even if done with the best of intentions.

In other words, I do not want us to abandon what we all started off agreeing, which was that this Bill should not compensate for a need for a culture change in relation to arguing for the importance of academic freedom. It should not be seen as a replacement for that. I definitely do not want the law courts to get in the way, because they can kill off any possibility of that culture of the spirit of freedom being drowned out. That is one side of it.

4.30 pm

I was reminded by the excellent speech of the noble Lord, Lord Triesman, and in particular by his point that trade unions have changed, that there is a real problem to address. I slightly disagreed with his description of student unions; they may have been like that in the past, but they are much more professionalised, litigious, disputatious and often anti-free speech than they ever were in the past. Nonetheless, things have changed, so my concern is: if we remove Clause 4, does this Bill become toothless? Is it the case that we are abandoning all the commitments of the Bill to having no implications or no outcome whatever? I just cannot decide which is the way to sell it, because I do not want this Bill to have no impact. Professor Kathleen Stock has been mentioned, and the truth is that she wrote an article supporting this Bill, which was the article that persuaded me to support the Bill. She said it was something she thought she would never need to support, but she felt circumstances had so changed that we needed something. So I think we have to at least recognise that the change is so profound that it may be that the Bill is necessary and it may be that the Bill without Clause 4 is toothless. That is my question, really.

However, I am more drawn towards the points put forward by the noble Lord, Lord Sandhurst, about a kind of employment tribunal way of approaching this and giving clearer powers to regulators, rather than constantly looking to the law courts. I am much more open to that, and I do hope the Government will listen to that as a very sensible suggestion, and to the other points that have been made about giving more powers—clear powers—to the regulators to deal with this.

I have just another couple of queries, and I appreciate this is because I do not understand the law as the lawyers do. The noble Lord, Lord Grabiner, I think explained that the duties in the Bill mean that you do not need to have a statutory tort because anyone would be able to sue. But he made the point that in the Bill, having it as a statutory tort made that right to sue more prominent. Well, the difficulty I have there is that if the problem or the complaint is that it is being drawn attention to, I do not necessarily want to have a Bill that hides it either. If you have the right to sue, does it make any difference if you draw attention to it in the statue? That was the query I had there.

My question to the Minister is—I am completely confused about this—is the only point of Clause 4 if somebody suffers material damage? This has been referred to by people in a much more sophisticated way than I can. Is it that these are just disputes where you will actually lose your job or directly suffer material damage? The reason I mention that is that in most of the free-speech disputes involving academics at universities, what actually happens is that it is not so much material damage as reputational damage that might well have an impact on your employment in future. You are described as a bigot for ever more, and you cannot escape having these kinds of labels attached to you. That is one of the things that, again very movingly, Professor Kathleen Stock found so demeaning: that somebody who is a lifelong campaigner for women's equality would have that label used against her. So can Clause 4 resolve this? Is it only material loss or does that material loss have a greater, encompassing way of saying reputational loss that will undoubtedly affect your employment prospects in the future anyway?

The Duke of Wellington (CB): My Lords, I first declare my interest as a former chairman of King's College London. In that position I was a layman, not an academic—we have had a number of very informed academic contributions—and I am certainly not a lawyer. I regret that I was not able to be present for Second Reading; I hope noble Lords will forgive me for intervening at this stage.

I am very surprised that the Government have sought to introduce this Bill at all, and certainly Clause 4. I have not yet detected a single Member of this House who is seeking to defend Clause 4 as currently drafted; every contribution has wished either to delete or amend it. The noble Lord, Lord Johnson, is in his place. He introduced the higher education Act a few years ago when he was Minister for Universities. I admit that I opposed many aspects of that Act. Indeed, the noble Lord, Lord Johnson, himself described it this afternoon as having introduced a very powerful regulator in the Office for Students; I would say that it is too powerful already.

However, we do have the Office for Students, and I really cannot understand the justification for putting into the Bill a statutory tort as well as the existing arrangements we have for the regulation of universities. On the whole, universities are surely one of the sectors of this country that have performed outstandingly well over many, many years. We have some of the leading universities in the world. We are recognised as being in that position; our universities are admired. Rather like the noble Lord, Lord Blunkett, I think I am opposed to the whole Bill; but I am most definitely opposed to Clause 4.

We all have such respect for the noble Earl, Lord Howe, and I do hope that Ministers will seriously consider withdrawing Clause 4 as currently drafted. If it is still in the Bill when we reach Report, I shall certainly oppose it—as, I believe, will many other noble Lords.

Baroness Chakrabarti (Lab): My Lords, it is a privilege to follow so many contributions from noble and learned Lords across the House. I declare my interests, first as a lawyer—unashamedly; we need to be loud and proud in these difficult times when we are so denigrated—but also my academic interests as listed in the register.

Like other noble Lords, I would prefer not to have the Bill at all, but this is not a Second Reading moment. It is a combination of virtue signalling on the one hand and "something must be done", in the context of very difficult times culturally, with a polarised society, intergenerational disputes and so on. However, in a Bill that is not great, Clause 4 is the worst part.

Against myself, I would rather go back to a halcyon age where universities were largely self-regulating, as I think it was a rather good way of preserving their academic and free speech independence; but perhaps I am a dinosaur to think that universities could be self-regulating. I do understand that, when a lot of public money is being spent on universities, people will be concerned that they should not be totally self-regulating—and they are not, in existing law. But Clause 4 is problematic for a number of reasons that have been well drawn out—and not just by the lawyers, I might add; some of my asterisked and underlining notes are from the contributions of non-lawyers with practical experience of the academy.

To get into the "otiosity"—if that is a word—dispute between the noble Lord. Lord Pannick, and the noble and learned Lord, Lord Hope, I am probably, not for the first time, with the noble Lord, Lord Pannick. If Clause 4 were removed—incidentally, what is it about fourth clauses? I am glad that my noble friends on this side are giggling at that and are not upset. My reading of the Bill if it existed without Clause 4 is that it would give some further definition to the rights that already exist under Article 10 of the ECHR, which deals with free speech, and the duties placed upon public authorities to respect that duty in relation to those who would otherwise be deprived of their free speech rights in a university.

The noble Lord, Lord Johnson of Marylebone, made an important point: it is one thing to say that a university regulator that already exists and has all sorts of duties relating to this publicly financed space will take on extra responsibilities and concerns around guaranteeing free speech, but another thing to have,

[Baroness Chakrabarti]
alongside all that architecture, a new statutory tort that brings financial compensation into it. Those things stand in tension, which is why I also have sympathy with the noble Lords, including the noble and learned Lord, Lord Etherton, and the noble Lord, Lord Sandhurst, who said, "Let's at least try to define this new Clause 4 duty or look at what it is we want to achieve by it."

My own understanding is that courts and employment tribunals should already be ensuring that people's free speech is protected in the context of their employment and appointment rights. If that is in doubt, so be it: provide for that in the employment law system, the appointments system and the regulatory system. But to create a free-standing and wide-ranging tort, which by definition would bring financial compensation in a context where civil legal aid is virtually dead in our jurisdiction, is an invitation to think tanks and NGOs, including international ones, to do what some people call making mischief—although, as a lifelong mischief-maker myself, I perhaps should not bang on about that too much.

Clause 4 will do the opposite of what is intended. What I believe to be intended is that we should once again be encouraging the clash of ideas, even when they are uncomfortable—even, occasionally, when they are offensive—in the academic space. To hand the right to litigate to people who should be debating, not litigating, is by definition to be handing it to some and not others. I have no doubt that that will have the opposite effect from what is intended.

The noble Baroness, Lady Fox, said, "Will it be just about financial loss or should it be about other kinds of loss as well?" One needs to be very careful about that in the context of free speech. I have been called a bigot. I do not think I am a bigot and it is not nice to be called one, but if people want to call me a bigot, they need to be able to challenge me on my prejudices, including in the academic space—and including in this Committee, where we are protected. Our free speech is protected in this place more than most people's in the country and around the world, and we should be careful about imposing new duties and obligations that bring litigation in the name of free speech.

I have concerns about it still, but if this Bill must pass, let it be about regulating universities and empowering them to do better in the difficult navigation exercise that they have. Let it not be a recipe for more litigation, under a Government who are always saying that we have too many "activist lawyers" and human rights lawyers—do not get me started as this is the language of the current Home Secretary and former Attorney-General. What a contradiction it is to say, "There is too much activist litigation" and then to design a recipe for more and more of the same.

4.45 pm

Lord Pannick (CB): I hope the Committee will accept my apologies for failing to mention my interest as a member of the governing body of All Souls College, Oxford. It is an unusual college as we have no students, but we are not immune from the problems the noble Lord, Lord Triesman, mentioned earlier.

Baroness Falkner of Margravine (CB): My Lords, I intend to intervene very briefly. I declare an interest as chair of the Equality and Human Rights Commission. The EHRC generally supports this clause so perhaps I need to add a caveat that I am not taking its advice but speaking in a personal capacity on this issue—perhaps "hybrid" is the best way to describe it, because I will lean on some of its arguments.

I broadly support the Bill. The importance of this clause is less to do with freedom of speech for individuals or visitors, and more to do with academic freedom. Academic freedom is profoundly important in terms of this clause. In the cases that have been mentioned, particularly on previous days in Committee, people have suffered real loss. At the commission, we carried out a very discreet and small piece of work—which is why it is not published yet—in a niche attempt to get under the skin of what was happening to academics in the daily course of their work in terms of a chilling effect and being able to express academic freedom. It was a small piece of work; nevertheless, we found clear evidence of a chilling effect in universities. This could extend to promotions or publications—it is very hard to get certain opinions published—or simply being welcome or having collegiate support in your faculty. There is a problem with the freedom of academics to research and publish what they do in certain areas that refer to some of the cases that have been mentioned here. I do not think the clause is designed to penalise those who offend who are just visiting speakers. It is much more about the people who have to do this day in, day out.

I want to address some points made by noble Lords. The reason this Bill is here is because we know that the Office for Students has been found wanting. The Office for Students has not been able to do what it should be doing, which is why we have the number of cases that have come to the courts. They have not come to the courts under employment law. They have had to come by different routes to get there because the Office for Students perhaps does not have the right powers. I do not wish to criticise another regulator, but perhaps it does not have the powers and that is why we are debating this Bill.

The noble Lord, Lord Grabiner, made a very powerful speech and I am convinced by a lot of what he said, which is why I am not in full enthusiasm supporting this clause. I will wait until Report for that. He made an important point that individuals, on the whole, do not have the resources to go to court. I think this point was picked up by other noble Lords as well. Welcome to the world of crowdfunding: anybody who has a gripe these days can crowdfund and will find somebody who is prepared to dip into their pocket to pursue that litigation. A lot of regulators and smaller bodies which are not fabulously well funded, as well as individuals, are having to face this blight of non-expert people reading an article in a paper, feeling outraged and getting on to PayPal and sending money. Charities know all about that. I do not support the clause but, on litigation, there are people who are endlessly willing to go to court, so I do not see this as a particular deterrent.

I will ask the Minister two questions. The first is on academics who come under extreme pressure in their departments, as was the case with Professor Stock, who has been mentioned. In order to resolve the situation, they are perhaps pressurised to agree—or perhaps they willingly agree, but at a time of huge distress—a departure with the institution. I do not know the detail of Professor Stock's case, but that is sometimes done through confidentiality agreements and sometimes through non-disclosure agreements. The Strasbourg court has in some cases overridden those on the basis of Article 10, but in other cases it has not. Therefore, there is ambiguity in the defence of Article 10 rights when you have had to sign a non-disclosure agreement with an institution in haste at a time of great emotional distress: later on, you do not know whether you can get those rights upheld.

Finally—here I address the Minister directly—Section 43 of the Education (No. 2) Act 1986 created a legal duty for higher education providers to take "reasonably practicable" steps to ensure freedom of speech within their institutions. There has also been subsequent legislation, the last being as recent as 2017. Would not those protections be adequate if Clause 4 were not to stand part? If they are not adequate, the Committee needs the Minister to explain why, because we return to this issue every few years. I am rather swayed by the very knowledgeable opinions expressed today urging the Government to be cautious in this regard, although we generally support the Bill.

Baroness Smith of Newnham (LD): My Lords, we on these Benches share the view that we do not need the Bill, as held by the noble Lord, Lord Blunkett, the noble Baroness, Lady Chakrabarti, and, I believe, the noble Duke, the Duke of Wellington—I apologise if I have taken his name in vain.

In order not to engage in Second Reading again, I will start with the point from the noble Lord, Lord Cormack: with any piece of legislation, ask yourself whether it is necessary. There seems to be a strong sense that there are serious questions about Clause 4 among all speakers across your Lordships' House, from noble and learned Lords to academics to retired politicians—or rather retired MPs: people in your Lordships' House may or may not think of themselves as politicians; on the Cross Benches they probably do not, but on some other Benches "retired MPs" may be the appropriate phrase. But there is almost unanimity across your Lordships' House in opposition to Clause 4, or at least in doubt about it. The only Member who seemed keen to try to support Clause 4 was the noble Baroness, Lady Fox, but she did not seem to have been quite persuaded by it. Could the Minister be persuaded to think again? As noble Lords, particularly the noble Lord, Lord Grabiner, have eloquently pointed out, this clause is not fit for purpose or desirable.

It is not clear that the clause will even work in its own terms. The noble Lord, Lord Triesman, sought to point out that academics are particularly mischievous and that they can debate until the cows come home. However, whether you hang a portrait or how you design your gardens in an Oxbridge college are not things that we would normally take to litigation. That might be the sort of activity that engages academics, but this debate is much more profound. Here I declare my interest as a Cambridge academic; I declared it at the start of Committee stage, but I reiterate it on the record as we are currently in the main Chamber. What we are talking about here is not the sort of debate that people might have over dinner, or in the Oxford Union or the Cambridge Union; these debates are about very serious issues of freedom of speech. Yet it is not clear how Clause 4 will, in any way, strengthen freedom of speech, because, as we have heard from several noble Lords—in particular, the noble Lord, Lord Willetts—there is a danger of a chilling effect. The Government have not adequately thought this through, including the law of unintended consequences. Already, with something like the Prevent requirements, academics or students considering whether they will invite people to speak will think, "Is it worth the effort? Is it worth going through all these procedures to invite a controversial speaker?" Very often, the answer will be no. Bringing in the civil tort will only make that danger even more severe.

Yes, we need a way of ensuring that free speech can be guaranteed, but as the noble Lord, Lord Johnson of Marylebone, suggested, surely that is the job for the regulator. Trying to bring in lawyers is a recipe for even more hours of debate than an economics faculty or the synagogue of the noble Lord, Lord Triesman, might engage in. It will be costly, but will it benefit anybody apart from the pockets of the lawyers? It is not clear that it will.

This clause seems to be deeply unwelcome, and it is unclear that it is necessary. Can the Government think again and consider removing it by Report stage?

Lord Collins of Highbury (Lab): My Lords, I start by saying that this has been an excellent debate. One of the excellent things about this House is that the debate has not been partisan at all—and certainly my contribution this afternoon will not be partisan.

I will share some thoughts about lawyers and courts. As a lifelong trade unionist, I have of course tried to resist courts intervening in industrial relations. This is for good reason, because when Governments have tried to use courts in industrial relations, it often ends in failure. The biggest change over the years—certainly in my experience—has come from the adoption of best practice, codes of practice and the introduction of a regulator. That has resulted in far more progressive and better change than when the courts were used as a weapon. I think that this clause is exactly about that.

The noble Lord, Lord Johnson, is quite right. Whatever we think about whether this provision will resolve some of those vitally important issues, the fact is that we have a well-established regulator, and this Bill proposes to strengthen that regulator. As I was listening to the debate, I thought about the one that we had on the Trade Union Bill. The Government at that time, when highlighting the problems in industrial relations, decided that the main focus—although I opposed that Bill at the time—should be on how we strengthened the regulator. Certainly, in terms of the certification officer, those powers were strengthened.

[Lord Collins of Highbury]

It is a fundamental question. If the Bill has a purpose, it is about change, and its main focus has been on how we make the regulator more effective. What the debate has clearly established is that this clause will have the opposite effect: it undermines the regulator and the changes that we are trying to make. The words that kept coming to my mind in Committee and at Second Reading are those of the Minister, who said that the provisions of Clause 4 were a backstop. I fear that it will be the first step and will result in very well-funded litigation, not to put right a wrong, change a practice or improve the situation, but simply to have a go and make a point. We call it "vexatious", but that is the climate that we are in danger of empowering, if we are not careful.

5 pm

I signed the clause stand part proposal from the noble Lord, Lord Willetts. The signatures to it reflect the point that I made at the beginning: this is a non-partisan debate, and it reflects opinion right across the House. I hope that the Minister will listen very carefully, because I would rather him come back and say that there are points on the regulator that the Government want to improve, there may be things that they will change over a period of time, and they will review the Act—if it becomes an Act. But this clause would open the door to courts and litigation that will undermine any good work that the regulator attempts to do, and the debate has shown very clearly that it needs to go.

Earl Howe (Con): My Lords, as noble Lords have indicated, today and at Second Reading, the issue of the proposed new tort is one that has given rise to a number of doubts, questions and worries, which I shall do my best to address. Whether I can entirely assuage those concerns remains to be seen, but I hope that noble Lords find what I say to be helpful at this stage.

Amendment 48 from the noble and learned Lord, Lord Etherton, seeks to make it clear in the Bill that a claim under the tort against a higher education provider or college can be brought only by the individuals specified under new Section A1(2), namely those whose freedom of speech is protected under the Bill. The amendment would also make it clear that such a person must have suffered loss in order to bring a claim. I can confirm without hesitation—and I hope that it is helpful for me to place on the record—that we intend for the new statutory tort to operate as the amendment suggests, which is the usual approach under tort law. This is reflected in the Explanatory Notes.

For someone to make a successful claim via the tort against a provider, the claimant would need to be able to show that the provider owed them a duty of care. Only the class of individuals specified in new Section A1(2) would be able to demonstrate that the provider owed them a duty of care. This is not a question of demonstrating standing to bring a claim, rather a question of demonstrating that they were owed a duty of care—a more limited group that would not, incidentally, include pressure groups.

As for the need to demonstrate that they have suffered loss, the claimant would need to point to a genuine loss that they had suffered as a result of the breach of the freedom of speech duties in new Section A1 in order to claim damages. If we bear in mind that only a person specified in new Section A1(2) could bring a claim, we consider that they would do so only if they have suffered because of a breach of the duties—even if, for example, that loss is injury to feelings and not a monetary loss. I come back to the point I have made before, which may be helpful to the noble Baroness, Lady Fox: we intend the tort to be a backstop, particularly for those situations where an individual disagrees with a recommendation that has been made.

I understand the concern of the noble Lord, Lord Grabiner, that Clause 4 should specify that compensation can be awarded by the courts. There are, as he rightly said, some statutory torts where it specifies this but also torts that do not: for example, Section 138D(2) of the Financial Services and Markets Act 2000. The principal remedy for tort is damages, although, as the noble Lord will know, an injunction and other remedies may also be available. An injunction, for example, could require that a student is readmitted on the course which a provider has removed them from, so we would certainly want a court to be able to order that, if appropriate.

The remedies available for the tort of breach of statutory duty are the same as for tort generally, subject to the intention of the relevant statute. Where the legislation itself provides a remedy, the question may arise whether it is tended to be additional to the general remedies available under the law or instead of them. Where the legislation provides a remedy but there is no express or implied indication as to whether other remedies are also available, there is a prima facie presumption that it is intended to be the only one available. This presumption will not always exist and the question depends in each case on the construction of the enactment concerned. Given this, we think that it is not necessary to specify that compensation is available; it could, in fact, unintentionally limit the court's powers.

Amendments 49 and 52, tabled by my noble friend Lord Sandhurst, seek to allow the employment tribunal to determine claims brought by academic staff members under the new statutory tort and to make dismissal for exercise of academic freedom automatically unfair. The consequential amendment removes the qualifying period for unfairly dismissed academics and the cap on the compensatory award, and it allows the tribunal to order interim relief. The Bill does not prevent academic staff bringing claims before the employment tribunal, which may take into account a breach of the freedom of speech and academic freedom duties, if it is relevant to a claim before it. Under the current employment law framework, the two-year qualifying period for unfair dismissal is intended to strike the right balance between fairness for employees and flexibility for employers, to ensure that employers are not discouraged from taking on new staff. Where an employee does not have two years' service, it is still possible to bring a claim for wrongful dismissal in the civil courts.

In answer to the noble Baroness, Lady Falkner, in particular, the Bill in fact broadens the range of people covered by the existing freedom of speech duties to ensure that all staff within a provider, college or students' union have protections and can seek redress where duties are breached. The new duties give particular protection to academic staff, including those who may not have employee status or have been employed for less than two years. It therefore broadens the scope of the current provision to ensure that visiting fellows, for example, have the freedom to research and teach on issues that may be controversial or challenging without the risk of losing their post, privileges or prospects.

The Bill gives specific jurisdiction to the courts to consider claims for breach of a statutory duty, as well as setting up a new complaints scheme. I say to my noble friend Lord Willetts that we think that this is a proportionate approach. Academic and non-academic staff will have sufficient routes for redress, without the need to amend employment law as proposed.

Amendment 50, also tabled by my noble friend Lord Sandhurst seeks to make clear in the Bill that the tort should be only a remedy of last resort and that individuals should first exhaust the free route of redress of the Office for Students complaints scheme. Under the amendment, the court would be able to stay the claim on the application of the defendant. We expect that most complainants will choose to use the complaint scheme of the OfS—or students may wish to go to the Office of the Independent Adjudicator for Higher Education—before considering going to court, as no costs are involved in lodging a complaint.

The noble Lord, Lord Grabiner, spoke of mischief-makers. We consider that the tort is unlikely to lead to higher education providers, colleges and student unions having to deal with a large number of unmeritorious claims. A claimant would need to be able to show that the defendant owed them a duty of care, and they would need to point to a genuine loss that they had suffered as a result of a breach of the freedom of speech duties, as I described. In the case of an unmeritorious claim, the claimant would struggle to make their case. In addition, an unmeritorious claimant would risk having to pay substantial legal costs as a result, not only their own but potentially also the legal costs of the defendant. This, together with the availability of free routes for seeking redress, means that we expect the tort will likely be used only as a backstop.

Lord Grabiner (CB): Does the Minister think it appropriate that there should be left in place two possible routes for a complainant—a regulatory route and a Clause 4 route—without there being any guidance whatever in the legislation as to who should or should not go first? At the moment, the Minister is saying, by way of assertion without a scrap of evidence to support it, if I may respectfully say so, that the expectation is that people will use the regulatory procedure first if they are going to make a complaint. At the moment, the legislation does not cater for that problem. Is he satisfied with that?

Earl Howe (Con): My Lords, I hope the noble Lord will accept from me that I am not impervious to the points made by noble Lords from around the Committee on that issue, including the very powerful points that the noble Lord himself made. I will come in a minute to the position I have reached as a result of this debate.

It may be helpful if I just explain first, though, that we should note that, to complain to the OIA, the complainant must generally have first exhausted the provider's internal complaints process; the same is likely to be the case for the OfS scheme. We anticipate that, in any event, where an alternative dispute resolution procedure is available, the court will be slow to engage with issues arising from the same subject matter, unless and until that procedure has been given reasonable time and opportunity to run to a conclusion. If an individual wishes to bring a tort claim before then, they should provide the court with good reasons for doing so, but that will be a matter for the courts to determine.

However, I have heard the concerns expressed by noble Lords, as well as in the other place, about exhausting other remedies and about the tort generally. We take these concerns seriously and will consider carefully whether anything can be done to address them. I am also happy to discuss the issue of who can bring a claim with the noble and learned Lord, Lord Etherton, if he still considers an amendment along the lines of his amendment necessary.

5.15 pm

Turning to the broad issue of this clause as a whole, I am aware that the noble Lord, Lord Stevens, who is not in his place, my noble friend Lord Willetts, the noble Lord, Lord Wallace, who cannot be here but is represented, if I may say so, by the noble Baroness, Lady Smith, and the noble Lord, Lord Collins of Highbury, have all given notice of their intention to oppose the inclusion of the tort clause. I have, of course, listened to other noble Lords who are of similar mind, who I hope will forgive me if I do not name them—there are many names to include. I simply add to what I have already said by pointing out that the existing legislation does not give a specific right to seek compensation to individuals who have suffered loss as a result of breach of the freedom of speech duty, leading to concerns that the law as it stands does not offer similar protection. This is one of the lacunae addressed by the Bill.

The noble and learned Lord, Lord Hope, who cannot be here—ah, he is here. I am very glad to see that he has escaped the fog at the airport and I beg his pardon. His views were, I hope, effectively represented by the noble Lord, Lord Grabiner, and I trust that I have picked them up correctly. The noble Lord, Lord Grabiner, made a point on the noble and learned Lord's behalf about the pre-existing access to the courts, and my noble friend Lord Cormack made points that followed on from this. The current duties under the Education (No. 2) Act 1986 are not actionable, except under the Human Rights Act or by way of judicial review. It would be the same position under this Bill without Clause 4: namely, an express tort set out in statute. The right to damages is therefore limited, and that is one aspect of the current regime that needs strengthening to give individuals the right to claim redress through the courts.

Lord Grabiner (CB): I apologise: it is probably my fault because I did not convey the point of the noble and learned Lord, Lord Hope, as clearly as I could, and perhaps should, have done, and certainly not as clearly as he inevitably would have. It is not about the earlier 1980s legislation; the fact is that the Bill, if it becomes law, will contain brand-new statutory duties. It is those duties that, if broken, would give rise to the course of action we are talking about.

Earl Howe (Con): I am grateful to the noble Lord. I shall reflect on that point and write to him, if he will allow me to clarify the Government's position in that way.

I have already set out how we envisage the tort will operate, so I will not repeat that. Suffice to say that, in the view of the Government, the statutory tort will provide an important legal backstop by giving individuals a specific right to bring a claim before the courts. This could include a number of people in different situations. For example, and purely by way of example, it could include students expelled from their course because of their views; organisers of an event that is cancelled, having incurred costs in the process; and a visiting speaker disinvited at the last minute, with the accompanying media furore and perhaps damage to feelings and reputation. There are other instances I could give. Noble Lords who wish to remove this clause need to be comfortable about removing a backstop provision that could offer a remedial route to certain individuals, such as those I have mentioned.

I hope I have been able to set out why we believe that this clause fulfils a duty that we surely owe to those who believe that their legal rights in this area have been infringed.

Lord Collins of Highbury (Lab): A number of noble Lords referred to the chilling effect and the Minister did not really cover that point. He keeps talking about this being a backstop, but if its effect is to prevent the invitations and stop the debate, what does he think about that chilling effect? It has completely the opposite effect to what he has been speaking about.

Earl Howe (Con): The point the noble Lord, Lord Collins, makes goes hand in hand with the point that I would like to reflect upon. The issue raised by a number of noble Lords was the sequence of events: whether the Bill should make clearer that the complaints process should have first been exhausted before a recourse to the courts is made. So if I may I will consider the noble Lords "chilling effect" point in that context, as well as in the context of the overall clause, and write to noble Lords accordingly.

Lord Macdonald of River Glaven (CB): My Lords, perhaps I might ask the Minister to consider this. He mentioned earlier in his remarks that the question of pressure groups was not really relevant because they would not be an entity to which a duty of care was owed. The problem with pressure groups is their willingness to fund litigation on the part of other people: I think that is the relevance. Would the Minister care to reflect on that?

Earl Howe (Con): I take that point absolutely. I was not seeking to say that someone well funded by a pressure group could not, in certain circumstances, have recourse to the courts. It was simply a point made about pressure groups in themselves.

Lord Etherton (CB): I am very grateful to the Minister for dealing with the range of issues that have arisen. So far as my own amendment is concerned—as I have made clear in the past—it is very poor drafting to leave out major provisions that should be going into the Bill and leave it to a statement of the Minister at the Dispatch Box or to be found in the course of reading the Explanatory Notes. I do think my amendment should be put into a proper form in the Bill itself, if necessary by a government amendment.

If, as I think the Minister referenced, it is envisaged that the courts will be able to give remedies other than compensation, again, that is a very important consideration. I would want to consider very carefully whether it is appropriate for the courts to have to find a suitable remedy other than damages in a particular case, so I would very much welcome an appropriate amendment that we could all see if this provision is to remain in the Bill. Subject to that—and I am very happy to have meetings with the Minister to discuss these matters—I beg leave to withdraw my amendment.

Amendment 48 withdrawn.

Amendments 49 and 50 not moved.

Amendment 51 had been withdrawn from the Marshalled List.

Amendment 52 not moved.

Clause 4 agreed.

Amendment 53 not moved.

Clause 5: General functions

Amendments 54 to 56 not moved.

Clause 5 agreed.

Clauses 6 and 7 agreed.

Clause 8: Complaints scheme

Amendment 57 not moved.

Amendment 58

Moved by ***Lord Willetts***

58: Clause 8, page 10, line 20, leave out "may" and insert "must"

Member's explanatory statement

The purpose of this amendment is to specify the route through which complaints must go, i.e., the OfS cannot intervene until a university's own procedures, or those of the Office of the Independent Adjudicator, are exhausted.

Lord Willetts (Con): My Lords, I will speak briefly to Amendments 58 and 59 in my name and that of the noble Lord, Lord Stevens of Birmingham.

In many ways these amendments follow on naturally from the debate which we have just held in this Committee. It has become very clear that one of the problems that we face is the lack in this legislation of any provision for a coherent complaints procedure which works step by step. A key issue, which will be of concern to many universities, student unions and other bodies, is whether they could find themselves simultaneously facing a civil litigation, an investigation by the Office for Students and a complaint to the Office of the Independent Adjudicator. It would seem extremely damaging and unproductive if all these different types of complaint, all envisaged in this legislation, could go on at the same time. So Amendment 58 is a simple attempt to provide at least an element of provision for sequencing rather than simultaneous investigation.

I realise that the Bill reflects a regrettable loss of confidence in universities as autonomous bodies able to run their own affairs and resolve their own disputes; we have had some vivid examples, for example from the noble Lord, Lord Triesman, opposite, of how those disputes are conducted. Amendment 58 says, "Let's give universities the first chance to resolve these disputes before they're then investigated by the Office for Students". It is an attempt to provide universities with their first responsibility—although not to leave them on their own any longer, absolutely in recognition of the point that the Office for Students would then have the power to intervene.

That leads on to Amendment 59, which tries to specify that the Office for Students really ought not to investigate vexatious complaints. It seems rather absurd and odd that we have a provision at the moment which says that it may or may not investigate vexatious complaints. Why do we not just say that it should not investigate vexatious complaints?

I regard both these provisions as providing some reasonable clarity on the process that will help universities and student unions, while also offering some protection for the OfS itself. We heard, in a very important intervention from my noble friend Lord Johnson, who played a crucial role in the creation of the Office for Students, that of course it is a key regulatory body. The tenor of the arguments from all sides of the Chamber today has been that, if anything, we see an enhanced role for the Office for Students rather than more civil litigation. At least the OfS ought to be able to say to a potential complainant, "You first need to have gone through a process with your university", and, "I'm terribly sorry; this is a vexatious complaint and we are not allowed to investigate such things". That will also help provide some definition of the role of the OfS.

In the light of the interventions we have had this afternoon, particularly from noble and learned Lords, I realise that the definition of the role of the OfS in these circumstances needs to go much further. There is much more we must clarify, but I hope these two amendments at least start the process of bringing some necessary clarification.

5.30 pm

Lord Sandhurst (Con): My Lords, Amendment 60 follows on from what my noble friend Lord Willetts has said. We all seem to agree that we need a strong and effective regulator; that is absolutely at the bottom of this. My amendment makes absolutely clear the scope—or as lawyers say, the jurisdiction—of the regulator. It would prevent a subsequent challenge in court that the regulator did not have power to deal with this.

The amendment seeks to ensure that the OfS complaints scheme has a jurisdiction that is wider than the conventional ombudsman's jurisdiction, which is simply to determine administrative fairness and reasonableness. It appears that the OfS complaints scheme is modelled closely on that of the Office of the Independent Adjudicator. That is pragmatic and sensible, and we know that scheme works. However, in two decisions—the case of Maxwell in 2011 and a decision in 2007—the Court of Appeal limited in an important respect the jurisdiction of the Office of the Independent Adjudicator and ruled that, acting as an ombudsman, it cannot adjudicate on legal rights and duties and that such matters are to be left to the courts.

We need an amendment to make it plain that the limitation the Court of Appeal introduced in the case of the OIA will not apply to the OfS. Otherwise, the director for freedom of speech and academic freedom will have very limited powers to address the substance of university free speech disputes, which will typically concern the right to free speech and this Bill's statutory duties. This amendment would remove an unintended weakness and provide the regulator with the powers that I believe this House wishes it to have.

Lord Triesman (Lab): My Lords, I rise to speak to my Amendment 62. I can help the Minister by saying that it is probably imperfect. That may save her a lot of time later, as she tries to dissect it to see how well it would or would not work. I have been doing my best to find something that might work, but I am painfully aware of its imperfections. Perhaps the best thing I can do is explain what I want it to achieve. I hope that the noble Lord, Lord Willetts, will not be upset by my saying that it follows his intentions as expressed in his amendment.

I am very grateful to the Minister, the noble Earl, Lord Howe, for saying that he will review Clause 4. A viable alternative, which is not unusual in other regulated bodies, is to say that every institution regulated by that body should be compelled to accept its rules. This is a body within higher education, in the same sense that the REF, other funding decisions and many other decisions have now been imported into the world of universities. Most of us would probably have preferred that they remain more independent, but I have accepted the argument that this is very difficult to sustain, given some of the things that have happened.

In this case, what I am trying to achieve is that every institution providing higher education be registered with a body and consequently accept its rules. As the noble Lord, Lord Johnson of Marylebone, said earlier, it was intended that the Office for Students be constructed to be authoritative and to provide appropriate guidance. However, it is not then for a university, a student

[Lord Triesman]
union or anybody else who brings a complaint through this mechanism to say that they will not abide by the decision taken by an officer—they could be named almost anything—in the Office for Students with the responsibility for adjudicating these matters.

I am keen that it should be a named office. A great deal of knowledge will be developed around the culture of dealing with these things in a way that probably would not happen with successive judges in courts. It will develop a knowledge and be able to respond in a knowledgeable way, and within the overall culture. The determination of this officeholder would be binding on those who had submitted the complaint.

I recognise that it is very seldom the case that people will say that this should be a completely untrammelled power. Therefore, I have also tried to build in a means by which the decision can be looked at—in a way, like an appeal. But in either case, whether accepted at first hearing or having gone through a second hearing, it is the decision and the parties must abide by it. I recognise that this makes no allowance for financial penalties, and I have not written anything of that kind into the amendment. However, it might very well make decisions about how a university, individuals within it or people invited to take part in its affairs should conduct themselves and, if necessary, reinstate a debate which has been cancelled. There is a whole variety of things that it could do.

I want to create something of that kind because it will be authoritative, it will address a number of questions that the Bill is obviously intended to address, and it will be from within the culture of higher education, rather than imposed on it from somewhere else, which is never a good recipe in higher education. It is miles better if it is felt to be at least in some significant way part of the beast of higher education. There may be many better ways of formulating this, but that is the amendment's aim. It does exactly what a number of noble Lords have said, which is to reinforce the regulatory system by making its determinations mandatory for all those who have joined the club of that regulatory system. No doubt it would in due course provide guidance. That would probably be very useful after the first cases have been heard and people have begun to ponder their import and what has been learned from them. It would probably provide good guidance. That is a structure which the best regulators achieve.

The old mechanism in the Cabinet Office to look at the validity of regulation specified a number of things. I will not go through them all, but it specified that the outcomes should be proportionate, intelligible, widely disseminated and understood more widely. We should expect all that as part of the outcome from proper regulation. Better regulation makes people feel they can live with a solution, rather than being ordered to do it in a court or some other place.

This amendment hangs together with the deliberations on Clause 4. I am ready to accept that it will need radical reworking. Helpful as the House of Lords officials have been in my trying to get there, I can see that somebody, including me, could pull bits of it to pieces.

Lord Grabiner (CB): My Lords, without wishing to repeat points that I made on earlier amendments, I will refer briefly to the amendments put forward by the noble Lords, Lord Willetts and Lord Stevens of Birmingham, Amendments 58 and 59. Both draw attention to key deficiencies in the current drafting of the Bill.

On moving Amendment 58 at the outset of this group, the noble Lord, Lord Willetts, identified a problem with the priorities or procedure to be adopted. All I respectfully say about that is that we need more of a root and branch exercise on the respective powers of regulators, if Clause 4 unhappily ends up in the legislation. This Bill is currently deficient on the relationship between those two mechanisms. Although I agree with the principle identified, I would like to see a more sophisticated response to the problem.

On Amendment 59, the distinction in legislation between "may" and "must" is a lawyer's old chestnut: "may" is discretionary; "must" is compulsory or mandatory. In order for any body to conclude whether a claim is vexatious, frivolous or a waste of time, it needs some understanding of the facts. I do not think whether it is "may" or "must" matters; it is important that a body has the power to dismiss a case if it is satisfied it is vexatious, frivolous or, for some other reason, unmeritorious.

Baroness Fox of Buckley (Non-Afl): My Lords, I have a couple of brief points. Following that helpful contribution on Amendment 59, I want to clarify that complaints are very often dismissed as vexatious, but it is important that we do not accept at face value that things are vexatious because somebody has accused them of so being. That can be a way of closing down the complaints procedure.

I also want to raise a query. I may have misunderstood something in Amendment 58 in the name of the noble Lord, Lord Willetts, but it suggests that

"the OfS cannot intervene until a university's own procedures … are exhausted."

There is a difficulty there. Often, academics and students to whom I have spoken feel that their dispute is with those very academic authorities, and that even the complaint within the university can get them targeted as free speech troublemakers. It is not straightforward. In some instances, we are talking about a rather toxic atmosphere. Often, the complaint an academic has is precisely because they have been put on some procedure by the university authorities—they may have been suspended or put forward for disciplinary action—which they feel is unjustified. They then get cleared, but all the testimonies from people who have been in this situation make the point that the process is the punishment these days. As I said earlier, the period in which an academic has been labelled as a user of hate speech, suspended from their job or whatever it is can be really discrediting and damaging to their reputation. It is slightly more complicated than has been presented, and this is one of the problems with the state of universities at present, in relation to free speech.

5.45 pm

In that sense, I want to raise the concern I have with Amendment 61 which has not yet been mentioned. Amendment 61 states that:

"When assessing whether a free speech complaint is justified, the scheme must require the OfS to be mindful of … the right of students to feel safe on university campuses".

There is a problem with that caveat of students feeling safe. We might think that means feeling safe in a physical sense—they are not being physically threatened—but the notion of students feeling safe is precisely how free speech is regularly closed down on campus. To use examples, trans students say that they do not feel safe when they hear gender-critical views or even when they are in the presence of someone who they know is gender-critical, even if they do not say anything gender-critical then. Feeling safe cannot be a caveat on the duty of academic freedom, under any circumstances.

The notion of feeling safe is now being broadly determined by a new therapeutic ethos in which harm is seen as psychological, not physical, and which is entirely subjective. When the whole issue of academic freedom first emerged, it was from students demanding safe spaces, so that they could be protected from hearing ideas that made them feel unsafe. What looks like a minor caveat on academic freedom would actually be the death of this Bill, so that it ended up being a censorship charter.

At a decolonisation argument at the University of Edinburgh recently, a Scottish professor gave a speech in which he said that, when he saw the strangulation and murder of George Floyd, he saw in the police officer's face David Hume—the Scottish Enlightenment philosopher. He said he could not see that murder without seeing David Hume's face. The argument was put forward that David Hume was a colonial philosopher who was responsible for slavery, which led directly to that murder. Far-fetched though that might be, the university authorities renamed the David Hume Tower, so that it is no longer called that, students having lobbied to say that they felt unsafe when they walked past it because it was a reminder of racism and colonialism. This is not a far-fetched example; it sounds wacky but the university changed the name of the tower and discredited one of the greatest philosophers of our time.

We must understand that academic leaders are unlikely to take action against speakers, academics, students or staff for a simple difference of opinion but, once the allegation is made that personal safety has been jeopardised, they are obliged to take action. The elision of words and violence is a linguistic trick that has been weaponised on campus with ruthless efficiency and caused a great deal of damage. I want to remove feeling safe completely from this amendment.

Baroness Garden of Frognal (LD): My Lords, I rise to speak to my noble friend Lord Wallace of Saltaire's contention that Clause 8 should not stand part of the Bill. He is back from his holidays but is speaking at the funeral of a very old friend in Bradford. He is very regretful that he cannot be here with us for the Bill, about which he cares so much.

This amendment harks back to the passionate speech of the noble Baroness, Lady Deech, at Second Reading, in support of the Office of the Independent Adjudicator. She was critical in setting it up and said it was doing a decent job. It exists and does a reasonable job of dealing with complaints, but Clause 8 is a complete duplication of bureaucracy. We noted that it was recommended by a Policy Exchange paper, but we do not have to do everything that Policy Exchange tells us to do. This clause will impose considerable additional costs but where are the benefits of this? Surely the Office of the Independent Adjudicator should be able to sort out most of the issues in this clause.

Anyway, universities should be able to manage their own complaints themselves, which most of them do very adequately. Mistakes will of course be made occasionally, but we cannot necessarily assume that state intervention will do better in most cases than the universities themselves. This very lengthy clause, with lots of duplication, is surely not necessary. I am sure my noble friend Lord Wallace would have put it much more passionately, but we simply propose that there is no need for this clause in this Bill.

Baroness Thornton (Lab): My Lords, I shall speak to Amendment 61 in the names of my noble friends Lord Collins and Lord Blunkett, and say to the Minister that this group of amendments is striving to make sense out of something. I read this clause several times over the weekend and found it very puzzling and complex. The Minister needs to look at this amendment and the complete complaints procedure again. I am very struck by the words of the noble Baroness, Lady Garden: it imposes costs, but where are the benefits?

The amendment of my noble friend Lord Triesman has tried to impose order on a very confusing clause. It may not be perfect but he is initiating a useful discussion. Every amendment in this group seeks to clarify and modify how the complaints procedure might work. As the noble Lord, Lord Willetts, said at the opening of this debate, the complaints procedure is not clear.

My noble friend's amendment would ensure that free speech complaints are considered alongside other competing freedoms, such as the Equality Act 2010 and the Counter-Terrorism and Security Act 2015, and that the Government should specify in guidance how that should happen. We have been raising issues around the compatibility of this Bill with those Acts all the way through this discussion and we are raising it again in relation to the complaints procedure.

I will not add any more to that. I think the Minister—the noble Earl or the noble Baroness—will need to address all these amendments, including ours, because, as it stands, this is not a satisfactory clause at all.

The Parliamentary Under-Secretary of State, Department for Education (Baroness Barran) (Con): My Lords, I shall now address the group of amendments that relate to the complaints scheme to be operated by the Office for Students.

Amendment 58, from my noble friend, Lord Willetts, seeks to mandate the provisions set out in paragraph 5(2) of new Schedule 6A on what complaints can or should be ruled out of scope for consideration under the scheme. Amendment 59 seeks to mandate that the OfS must dismiss "frivolous or vexatious complaints", with the intention of reducing the potential bureaucratic burden on the OfS and higher education providers.

[Baroness Barran]

The current drafting's use of "may" rather than "must", as highlighted by the noble Lord, Lord Grabiner, is intentional. The wording is derived from the Higher Education Act 2004, which established the student complaint scheme of the Office of the Independent Adjudicator for Higher Education. This is the usual drafting approach when setting up a new body or new scheme in legislation, allowing for the decision-making body to have discretion in setting out the detail.

New Schedule 6A sets out the bones of the new scheme but it will be for the OfS to provide the detailed rules. The OfS needs the discretion to determine which rules should apply, looking at the scheme in the round. The noble Baroness, Lady Fox, highlighted some of the reasons why that is important. We anticipate that the Office for Students will consult on the rules, so it will be informed by key stakeholders in the sector. These rules will set out the detail of the type of complaint that the scheme will consider and the process to be followed.

I think we are aligned on my noble friend's aspiration for coherence—he is smiling behind me; I am not sure whether that is encouraging—but it is a question of where that coherence is established. We respectfully suggest that that should be done in detail in the rules. My noble friend will absolutely be aware that paragraph 5(2)(b) of new Schedule 6A clearly sets out what is within scope for the OfS to decide—whether a free speech complaint should not be referred until the internal procedures are exhausted. We would expect that to be set out more clearly and in more detail when the OfS has gone through this procedure of drafting the rules.

It is also the intention that complaints should be referred under the scheme within a specified time limit. In the case of the OIA, the time limit is 12 months from the date on which the higher education provider tells the student its final decision. The OfS may well decide on a similar provision, but that is a level of detail for it to determine; it is too specific to be included in primary legislation. It is not necessary to mandate that there should be a time limit, as the OfS will want and need to include this as a matter of good administration. The OfS will also set out rules on how it will deal with frivolous or vexatious complaints for the reasons that the noble Lord, Lord Grabiner, eloquently exposed.

I know that my noble friend and the Committee more generally will have spotted that we use "must" in a couple of cases in the Bill. That is where it is considered particularly significant, such as in the requirement to make a decision and the need to make a recommendation if the regulator considers a complaint justified where "may not" is used—that is, where we have a prohibition.

Amendment 60, from my noble friend, Lord Sandhurst, seeks to confirm in the Bill that the OfS has the power to determine whether a provider has breached its freedom of speech duties. My noble friend is right to think carefully about how the complaints scheme will work.

My noble friend mentioned the Court of Appeal decision in Maxwell and the powers of the OIA. This was about its power to adjudicate on disability discrimination. The court held that it was the OIA's role to review complaints and consider whether the provider acted reasonably and in a justified way. Here, the Bill sets out the parameters of what the OfS must decide. It is clear that it will have the power to determine whether they consider that there has been a breach of the free speech duties.

The Bill specifies that the OfS must provide a scheme under which it is to review and determine free speech complaints. Such complaints are defined as claims that the person has suffered adverse consequences as a result of the governing body's action or inaction, and

"claims that, or gives rise to a question as to whether, the action or inaction was a breach of a duty of the governing body under section A1."

That is at paragraph 2 of new Schedule 6A. Where a complaint is referred under the scheme, the OfS will be required to make a decision as to the extent to which the complaint is justified. As I mentioned earlier in relation to the Maxwell case, this makes it clear that the OfS may determine whether a provider has breached the freedom of speech duties. Indeed, it is a central part of how the complaints scheme will operate.

6 pm

Amendment 61 from the noble Lord, Lord Collins of Highbury, which was eloquently presented by the noble Baroness, Lady Thornton, seeks to set out in the Bill that the OfS must be mindful of the right of students to feel safe on campus, and the other legal duties on providers, colleges and student unions, when considering whether a complaint under the complaints scheme is justified. These other duties would need to be specified in government guidance issued within three months of the passage of the Bill.

As I mentioned, Clause 8 provides that the OfS may make a decision under the complaints scheme as to whether an individual has suffered adverse consequences as a result of a breach of specified freedom of speech duties set out in the Bill. The wording of new Sections A1 and A5 is clear that the main duty is to take "reasonably practicable" steps to secure freedom of speech. The Bill does not say that the freedom of speech duties override other duties and so the Bill must be read consistently with other legislation. I heard the noble Baroness say that she has repeatedly raised issues of compatibility; I hope this goes some way to addressing those. It would not be reasonably practicable for a provider, college or student union to act in a way which means that they would be in breach of their other legal duties, as I have said before.

Given the wording of the duty, when the OfS considers a complaint under the complaints scheme it will already have to take into account all the circumstances, including student safety and other legal duties on providers, colleges and student unions. As for guidance for those subject to duties under the Bill, we anticipate that the OfS will issue guidance about the free speech duties and the complaints scheme, so separate government guidance will not be needed. Indeed, it could confuse matters.

I thank the noble Lord, Lord Triesman, for his generous introduction to his Amendment 62, which would introduce a free speech and academic freedom

officer at the OfS. The officer would act on behalf of the OfS, with powers to require anyone to do, or refrain from doing, anything found necessary as a result of an inquiry under the complaints scheme, and to publish their findings and reasons. Under this amendment, constituent institutions of registered higher education providers and student unions would be obliged to comply with the requirements of the officer, unless they had compelling reasons for not doing so and they published and shared these reasons with the OfS. The OfS would then be required to make immediate arrangements to consider them and make a binding decision in the case. The amendment also seeks to ensure that compliance with the requirements of the officer is made a condition of registration with the OfS, and that, in the case of student unions, it is made a condition of their financial support.

Much thought has been given to the design of the complaints scheme, and it has always been our intention that decisions made under the scheme should give rise only to recommendations, not requirements. This is the common approach of ombudsmen schemes that operate in the public sector, and we believe that it is the right approach here.

We would expect the OfS's recommendations to be complied with, as a registered provider, constituent institution or student union could incur significant reputational damage if it did not comply. If it did not comply, the complainant would in any event have the right to bring tort proceedings before the court. In doing so, we would expect the OfS's decision under the complaints scheme, including any reasons for the decision, to form part of the evidence put before the court, and it seems unlikely that the result would be different.

I do not believe that the designation of a free speech and academic freedom officer is necessary as the Bill already makes provision for the creation of a new role on the OfS board for the director for freedom of speech and academic freedom. The director will have responsibility for investigations of infringements of the free speech duties and will oversee the imposition of sanctions for regulatory breaches, as well as recommendations under the complaints scheme.

On the final sub-paragraphs of the amendment, I assure the noble Lord that it is not necessary to make compliance with OfS requirements a condition of registration for providers, or of financial support for student unions. The Bill already makes provisions for new registration conditions relating to freedom of speech. Under Clause 6, the OfS must ensure that the ongoing registration conditions of each registered higher education provider include a condition requiring the governing body of the provider to comply with the free speech duties. I think that this lay at the heart of the noble Lord's amendment. The Bill also makes provision for the regulation of student unions' free speech duties by the OfS, and allows the OfS to impose a monetary penalty on a student union if it breaches its duties.

In the light of these measures, I am confident that providers, their constituent institutions and student unions will be bound by, and comply with, their free speech duties under the Bill, and will comply with any requirements or recommendations made by the OfS.

Finally, I turn to the notice from the noble Lord, Lord Wallace of Saltaire, of his intention to oppose the inclusion of Clause 8 in the Bill, which was ably communicated by the noble Baroness, Lady Garden. I understand that he wishes to clarify why the Office of the Independent Adjudicator for Higher Education is not sufficient to respond to student complaints. Clause 8 is essential to the Bill. The OfS complaints scheme will provide a clear, effective and cost-free route for all individuals who have a specific complaint to seek redress for breaches of the new freedom of speech duties. The noble Baroness asked what the clause adds. Without it, staff and members of the provider, and visiting speakers, would not have access to redress. The OfS scheme also provides a route for complaints against student unions, without which there would also not be access to redress in that regard.

It is true that a student can currently bring a complaint against their provider or college through the OIA and they will still be able to do so. The OIA will remain the body for general student complaints. That means that students will have a choice. If, for example, they have a number of various complaints, including one involving freedom of speech, they may want to go to the OIA, but if their complaint is solely about freedom of speech they may wish to use the OfS scheme, which is dedicated specifically to that.

Unlike the OIA scheme, the OfS scheme will focus exclusively on freedom of speech and academic freedoms. I know that your Lordships previously expressed support for the OfS taking on this role. We are confident that the OfS's experience and technical expertise will help it to perform the role effectively, with its clear view across the whole sector.

I assure noble Lords that there will not be unnecessary duplication or a sequencing issue across the operation of the two schemes. Paragraph 5 of new Schedule 6A will enable the OfS to make rules to ensure that a free speech complaint will not be considered under its scheme if

"a complaint brought by the complainant and relating to the same subject-matter is being, or has been, dealt with"

by the OIA. Again, I think that was a point that my noble friend Lord Willetts raised.

Paragraph 19 of the schedule will enable the OIA to make an equivalent rule the other way around. I should point out to my noble friend that Amendment 58 would not in any event result in the OIA scheme having to be used before the OfS could consider a complaint. The OfS scheme will be vital in supporting the strengthened duties under the Bill. It will provide a clear and accessible route for making complaints and seeking redress for all individuals protected by the Bill. It is therefore a key component in ensuring that freedom of speech is protected within higher education. I hope I have offered reassurance about the need for this important scheme.

Lord Willetts (Con): I thank the Minister for that response to a brief but very illuminating debate. I certainly learned from the debate that there are defects in the two amendments that I tabled. The noble Lord, Lord Grabiner, said they lacked sophistication, so I plead guilty to a certain rustic simplicity in just saying what should be done, and I have learned my lesson. I

[Lord Willetts]
also understand the point that we have to do some investigation to establish whether a complaint is vexatious. However, I have to say to the Minister that at the end of this debate the underlying concern—again, I think, shared across all sides of the Committee—has not really been addressed. It is that some event does not happen, for whatever reason, at a university, and the following day a well-organised critic fires off a letter to the OIA, a letter to the OfS, tries to start civil litigation, writes a letter of complaint to the vice chancellor and phones a couple of newspapers. That is not in the interests of anyone who cares about freedom of speech and higher education. I think all of us on different sides of the Committee would like some greater clarity about the sequencing and the hierarchy that ensures that a student union or a university does not face that issue. However, in light of the Minister's comments—I completely accept the defects in my amendments—and in the hope that in some way we can return to these debates, I beg leave to withdraw the amendment.

Amendment 58 withdrawn.

Amendments 59 to 62 not moved.

Clause 8 agreed.

Clause 9: Overseas Funding

Amendment 63

Moved by ***Lord Johnson of Marylebone***

63: Clause 9, page 12, line 39, at end insert—

"(3A) The duty in subsection (1) includes a duty to consider whether a registered higher education provider or any constituent institution is overly reliant on overseas funding from a single country of origin."

Member's explanatory statement

This amendment, together with the other amendment to this clause in Lord Johnson's name, would include income from international tuition fees in the definition of overseas funding and ensure that the Office for Students has a duty to monitor over-reliance on overseas funding from a single country.

Lord Johnson of Marylebone (Con): In rising to speak to Amendments 63 and 64 in my name, I draw attention to my interests in the register as a visiting professor at King's College London, chairman of Access Creative College and chairman international of ApplyBoard.

I am not sure we are capturing exactly what we need to in this section of the Bill on overseas funding. If we are to legislate afresh, as we seem to be doing, on freedom of speech in higher education, the chilling effects arising from the excessive concentration of international research and tuition income surely need to be part of the discussion. The four categories of relevant overseas funding in Clause 9 are all good as far as they go, but they manage to exclude altogether the largest single source of such income. That is, of course, the income that universities receive from the uncapped and unregulated tuition fees charged to international students.

Like so many in this place, I strongly support the contribution that international students make to the success of our higher education system, and I am very pleased indeed that we met the Government's target of 600,000 international students in this country by 2021, 10 years ahead of the 2030 target. There are many critics of international students in the country today. I note only that the proportion international students represent in the overall student population has not changed markedly since 2014. While the actual number has increased by 28% since that time, that has been matched by a similar growth in the UK student population, meaning that their proportion of the mix has stayed broadly the same.

6.15 pm

What has changed, particularly since our departure from the EU, is the composition of this international student body. Concentrations of international students from particular countries are intensifying quite rapidly. Efforts to diversify are generally making feeble progress. Recent research by Janet Ilieva of Education Insight for Universities UK International highlighted this clearly. Her research pointed to an increase in the number of UK higher education institutions recruiting more than half of their undergraduate students from just one country, and at postgraduate level the number of higher education institutions recruiting more than half of their PG students from one country has increased over the past three years from 42% to 50%.

A full quarter of international students in the UK are from China. It is reasonable for policymakers to ask whether this is perhaps too much of a good thing, at least for some institutions. Dependency on China for international students varies markedly across the UK system, driven by the strong preference of Chinese students for prestigious and highly ranked institutions. China accounts for 51% of all non-EU students at the 24 universities of the Russell group—10 times more than the next country, India, which accounts for just 5% of such students. The Russell group has made a clear business decision to focus its international student recruitment on a group that yields the most revenue per place. That is because average tuition spend is almost £20,000 for a Chinese student, whereas it is £11,000 for a student from Nigeria and an average of £10,800 for a student from India. Six of our Russell group universities—a quarter of them—had more than 5,000 students from China in the last academic year, and one big institution currently has more than 11,000 Chinese students, roughly a quarter of its total student body of 44,000.

The problem is that excessive concentrations of students from particular countries within certain institutions can create financial dependencies that may limit freedom of speech and result in academic self-censorship. This issue pertains to China now, especially within the Russell group, but it could easily be about other countries exercising inappropriate influence and instrumentalised student flows in the future. We are living through torrid geopolitical times, and views may vary as to how likely some form of disorderly disengagement in our relations with China is and over

what timeframe, but we should assign some probability to a severe disruption to student flows and research partnerships.

To my mind, the Office for Students is late on to this from the perspective of institutional and systemic financial sustainability, and I also believe that UKRI is late on to it in terms of assessing the impact on our capabilities in key fields, including telecommunications and applied materials, where a significant portion of our most impactful research is undertaken in collaboration with Chinese partners. That is why I would welcome a broader definition of overseas funding than is currently in the Bill and why I believe it would be sensible to add a duty on the Office for Students to consider whether a registered higher education provider is overly reliant on income from a single country of origin. I beg to move.

Lord Grabiner (CB): My Lords, if I may respectfully say so, I was extremely interested in the observations of the noble Lord, Lord Johnson of Marylebone, in support of the two amendments to which his name is attached. But there is another aspect of this discussion that gives me an opportunity to have a personal grouse, based on my own experience of higher education in the UK. Until recently I was the master of Clare College, Cambridge, and before that I was for many years chairman at the London School of Economics. We always took enormous pleasure on those occasions when we were able to recruit under-privileged students from poor postcode districts. At the end of the day, it is a terribly important part of the education process that we are concerned with.

The big problem with the current state of play—it has been going on for many years now—is that the cost of educating an undergraduate student at, say, Russell group universities is significantly more than the £9,250 charge that we make. Accordingly, most universities operate at a working loss in respect of the undergraduate school. It is only when you get to the uncapped overseas funds and the kinds of people we are talking about in these amendments that universities get an opportunity to, in effect, balance the books. I am afraid that for many years now, to balance the books we have had to take unregulated students from abroad—with, I entirely agree, a special emphasis at the moment on China.

Some of these fees are literally enormous, at £20,000, £30,000 or even more for certain specified courses. This is a very unsatisfactory state of affairs, not least because, when these students come from somewhere like mainland China, we are not interested in poor postcodes or whether they come from underprivileged families and so on. The answer is that they do not: they come from well-heeled families or state-funded backgrounds, enabling them to be educated here and—invariably, I am afraid, in most cases—to go straight back to their home countries. This is a serious concern, because we need strong cohorts of foreign students to come to our universities, without whom we would not be able to balance the books.

Lord Hope of Craighead (CB): My Lords, following on from the noble Lord, Lord Grabiner, two words in the amendment cause me some concern: "overly reliant". The problem is that no touchstone is provided in the amendment as to how that phrase is to be applied.

As it stands, subsection (2) gives clear guidance as to what the OfS is to look at. The problem to which the noble Lord, Lord Johnson of Marylebone, has drawn our attention is very widespread. It is not only China that one has to consider; there may be other countries too, and there is the question of balancing the contribution made in proportion to the size of the country, and whether it is so great that it gives rise to particular concerns. However, if I may say so with respect, the clause would be improved if it said a little more about the particular point to which the OfS should direct its attention, so that it knows itself what it should be doing.

Lord Willetts (Con): My Lords, in the light of that last comment, I can briefly intervene with reference to Amendment 65 in my name. I register my interests as a member of the board of UKRI and a director of Thames Holdings.

I have two questions for the Minister but they arise also from the important intervention of my noble friend Lord Johnson of Marylebone. First, we do indeed need some sense of proportionality; the figure of 1% of the total income of a registered provider was an attempt to get some sense of what constituted undue influence. It would be very helpful to have an update from the Minister on the Government's view on that. Secondly—I am speaking very much in a personal capacity—this clause is really about research funding. Of course, my noble friend has made an important point about teaching income. In the legislation which he steered through this House, there was a rather clear distinction between teaching, which is a responsibility of the OfS, and research, which is a responsibility of UKRI. It is important that those two bodies work together.

It would also be helpful to hear from the Minister how she envisages the OfS scrutinising what in this clause is predominantly research funding, for which the OfS has historically and legally not had any responsibility, but for which a different government body, on whose board I sit, currently has the main responsibility.

Baroness Smith of Newnham (LD): My Lords, I rise in part to move Amendment 66 in the name of my noble friend Lord Wallace of Saltaire. Before I do that, I would like to speak to the amendments tabled by the noble Lord, Lord Johnson of Marylebone, and the noble Lord, Lord Willetts.

My immediate reaction on reading Amendment 63 and the term "overly reliant" was to ask, how defined? In many ways, Amendment 65 in the name of the noble Lord, Lord Willetts, shows that there is a way of defining overly reliant; 1% might be the right amount or might not, but it begins to give us a way of saying what over-reliance means. Therefore, I believe Amendment 65 to be a helpful addition.

Amendment 64 is interesting but, as the noble Lord, Lord Willetts, pointed out, we need to be careful regarding whether we are talking about research funding or wider university finance. The noble Lord, Lord Grabiner, is obviously correct that the home

[Baroness Smith of Newnham]
undergraduate fee does not cover tuition adequately; international student fees are deemed by many higher education institutions to be extremely important. However, an important question raised by the noble and learned Lord, Lord Hope of Craighead, is: what is over-reliance? If 60% of a British university's students came from one country and then its economy completely collapsed, that would leave the university more than decimated—potentially, minus 60% of its fee income if that market disappeared. So it is in many ways in the interests of higher education institutions to make sure they are not overly reliant on a single source of student fees.

Quite separate from that, in the case of freedom of speech the question then becomes: to what extent do we believe there is an issue about where the money is coming from? If we are talking about Confucius Institutes, for example, that is money coming directly into universities, and there might be questions about the conditions. If we are talking about undergraduate or graduate students coming to study in the UK, the questions might be slightly different. Wealthy parents from whichever country will not necessarily say, "We will send our offspring to the United Kingdom to be educated only if freedom of speech is in some way curtailed or if certain norms and values are articulated." That is probably not what we will hear from China.

If there is somehow government intervention from countries paying fees for their brightest and best to come to the UK, maybe it is something to be explored, but I am not sure that this Bill is the right place to be doing that. There is a whole set of higher education funding issues that we might need to think about, but that then becomes very specific in the Bill, and I am not wholly persuaded that fee income will be a major factor in curtailing freedom of speech.

That also underlies Amendment 66 in the name of my noble friend Lord Wallace, which is a probing amendment to ask to what extent His Majesty's Government think there is a problem with regard to the funding of student unions. Is money coming directly from the Governments of other countries? If so, are they constraining what student unions are able to do? The real question is: is this a problem that needs to be resolved, or is it simply the Government thinking they might like to have another regulator exploring a bit more what student unions are doing? In that case, perhaps we should not support that particular part of Clause 9.

6.30 pm

Lord Collins of Highbury (Lab): My Lords, I thank the noble Lord, Lord Johnson, for raising this issue, because it is an important thing we should debate. Fundamentally, it is about balance and being proportionate—and, as we have heard, there is also the business case about overreliance on a single source of income. Certainly, if foreign students are coming from one country, as the noble Baroness, Lady Smith, said, clearly there is a risk factor in that.

I will start by saying, as I think the noble Lord, Lord Johnson, was saying too, that foreign students are an important element of our soft power. We should not underestimate how making our universities open to overseas students is an important part of the three Ds of our integrated policy of defence, diplomacy and development. Okay, I hear what the noble Lord, Lord Grabiner, said: often, the people whom we are attracting are a growing part of the wealthy side of society and instead we should be focusing on other areas, particularly in Africa, where we should be encouraging more students. However, when I was a student, I found that many of the overseas students that I became friends with subsequently became leaders of countries and influencers of countries, and we should not underestimate that. So I start by saying that I am very much in favour of supporting overseas students and that universities should continue to encourage them—especially from China. I do not think we should be debating that Chinese students are a bad thing. The Chinese Communist Party is a bad thing, but not Chinese students—we should absolutely be committed to that.

As I said at Second Reading and in other debates, the key to addressing the influence of income on free speech is transparency. I am sympathetic to the idea that there should be a requirement to say just what proportion of income is coming from which areas—that is absolutely right—but I also support the view of the noble Lord, Lord Willetts, that in introducing that element of transparency we should not place burdens on institutions that could inhibit academic research and the commitment to follow through those income streams. When we look at other countries, certainly when it comes to reporting requirements, we are talking about a much higher level than those currently envisaged by the Government.

So it is very important that we address these issues, but I share the concern of the noble Baroness, Lady Smith, that this Bill is not necessarily the appropriate place to do it.

Baroness Barran (Con): My Lords, I would like to address the group of amendments relating to overseas funding.

Amendments 63 and 64, tabled by my noble friend Lord Johnson of Marylebone, seek to amend the transparency measures concerning overseas income received by higher education providers. They would add tuition fees to the categories of overseas funding in scope and require the OfS to consider whether a provider or college was "overly reliant" on funding from a single country of origin.

Increasing awareness of foreign interference risks in higher education is of course vital. That is why we have already added measures to the Bill that will require the OfS to monitor the overseas funding of registered higher education providers and their constituent institutions so that it can assess the risk that the funding may pose to freedom of speech and academic freedom in the provision of higher education within a given institution. However, we have ensured that the scope of these measures is proportionate to the risk, in order to ensure that our universities remain a place where freedom of speech can thrive.

The Government consider that these further amendments are unnecessary and potentially overly bureaucratic. Providers are already required to submit data to the OfS on course fees by broad domicile,

broken down by UK, other EU and non-EU. In addition, international student numbers are reported to the Higher Education Statistics Agency and published online, broken down by country of domicile and by provider. This means that information about international tuition fees is already available to the OfS. If the OfS considered that a provider was overly reliant on student tuition fees—the noble Lord, Lord Collins, talked about the business case for overseas students—it could take steps if it thought that this would threaten the financial sustainability of the provider. That is included in the registration conditions that providers must already comply with. The OfS can issue sanctions for breach of these conditions.

Amendment 65, in the name of my noble friend Lord Willetts, seeks to increase the financial threshold for reporting required by higher education providers under Clause 9. This would require that no less than 1% of the total income of a higher education provider would fall to be reported, thereby reducing the burden of reporting on providers.

For many large providers, 1% of their total income could represent tens of millions of pounds, but I am sure noble Lords will agree that, for example, £1 million would be a very significant amount of money if an individual member of the academic staff received it as a research grant. Amendment 65 would mean that such instances might not fall to be reported.

The aim of Clause 9 is to increase the transparency of overseas funding. The OfS will require providers to supply information to them on relevant overseas funding. Relevant funding is defined as certain specified types of funding received by the provider, a constituent institution or a member or members of staff from a relevant overseas person, where that exceeds a threshold—to be set out in legislation—within a period of 12 months. The current intention is to set this at £75,000 in a 12-month period for providers and colleges.

We recognise that the risk of undue influence arising from smaller amounts of overseas income is likely to be lower. We have therefore ensured that the scope of these measures is proportionate to the possible risk to freedom of speech. We believe that the intended threshold of £75,000 for providers and colleges is appropriate, as it will strike the right balance by increasing the transparency of significant transactions without creating undue bureaucracy by requiring the reporting of smaller transactions that are less likely to pose a risk. The information required is further narrowed in scope, as "relevant overseas person" is a limited category and there will also be countries that are excluded from this provision that will be set out in regulations.

We take the impact on the higher education sector seriously, which is why the Bill includes the measures that I have just described to reduce the level of reporting required. We are therefore ensuring the proper targeting of the measure to the risk to freedom of speech, and that the burden on providers will not be too great.

I now turn to Amendment 66 tabled by the noble Lord, Lord Wallace of Saltaire, and spoken to by the noble Baroness, Lady Smith of Newnham, which seeks to clarify why students' unions have been included within the scope of the overseas income measure in Clause 9. The overseas funding measures in the Bill seek to increase the transparency of overseas donations and other income received by higher education providers, their constituent institutions and students' unions to better enable the OfS as a regulator to understand the possible extent of financial leverage from a foreign source, which may influence behaviour to pose a threat to freedom of speech and academic freedom. The information reported will enable the OfS to monitor and report on any sector trends and patterns.

In order for these measures to have the maximum intended effect on countering the threat of foreign interference in higher education and to increase public confidence in the sector, we considered it vital that the overseas funding duties extend to students' unions, as other measures in the Bill do. Students' unions across England are in receipt of a variety of overseas income every year and there is diversity across students' unions in the ways in which they are funded. Information published by the Charity Commission demonstrates that a large number of students' unions are very reliant on the annual donations and legacies that they receive. Therefore, it would be remiss not to include students' unions in Clause 9.

The scope of the measure—noting in particular the threshold amount, which we anticipate will be set at an appropriate level for students' unions—means that the burden on those unions will not be too great and will ensure the proper targeting of the measure to the risk to freedom of speech. I trust I have given reassurance that Clause 9 as drafted offers sufficient and proportionate protection against undue foreign influence on freedom of speech and academic freedom within higher education.

Lord Johnson of Marylebone (Con): I am grateful to my noble friend the Minister for her response and to noble Lords for their excellent contributions. I will reflect on the debate and particularly on whether this was the best place for my amendment, which I recognise I have rather contrived to attach to this Bill. In the meantime, I am very happy to beg leave to withdraw it.

Amendment 63 withdrawn.

Amendments 64 to 66 not moved.

Clause 9 agreed.

Clause 10: Director for Freedom of Speech and Academic Freedom

Amendment 67

Moved by ***Baroness Thornton***

67: Clause 10, page 15, line 11, at end insert—

"(1A) A person may not be appointed as the Free Speech Director if the person has at any time within the previous three years made a donation to a political party registered under the Political Parties, Elections and Referendums Act 2000.

(1B) The person appointed as the Free Speech Director may not while in office make any donation to a political party registered under the Political Parties, Elections and Referendums Act 2000.

(1C) The appointment for the Free Speech Director must be made by an independent advisory panel to be established by regulations made by the Secretary of State.

(1D) The appointment of the Free Speech Director is subject to a confirmatory resolution of the relevant Select Committee of the House of Commons.

(1E) A statutory instrument containing regulations under sub-paragraph (1C) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament."

Member's explanatory statement

This would ensure that the Free Speech Director has not recently and cannot while in office donate to a political party, and that they are only appointed subject to confirmation of an independent advisory panel, a Select Committee of the House of Commons and a resolution of each House of Parliament.

Baroness Thornton (Lab): My Lords, Amendment 67 was tabled in the names of my noble friends Lord Collins and Lord Blunkett. I raised the issue of the appointment of the director at Second Reading. At the time of our Second Reading, which I think was around June, the job had been advertised, with a closing date of 13 July. I do not know what happened after that. I appreciate that the Government have had their mind elsewhere over the last few months, so it is possible that it has sunk without trace. I suppose my first question is: what happened? Was an appointment made and, if so, who is that appointment?

We hope that Amendment 67 is helpful for the Government to fulfil the Prime Minister's stated ambition for integrity and honesty in politics and government. It is about the kind of person who should be appointed to this job and the accountability and safeguards that need to be in place to ensure that they can do their job in the best possible way. Our view is that we should ensure that the free speech director has not recently, and cannot while in office, donated to a political party. Their appointment should be subject to the confirmation of an independent advisory panel of a Select Committee of the House of Commons and a resolution in each House of Parliament.

This is an important job, and we should be using the accountability structures that we have to ensure that this job does what it says it will do on the tin and that the person appointed is appropriate. This was raised by my honourable friend Matt Western in the Commons, at Committee and Report stage. He raised concerns at that time, and we still have those same concerns. I would like to be updated on where exactly we have got to.

If the appointment has not yet been made, at Second Reading I raised the job description, and recommended noble Lords might read it—and some may have done so. The position seemed to require no legal background or expertise in higher education. The person holding this job will be tasked with settling contentious cases, so it must be in our interests that they have a broad understanding of the sector and of the legal and regulatory frameworks around free speech. None of those things was essential in the job description, as it was in July. I ask the Minister whether that has changed. Maybe now there has been this hiatus, there is an opportunity to return to that and perhaps start again.

6.45 pm

Baroness Smith of Newnham (LD): My Lords, I think for the last time I will speak to an amendment on behalf of my noble friend Lord Wallace of Saltaire, and I will also speak to Amendment 67. My noble friend Lord Wallace's amendment also talks about the role of the free speech director. It is about the appointment process. There is a clear issue with the nature of the role, as the noble Baroness, Lady Thornton, has already pointed out.

It is absolutely crucial that the person appointed enjoys the respect of all parties. I do not mean respect in terms of agreeing with what they are going to say but in feeling that they will be impartial. As the noble Baroness pointed out, it would be preferable if the free speech director had some legal expertise, and they also need to understand higher education. But it is absolutely vital that they have the respect of the higher education sector, hence Amendment 68, which suggests that the nominee should come from the Secretary of State after consultation with UUK and with the approval of the House of Commons Education Select Committee. That would at least mean that there is some cross-party approval.

However, there is a real question about the role of the free speech director and how it is going to be possible to appoint someone who is able to adjudicate and lead on free speech, without already being identified with various sides of political debates. Amendment 67 is important, but I would like the Minister to explain, if she can, how the Government feel they are going to be able to appoint somebody deemed to be appropriate by all sides of very often contentious debates, and by whom students, academics and others in higher education feel their interests will be served.

Viscount Stansgate (Lab): My Lords, I support my noble friend Lady Thornton and I support the spirit behind both Amendments 67 and 68, for the following reason. Over the years—you could argue, over the centuries—the balance of power between the Executive and legislature has changed, and it has changed to the detriment of the legislature. Therefore, whenever I see an amendment of the kind proposed in Amendments 67 and 68, which requires that a particular appointment—in this case it is the free speech director but it could be any other important post that arises in legislation—should be subject to the approval of the relevant Select Committee of the House of Commons, I think that is a very good thing. It would be a modest step towards rebalancing the imbalance that I fear is infecting the relations between both Houses of this Parliament, and between us and the Executive. I support the amendments for that reason.

Baroness Barran (Con): My Lords, I will now address the amendments concerning the appointment of the new director for freedom of speech and academic freedom at the Office for Students. Amendments 67 and 68, tabled by the noble Lords, Lord Collins of Highbury and Lord Wallace of Saltaire, and spoken to by the noble Baronesses, Lady Thornton and Lady Smith, cover similar ground, as the noble Baronesses pointed out. They seek to introduce additional requirements to the process for appointing the new director.

Amendment 67 would require the appointment to be made by an independent panel, established under regulations and confirmed by the Education Select Committee. It would further prevent the appointment of a person who had made any political donations in

the last three years and prohibit them from making any donations during their tenure. Amendment 68 would require the Secretary of State to consult Universities UK and obtain approval from the Education Select Committee before nominating the director.

I make it clear that the director for freedom of speech and academic freedom will be appointed in the same way as other members of the OfS board, by the Secretary of State under the Higher Education and Research Act 2017. Although this is not officially a public appointment, it will be done in accordance with the public appointments process, which will ensure the independence of the process. The noble Baroness, Lady Smith, rightly asked how people can be reassured and have confidence in the process, and that is the answer. The involvement of the higher education sector in the appointment through formal consultation would risk threatening the independence of the role. I emphasise that, as has been said in the other place, freedom of speech and academic freedom are fundamental principles in higher education; they are not the preserve of one particular political view.

I point out that one role within the OfS involves appearing before the Education Select Committee as part of the process for being appointed: the chair. No other member of the board, such as the chief executive officer or the director for fair access and participation, requires their consideration or consultation with the sector. It would be inconsistent to make different rules for the director for freedom of speech and academic freedom, and we believe it would set an unhelpful precedent.

Lord Deben (Con): I am always suspicious when Ministers use the word "inconsistent" to overcome a problem. It is inconsistent because it is different. The particular person here needs to have the confidence of all of us. I was impressed by the comments of the noble Viscount, Lord Stansgate, who made a point that we in this House ought to make very clearly to Ministers: the power of the Executive has increased, is increasing and ought to be diminished. In this case, it does no harm to the Government to say, "What a good idea. Wouldn't it be a good idea to take some of these concepts and make sure that people have confidence?" I no longer have any confidence in decisions made by Ministers unaffected by Parliament. The noble Viscount, Lord Stansgate, is right, and the word "inconsistent" does not get out of the problem.

Baroness Barran (Con): I am sure that my noble friend is right that it does not. He may dislike the word "precedent" as well, but it would set a different precedent for how these appointments are made. When you have a chief executive and a director for fair access and participation who are not subject to that kind of consideration or consultation with the sector, it is fair to ask why this role should be, given that those are also highly important and sensitive roles.

Baroness Smith of Newnham (LD): Would the noble Baroness feel the same regardless of who was Secretary of State for Education? Is there not a danger that politics could perhaps be seen in the appointment process? Might it not be better to make it as objective as possible? A precedent might actually be the way forward.

Baroness Barran (Con): By following the public appointments process, which I hope your Lordships trust, we are endeavouring to make it as independent and objective as possible.

On the noble Baroness's point about legal training or expertise, I reassure your Lordships that the successful candidate for the role will have been assessed for their understanding of the legal framework concerning freedom of speech and academic freedom, including how this relates to other relevant legislation. Although legal knowledge would be a benefit for the person undertaking the role, the director will be supported by a team of lawyers, caseworkers, board members and others at the OfS to support decisions under these measures. These decisions will legally be those of the OfS and not of the director personally.

Important oversight will also be built into the system once the director has been appointed. The director will be responsible for reporting to the OfS board on the performance of the OfS's free speech functions. This reflects a similar provision in Schedule 1 to the Higher Education and Research Act 2017, which makes the director for fair access and participation responsible for reporting to the other members of the OfS on the performance of the OfS's access and participation functions. This will not only ensure oversight of the role of the director for freedom of speech and academic freedom by the rest of the OfS board; it will also allow the OfS to co-ordinate and monitor its free speech functions better.

I therefore confirm that the appointment of the director will be in line with the usual public appointments processes, and there will be ongoing oversight of the role. On the noble Baroness's question about where we have got to in the appointment, applications for the role closed on 27 July, and we are currently sifting them, after which there will be interviews and an announcement in due course. Given this, I hope that noble Lords will agree that these amendments are not required.

Baroness Thornton (Lab): I thank the noble Baroness for that explanation. I also thank my noble friend Lord Stansgate and the noble Lord, Lord Deben, for their comments. We of course support the amendment from the noble Lord, Lord Wallace—I thank the noble Baroness, Lady Smith, for her comments in support.

This is not a satisfactory situation. I suppose we should be quite pleased that the accusation of pre-emption that I made at Second Reading is not happening. I suspect that this is not through design—through deciding to wait until the legislation is on the statute book before making the appointment—but rather through not having got round to doing it yet, which is par for the course in government at the moment. I hope that will change over time, particularly if we have a change of Government.

In a way, this is the most partisan amendment that we on these Benches have put down. It is based partly on the appointment of the chair of the OfS, which was

[Baroness Thornton]
not uncontroversial, because it was a donor to the Conservative Party and someone who made a speech in a gathering of very right-wing European politicians in Hungary, as mentioned in the discussions on the Bill in the Commons and at Second Reading. So, pardon me, but we are a bit suspicious about this appointment.

My point is that made by the noble Lord, Lord Deben: this is a particularly special appointment, and it needs to have the confidence of the whole higher education sector. The Government's job is to ensure that that happens, and I am afraid that it is not the case at the moment. However, I beg leave to withdraw my amendment.

Amendment 67 withdrawn.

Amendment 68 not moved.

Clause 10 agreed.

Amendment 69 not moved.

Clause 11 agreed.

7 pm

Amendment 70

Moved by ***Lord Collins of Highbury***

70: After Clause 11, insert the following new Clause—

"Expiry

(1) This Act expires at the end of the period of three years beginning with the day on which it is passed, subject to subsection (4).

(2) A Minister of the Crown may by regulations made by statutory instrument repeal any of the provisions of this Act after one year from the day on which it is passed if the Minister is not satisfied that the provision is working as intended.

(3) Before the end of the period of three years beginning with the day on which this Act is passed a Minister of the Crown must lay before Parliament a written report on the effectiveness of the provisions of the Act.

(4) A Minister of the Crown may by regulations made by statutory instrument—

(a) provide that this Act does not expire in accordance with subsection (1), in full or in part, subject to approval by resolution of both Houses of Parliament, or

(b) make transitional, transitory or saving provision in connection with the expiry of any provision of this Act.

(5) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament."

Lord Collins of Highbury (Lab): My Lords, it is appropriate that the last amendment of the day should be considered as a sunset clause. Amendment 70 would introduce a sunset clause, ensuring that it expired after three years and providing for clauses to be removed if they are not working. I stress that the purpose of this amendment is not to deny the importance of freedom of speech, academic freedom or even whether the Bill is necessary; it is to give the Government the opportunity to gather more evidence on whether the Bill is necessary and whether its provisions are fit for purpose.

Unfortunately, in the debates we have heard—not only today, but throughout Committee—a number of noble Lords expressing opinions about whether the Bill is really necessary. The Bill is there and the Government will pursue it, but I want to give all those noble Lords who have some concerns about it—and particularly about the evidence on which it is based—the opportunity to support this amendment so that, with the support of the academic institutions themselves, we can review the practical elements of the legislation and see how well it is working. This will give the Government the opportunity to have second thoughts, even after the Bill passes all its stages.

I hope that the Minister will give it some consideration; I suspect that she will not. The noble Earl, Lord Howe, said at the beginning that he has been in listening mode. The important thing is that we are at one on the importance of academic freedom and freedom of speech. We are concerned about some of the unintended consequences of the Bill and how they may actually have the reverse impact. This is why something like a sunset clause may be necessary, so that we do not bake into statute something that will end up denying freedom of speech rather than supporting it. I hope that noble Lords will give due consideration to this. I beg to move.

Baroness Bennett of Manor Castle (GP): I will speak briefly to Amendment 70 in the name of the noble Lord, Lord Collins of Highbury, who has just introduced it very clearly, and to which I attached my name. In doing so, I am prompted to declare an interest. The noble Baroness, Lady Smith, made a declaration of interest that made me wonder whether I should do the same, so I will take this last possible opportunity to declare that I receive support from King's College London in the form of an intern—I now have a second excellent intern. I am not sure why that should be declared, but it is now on the record.

The noble Lord, Lord Collins, set out the case for the amendment very clearly. Like many speakers today, I remain convinced that it would be better not to have this Bill at all. But given that we have it, to add a sunset clause—a checkpoint written in the Bill to see what is happening—is unarguably a good idea. To stress the point that this is not a party-political matter but purely a practical, sensible and helpful suggestion to the Government, I will quote the noble Lord, Lord Grabiner, from earlier in this debate:

"Often, the legal process, especially a new-fangled one, confuses and undermines well-intentioned purposes. It is also often the case that the introduction of lawyers and the courts merely fuels increased tension."

There have been huge concerns expressed around this point about the Bill. This amendment is just a simple and practical measure to say, "Let's have a checkpoint. Let's not have another version of the Dangerous Dogs Act; let's make sure we're not making things worse by adding this simple provision, Amendment 70."

Baroness Smith of Newnham (LD): My Lords, a sunset clause seems to be eminently sensible in a Bill that seems to have so little support. I also note that in

proposed new subsection (4) in the amendment, there is actually an opportunity for the Government to offset the sunset aspect of the clause, should they feel that the legislation is going well,

"subject to approval by resolution of both Houses of Parliament".

This would mean that the legislature can keep its rightful place, even while we allow the Government to go ahead with this legislation, about which we are not entirely convinced.

Lord Adonis (Lab): My Lords, if I followed the earlier debate correctly, we have now had six months without a free speech director. I believe that that is correct, based on my noble friend's earlier amendment probing when the appointment was going to be made. If it were so vitally important that this legislation was on the statute book because there was an imminent danger to freedom of speech, presumably the free speech director would have been appointed by now.

In my experience, it is a golden rule of public appointments that those who are most important are filled immediately—for example, we would not be without a Prime Minister for six months because the country would not be run. However, it does not appear that freedom of speech in universities has been imminently threatened and undermined by the fact that there has not been this rather Orwellian-sounding and very un-Tory-sounding person—a free speech director; somebody from the centre who will decree that free speech shall prevail—in post.

If the sunset clause does come in, as my noble friend is suggesting, it may be that, by the end of it, we will still not have a free speech director, and so we will not have seen whether these vital provisions will underpin freedom of speech in our campuses up and down the land. Since this appears to be largely a Bill in search of a problem, removing it from the statute book at the earliest possible opportunity—maybe even before the Orwellian free speech director has been appointed—would seem to be a thoroughly worthwhile development. Since, by then, there could be a Labour Government in office—I imagine that the Tories would be very wary of a free speech director appointed by a Government opposed to them, who could have all kinds of secret agendas—this could be in their interests too.

The Minister may have a wonderful opportunity here to avoid implementing legislation which the Government themselves do not appear to be very keen to implement at the moment—given that they still have not appointed a key officeholder under it—and to prevent it being misused by their political opponents.

Lord Deben (Con): The noble Lord, Lord Adonis, is always a pleasure to listen to.

As a matter of fact, I am not in favour of this amendment, but I want to ask the Minister a question. One of the reasons I raised the question earlier about public appointments is that the period of time it takes to make any appointment is becoming a scandal. I am still waiting for two appointments to the Climate Change Committee. The meetings of the chairmen of all the organisations always say that they are fed up with trying to run committees in which there are no members because the system takes so long.

Could I have the assurance of the Minister that, under this Bill, an appointment will be made, and made quickly? Will she say to the Government as a whole that, until the system works quickly, we will go on complaining about it? It is not reasonable to have so long a gap. It is not that, for some reason or another, this is not an important appointment—I think that there is a lot to be said for it—but that this problem is true right across the board. The time waiting for appointments gets longer and longer, and the process gets stuck more often than it should.

Baroness Barran (Con): My Lords, the amendment tabled by the noble Lord, Lord Collins, also in the name of the noble Baroness, Lady Bennett of Manor Castle, would make the Bill subject to a sunset clause, with the Act to expire three years after the date of enactment, unless a report is made to Parliament and regulations are made to renew the Act. It would also allow Ministers to remove provisions of the Bill one year after enactment if they were not working as intended.

My noble friend Lord Deben shared his concerns about the speed of the appointment process. Sadly, I do not possess a magic wand in relation to Defra appointments, but I shall share his concerns with my noble friends in that department. I also take his serious point that, as someone once said, sometimes when it is slow it is because it is being carefully considered, and sometimes it is just slow. We shall leave it to your Lordships to judge.

We do not think it would be right or appropriate to include a sunset clause in the Bill. Equally, it would not be right to allow Ministers to remove provisions by way of regulations after only one year, when Parliament has only recently approved the Act and there will not have been enough time for the Act to bed in. I should note in this context that it will take time to implement the new statutory regime, with a need to make a number of sets of regulations; to appoint the new director for freedom of speech and academic freedom, as the noble Lord, Lord Adonis, reminded us; to draft guidance; to draft and consult on changes to the regulatory framework; and to set up the new complaints scheme. One year would certainly be insufficient to see the effect of the Bill on the ground. A sunset clause for a whole Act would be very unusual, and we see no reason why this Bill should be treated differently from other pieces of primary legislation.

Lord Collins of Highbury (Lab): I thank the Minister for her response. I am glad that my amendment has at least given the noble Lord, Lord Deben, the opportunity to be supportive of the Government on this occasion.

Just to pick up on some of the points that have been made, from what the Minister said, it sounds as though, if the appointments process for the director for freedom of speech is anything to go by, it will be at least three years before we see this legislation actually being implemented—and who knows what will have happened in three years' time?

The important thing that I wanted to stress in moving this amendment is how important evidence-based legislation is. Certainly, a lot of concern has been expressed throughout Committee about the lack of

[Lord Collins of Highbury]
evidence on some of these points. However, I hear what the Minister says, and I am glad that the noble Lord, Lord Deben, has been able to make that contribution at long last. I beg leave to withdraw the amendment.

Amendment 70 withdrawn.

Schedule: Minor and consequential amendments

Amendment 71 not moved.

Schedule agreed.

Clauses 12 to 14 agreed.

House resumed.

Bill reported without amendment.

7.13 pm

Sitting suspended.

Northern Ireland Elections
Statement

The following Statement was made in the House of Commons on Wednesday 9 November.

"With permission, Mr Deputy Speaker, I would like to make a Statement on the issues arising from the failure of the devolved Government of Northern Ireland—the Northern Ireland Executive—to form. The overriding priority of this Government is to implement, maintain and protect the Belfast/Good Friday agreement.

'Northern Ireland is governed best when it is governed locally.'

Since May,

'that has not been possible. However, our commitment remains absolutely clear'.

The Government believe that this is the moment for restoration of the devolved institutions

'and will work to that end as a matter of utmost priority... My predecessors have all referred to critical times for Northern Ireland, and there have been many, but this year is indeed critical'.—[*Official Report*, Commons, 11/1/06; col. 287.]

I can see you are thinking that you might have heard those words before, Mr Deputy Speaker. That is because you have: they were spoken by the then Secretary of State and right honourable Member for Neath at this Dispatch Box back in 2006.

Although these are different times, with different issues affecting Northern Ireland, I and this Government believe strongly that the people of Northern Ireland deserve a functioning Assembly and Executive where locally elected representatives can address the issues that matter most to the people who elect them. Back in May, people cast their votes in Northern Ireland to give their communities a voice in Stormont. However, for six months the parties have not come together.

On 28 October, the deadline for forming an Executive, as set out in the Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, passed. That is hugely disappointing. As a result, I am bound by law to call new elections for the Northern Ireland Assembly, as set out in the *New Decade, New Approach* agreement. Those elections will have to take place within 12 weeks of 28 October.

Since 28 October, I have been engaging widely in Northern Ireland with the parties, with businesses, with community representatives and with members of the public. I have also spoken with other international interlocutors. I think it is fair to say that the vast majority of those to whom I have spoken think that an election at this time would be most unwelcome.

What people would welcome is having their devolved institutions up and running, because they are worried to see a massive £660 million black hole in this year's public finances at the same time that their public services are deteriorating. They are worried that almost 187,000 people in Northern Ireland have been waiting for more than a year for their first out-patient appointment. They are worried that the share of working-age adults with no formal qualifications is higher in Northern Ireland than anywhere else in the United Kingdom. There is also legitimate and deep concern about the functioning of the Northern Ireland protocol. That concern is felt across Northern Ireland and very strongly indeed in the unionist community.

The one thing on which everyone agrees is that we must try to find a way through the current impasse, in which I have a legal duty to call an election that few people want and that everyone tells me will change nothing. I will therefore introduce legislation to provide a short, straightforward extension to the period for Executive formation. The current period will be extended by six weeks to 8 December, with the potential for a further six-week extension to 19 January if necessary. The aim is to create the time and space necessary for talks between the UK Government and the European Commission to develop, and for the Northern Ireland parties to work together to restore the devolved institutions as soon as possible.

As I stand here, the Northern Ireland Executive have no Ministers in post. That means no Ministers to make the choices that deliver the public services that people rely on, to react to the budgetary pressures that schools, hospitals and other key services face, or to deliver the energy support payments that this Government have made available to people across the rest of the United Kingdom. Before leaving his post, the Northern Ireland Finance Minister highlighted a £660 million in-year budget black hole, but there are no Ministers in the Executive to address it.

As civil servants do not have the legal authority to tackle these issues in the absence of an Executive, I must take limited but necessary steps to protect Northern Ireland's public finances and the delivery of public services. As has been done before, the legislation that I introduce will enable Northern Ireland departments to support public service delivery, make a small number of vital public appointments such as those to the Northern Ireland Policing Board, and address the serious budgetary concerns that I have mentioned.

At a time when so many people are concerned about the cost of living in Northern Ireland, I know that the public there will welcome a further measure that I intend, which will address another matter that was addressed by the former Secretary of State whom I quoted earlier. People across Northern Ireland are

frustrated that Members of the Legislative Assembly continue to draw a full salary while not performing all the duties that they were elected to do. I will therefore be asking for this House's support to enable me to reduce MLAs' salaries appropriately.

Let me end by repeating that the overriding priority of this Government is to implement, maintain and protect the Belfast/Good Friday agreement, which has been the bedrock of so much of the progress in Northern Ireland over the past quarter-century. In recent days, some people have called for joint authority in Northern Ireland. Let me say that that will not be considered. The UK Government are absolutely clear that the consent principle governs the constitutional position of Northern Ireland, under which Northern Ireland is an integral part of the United Kingdom. We will not support any arrangements that are inconsistent with that principle. In addition, we remain fully committed to the long-established three-strand approach to Northern Ireland affairs.

As we approach the 25th anniversary of the Belfast/Good Friday agreement, I have found myself reflecting on the fact that political progress in Northern Ireland has so often required courage, understanding and compromise. I hope that the measures that I have announced in my Statement will allow some extra time for those qualities to be displayed once again. I commend this Statement to the House."

7.30 pm

Lord Murphy of Torfaen (Lab): My Lords, I very much welcome the Statement made in the other place last week. First, it says that there should be no elections in Northern Ireland, and I agree with that. I see no point at all in having elections, given the fact that it would harden positions and polarise the situation. It would also, of course, cost £7 million, which could be better spent on the health service. Secondly, I believe the implication in the Statement is that we are looking forward to celebrating the 25th anniversary of the Good Friday agreement, and that that could be a suitable time for which the negotiations ahead of us might aim. As the Secretary of State said in the other place, there are also huge unresolved issues in Northern Ireland at the moment. The health service is in a critical position and decisions are now going to be made by civil servants. That is not a good state of affairs, and I hope that these issues will be resolved as soon as possible.

The Minister will know, because he has been involved in these matters for a long time, that ultimately the solution to all this can be resolved only in Belfast, even though the negotiations are between London and Brussels—of course they are, because we are talking about the Northern Ireland protocol, and those negotiations should obviously now continue at pace. We are told that, so far, we have had technical discussions between civil servants from London and Brussels. I hope that Ministers from the Foreign Office are now able to negotiate much more assuredly than they have over the last number of months. As the Minister also knows, whatever they do about the Northern Ireland protocol, the solution that is ultimately found has to be resolved by agreement between the nationalist and unionist communities in Northern Ireland.

I understand the problems that unionists have with the protocol and the feeling that their identity has been subject to a lot of strain because of it, but there is an issue among nationalists too, who, by and large, believe that the protocol is something that should happen. It is not easy, of course, but it never has been for negotiations so far as Northern Ireland is concerned.

The one thing I would stress in what I ask the Minister is that the negotiations themselves should be very different from what has occurred over recent months. First, there should be a proper process and plan, and there should be a timetable and a structure. There has been ad hocery, if you like, over recent months, where we find that Ministers go to Northern Ireland, spend some time with the party leaders and come back again. I am not saying that that is a worthless occupation but it is just not sufficient. There has to be a proper, structured plan for talks over the next few months. There is a huge need for those talks to be held among the political parties in Northern Ireland. Yes, the Secretary of State and Ministers must talk with the party leaders, but there is a strong case for the party leaders in Northern Ireland and the Government to come together in round-table talks. That is how progress can be made, and I hope that can happen as well.

I hope that the new Prime Minister and the new Taoiseach—or the new-ish Taoiseach, by Christmas—will be able to get together as well. The Minister knows, as Members of the House know, that, ultimately, what is needed in Northern Ireland is the push that comes from prime ministerial engagement. That is very important too.

The other issue is that, over the last number of months, the negotiation has been seen as a European Union-United Kingdom negotiation. Of course, that is absolutely proper, but it seems to me that the Prime Minister meeting the Taoiseach the other day was a good sign in indicating that the two guardians of the Good Friday agreement—the British Government and the Irish Government—have a very special part to play in ensuring that they get together to deal with issues where is it appropriate, particularly of course on strand 2, north-south relations, and strand 3, east-west relations.

The months ahead present us with huge opportunities. They are difficult ones—but it has always been difficult, as I said earlier. When we get to April, I hope that we will have arrived at a situation where the institutions are up and running; the people in Northern Ireland can govern their own affairs; the institutions are there for all the people of Northern Ireland, whichever community they come from; and that we do not drift towards direct rule. That is the last thing that anybody wants—nobody wants it—and I hope that we will see progress in the months ahead.

Baroness Suttie (LD): My Lords, I too am grateful for the opportunity to discuss last week's Statement. An election at this time, as the noble Lord, Lord Murphy, said, would have been an expensive distraction and would almost certainly not have resulted in any kind of breakthrough in the impasse. It is always a great pleasure to follow the noble Lord, Lord Murphy. Not only does he speak with such great authority and

[Baroness Suttie]
common sense but, for many of us, me included, he symbolises a more optimistic time in Northern Ireland politics.

Nearly 25 years on since the Belfast/Good Friday agreement, it is very important to recall that it was not always like this. There have been times of great hope and optimism. The peace process has previously been held up as a positive example to many other troubled parts of the world. But, as the Minister knows all too well, with all his years of experience, those more optimistic times did not happen without hard work, dedication, dialogue and commitment at the highest level. Mutual respect and trust were absolutely key to this.

Like the noble Lord, Lord Murphy, I appeal to the Prime Minister to take an active role in finding a solution and a way forward out of this impasse, for it is in the interests of the whole United Kingdom for him to do so. Continued stalemate in Belfast is damaging to our reputation and is not in our national interest. So can the Minister confirm when and whether the Prime Minister plans to visit Northern Ireland next?

I am a Scot who believes strongly in the United Kingdom. I am not from Northern Ireland but, in the six years of closely following Northern Ireland matters in your Lordships' House, I have come to understand the intensity and strength of feelings—and indeed anger—that have come to pervade Northern Ireland politics since 2016. An already complex history has become so very much more complex and complicated since Brexit. Cross-community consensus is the only way forward but, to quote my honourable friend Stephen Farry MP,

"power sharing is about power sharing happening; it is not about blocking it from happening."—[*Official Report*, Commons, 20/7/22; col. 1026.]

The Minister will be aware that the leader of the Alliance Party, Naomi Long, wrote to the Prime Minister on 25 October setting out some suggestions for reform. If the choice becomes between deadlock and direct rule, is this not the time for the Good Friday/Belfast agreement to evolve and develop to meet the current circumstances? As the noble Lord, Lord Murphy, said in a debate last week, any reforms to the Belfast agreement have to be "by agreement"; it cannot be

"changed unilaterally by one side or the other."—[*Official Report*, 7/11/22; col. 535.]

Can the Minister indicate when he anticipates that Naomi Long will receive a response to her letter?

As a true believer in devolution, I say that it is hard not to reflect what a fully functioning Northern Ireland Executive would be in a position to achieve right now. A functioning Executive could have been working to resolve the crisis in the healthcare system and to deal with those issues surrounding legacy and moving on from the past—for example, through promoting a truly integrated education system. Perhaps most importantly, a functioning Executive could have been promoting Northern Ireland as a positive place to do business and to attract inward investment, with its unique access to both the United Kingdom and EU markets.

I am not in any way underplaying the scale of the problems facing Northern Ireland politics at this time, but surely the Government, as well as all the political parties in Northern Ireland, owe it to the people of Northern Ireland to try again, to change the tone and to start again with a fresh approach to negotiations, both in Brussels and in Belfast. Not to do so would, I believe, be unforgivable as we approach the 25th anniversary of the Belfast/Good Friday agreement.

The Parliamentary Under-Secretary of State, Northern Ireland Office (Lord Caine) (Con): My Lords, before I reply to the comments of the noble Lord, Lord Murphy of Torfaen, and the noble Baroness, Lady Suttie, I want to place on record my sadness at the news today of the death of the very eminent Northern Ireland historian Dr Éamon Phoenix, an outstanding public figure who will be greatly missed. We send our deepest sympathies to his family. Also, I am also very conscious that today marks the 41st anniversary of the brutal murder by the IRA of the former Member of Parliament for Belfast South, the Reverend Robert Bradford, and the caretaker at the Finaghy Community Centre, Kenneth Campbell. If I can pick up on some comments that have been made recently in Northern Ireland, there was always an alternative to terrorism.

I am incredibly grateful to the noble Lord who, as always, speaks with great wisdom on Northern Ireland affairs, as a very distinguished former Secretary of State; as, indeed, does the noble Baroness, Lady Suttie. I welcome their comments on the Belfast/Good Friday agreement and the approaching 25th anniversary. The noble Lord played a key role in securing that agreement back in 1998 as the chair of strand 1, I believe. The House should be in no doubt that this Government are absolutely determined to restore as quickly as possible a fully functioning devolved Administration, which will then allow the other institutions in strands 2 and 3 to function effectively.

The noble Lord and the noble Baroness highlighted some of the problems that Northern Ireland currently faces and that we should be looking to a restored Executive to address as a matter of urgency. Only recently, the outgoing Northern Ireland Finance Minister pointed to a £660 million black hole in the Executive's finances and this, of course, is having a very damaging impact on key public services, not least the National Health Service and education in Northern Ireland. So, I absolutely agree with noble Lords who are very keen and very desperate to get the institutions back up and running. I can assure noble Lords that that is the Government's very clear commitment.

The noble Lord, Lord Murphy, referred to the need for a plan and a structure. I very much take on board what he says about that, given his experience. I too have been involved in a number of talks processes in Northern Ireland—some successful, some less so. It is always a difficult decision, how exactly we move these things forward, but I very much take his comments on board. One of the reasons, obviously, for delaying the election and postponing the election duty under which the Secretary of State is currently, is to give extra time and space, first for our discussions with the European

Union over the protocol but also in the hope that the Northern Ireland parties can come together in some form, ready to restore an Executive.

Both the noble Lord and the noble Baroness referred to prime ministerial involvement. I hope both will welcome the fact that the Prime Minister attended the British-Irish Council meeting in Blackpool last week—the first that a Prime Minister has attended, I believe, since 2007. I understand that at that meeting there was very constructive engagement between the Prime Minister and the outgoing Taoiseach, Micheál Martin. I look forward to those discussions and that engagement continuing. I cannot give the noble Baroness a precise time and date as to when the Prime Minister will next step foot in Northern Ireland itself, but I assure her that resolving these issues is very much a top priority.

I will add one word of caution—or a caveat, if you like—based on all our experiences. Yes, of course prime ministerial involvement is important, but it is not always the silver bullet. The noble Lord, Lord Murphy, will recall Leeds Castle in 2004 and the Hillsborough declaration in 2003. I was involved in the Stormont House negotiations, when there was limited involvement from the then Prime Minister yet we had a successful agreement. Prime ministerial involvement is not always a guarantee of success, but I very much take on board the comments made.

I absolutely share the sentiments of the noble Lord, Lord Murphy, about not wanting to drift into direct rule. Both he and I have both been in the Northern Ireland Office during periods of direct rule, and it is a very unsatisfactory state of affairs. I agree entirely that Northern Ireland is best governed when it governs itself under the devolved Administration.

The noble Baroness referred to the letter sent by Naomi Long to the Prime Minister. I will go back to officials and try to establish where we are with the draft response to that.

We had long debates about reform of the institutions on the then Northern Ireland (Ministers, Elections and Petitions of Concern) Bill. As I set out at the time, the Government are not opposed to the reform and evolution of the institutions, but the noble Baroness will be aware that since the mid-1990s we have proceeded on the basis of what is known as the sufficient consensus rule. This means that changes to arrangements in Northern Ireland should have the support of parties that represent the majorities of unionism and nationalism. We are always open to ideas about how the institutions will evolve, so long as any reform or evolution is consistent with the underlying principles of the Belfast agreement which, to our minds, should be sacrosanct.

I am very grateful to both the noble Lord and the noble Baroness. I will take on board a number of their comments in discussions that I will have with the Secretary of State as we chart the way forward over the next few weeks and months with the sincere hope that the Belfast/Good Friday agreement is upheld, maintained and protected, and the institutions restored as soon as that is possible.

7.48 pm

Lord Hain (Lab): Like my noble friend Lord Murphy and the noble Baroness, Lady Suttie, whose responses I commend, I welcome this Statement. However, I stress that there is only one way in which we will get the devolved Government up and running: to succeed with the negotiations over the protocol. I hope that the Government and these early signs of the Secretary of State's stance over recent weeks—as well as the Prime Minister's meeting with the Taoiseach—are good signs. Trust between London and Dublin has basically been at a level of zero for quite a while, and it is not much better with Brussels.

To be perfectly honest—I hope the Minister will not take this amiss—we negotiated the Good Friday agreement and the St Andrews agreement even though they were "It will never happen" agreements; my noble friend Lord Murphy was directly involved in the former, and myself in the latter. By comparison, the negotiations with the European Union are relatively straightforward. There need to be much more flexibility and creativity on the part of London and less dogmatism over such matters as the European Court of Justice—the noble Lord, Lord Thomas of Gresford, suggested a solution to that which I commend to the Government—as well as over the question of the democratic deficit, and the Northern Ireland parties need to have consultative rights with Brussels over issues affecting them due to the protocol. Norway has those although it is outside the European Union; like Northern Ireland, it is in the single market. Northern Ireland should have those consultative rights. I therefore urge the Minister and the Secretary of State to impress upon the Prime Minister that there needs to be more flexibility on the part of the British Government, then we can sort the protocol, get Stormont up and running again and the devolved Government of Northern Ireland doing their job.

Lord Caine (Con): I am grateful to the noble Lord, another distinguished former Secretary of State, for his comments. Of course, I absolutely agree that the single biggest obstacle to the restoration of devolved government is the current operation of the Northern Ireland protocol, which is why the Government are absolutely determined to keep what is working within the protocol but to remedy the clear defects that are apparent. We have had very lengthy debates about this in Committee on the Northern Ireland Protocol Bill over the past few weeks. The Government's clear preference is that we have a proper negotiated outcome and an agreement with the EU but, of course, if that is not possible, we will have to take action as set out in the Bill itself.

The noble Lord referred to the need for the Government to show a greater degree of flexibility. I wish he had added something about the need for the European Union also to adopt a less theological and less dogmatic approach to certain matters. However, I agree with his aspiration that we manage to come to an agreement with the EU to resolve these issues so that Stormont can be back and up and running again as quickly as possible.

Lord Browne of Belmont (DUP): My Lords, I too wish to be associated with the remarks the Minister made regarding the untimely death of Dr Phoenix. If the current negotiations taking place with the European

[Lord Browne of Belmont]
Union on the Northern Ireland protocol fail to deliver any major changes, I think it is unlikely that the Assembly will resume. Can the Minister therefore confirm what he has just said: that the Government will therefore act on the protocol Bill which has been agreed by the other place?

Lord Caine (Con): I am grateful to the noble Lord speaking for the DUP. As he is well aware, the Government are committed to making changes to the protocol through discussions with the European Union that are currently taking place. We all hope that they will be successful, but in the event that that is not the case or is not possible, we remain committed to the provisions of the Bill.

Baroness Ritchie of Downpatrick (Lab): My Lords, I would like to be associated with the Minister's comments about Dr Éamon Phoenix, a lecturer in Irish history at Stranmillis, one of the colleges of Queen's University Belfast, who had a particular emphasis on Ireland and Northern Ireland. Dr Phoenix was a very eminent historian, giving talks on a regular basis and writing documents about historical analysis, with particular reference to the current situation with the Good Friday agreement, particularly over the last 25 years.

The Government were correct to pause the elections. As my noble friend Lord Murphy said, it would simply have increased the level of polarisation in Northern Ireland. Rather gently, I say to the DUP that no political ideology, no matter how dearly held, should prevent the restoration of the political institutions. Over the last weekend, we have seen a health service in crisis. The Royal Victoria Hospital in Belfast and the Antrim Area Hospital have been unable to deal with accidents and emergencies that have arrived at their front doors.

As a follow-on from the Statement, and from the Elections Act 2022, what negotiations will take place with the political parties regarding the statutory designation of the First Ministers as joint First Ministers to reflect their equality of power and equality of say in terms of partnership and co-operation, and will such a provision be made in the forthcoming legislation on foot of this Statement?

Lord Caine (Con): I am grateful to the noble Baroness and echo the comments about Dr Phoenix. I was present at a talk on the road to partition that he gave to the British-Irish Parliamentary Assembly when I was briefly a member last year. It was an outstanding lecture and, of course, he played a great role in some of the work around the decade of centenaries in Northern Ireland from 2012 onwards.

The noble Baroness referred to opposition to the protocol. The Government have been very clear throughout that we do not regard opposition to the protocol as a justification for not being part of an Executive, just as, I hasten to add, we did not regard the Sinn Féin position between 2017 and 2020 as remotely justified. We have been pretty consistent on that.

The noble Baroness rightly referred to the problems in the NHS. I spoke of the £660 million black hole in the Executive's finances and the impact it is having. It is why we will have to bring forward budget allocations and a budget Bill in Westminster. It is very regrettable. These are matters that should be dealt with in the Northern Ireland Assembly. However, we must provide some certainty and the ability to protect key public services at this time.

On the noble Baroness's point about First Ministers and Deputy First Ministers, of course there will be ongoing engagement between Ministers and Northern Ireland political parties. At the moment, our first priority is to get the institutions back up and running. However, as I said in responding to the noble Baroness, Lady Suttie, we are not against reforms and evolution of the institutions, so long as we proceed on the basis of agreement and sufficient consensus.

Viscount Stansgate (Lab): My Lords, I welcome the Statement and the news that action will be taken to extend the legislative formation of the Assembly, and to enable time and space for the talks to be taken forward. Probably everyone in this House hopes that those talks succeed.

I hope the House will not mind if I make two observations. I have been to Northern Ireland and seen the Assembly in action on many occasions over years when it was in operation. I organised the annual "Science & Stormont" event, on which all the major parties in Northern Ireland co-operated to co-sponsor. I have seen the capacity of the Northern Ireland Assembly to work together for the good of the people of Northern Ireland.

I very much hope, as referred to later in the Statement, that progress can be made despite all the difficulties. I am mindful of the fact that it was possible for the Northern Ireland Assembly to meet when Her late Majesty the Queen died. There was a Speaker and tributes were paid from all sides of the Assembly. I would have thought—I hope the Minister agrees—that if it is possible to do that on the death of the Monarch, it is possible to restore the Assembly to the working order we all hope for in the future.

Lord Caine (Con): I am grateful to the noble Viscount for his comments and his long-standing involvement and commitment. He makes some pertinent points about the Assembly and the need to get it back up and running. As I say, the Government's clear position is that the current situation is not justified and it would be far better for all if the Assembly was functioning in the way intended. He refers to people coming together; in the context of approaching the 25th anniversary of the Belfast/Good Friday agreement, this serves as a useful reminder of Northern Ireland's huge potential, notwithstanding the current challenges we all face, to thrive and prosper when people work together on all sides.

Lord McCrea of Magherafelt and Cookstown (DUP): My Lords, it is well known that the Secretary of State, beating his chest and saying, at one minute past midnight, that an election would be called, was endeavouring to blackmail the DUP into the Executive. It did not work. Make no mistake: the DUP is not afraid to go back to the electorate after honouring what was pledged in the previous election. It is interesting that the noble

Baroness, Lady Suttie, and the Alliance Party are suggesting a reform of the institutions because of the present stalemate. The Alliance Party did not say the same when Sinn Féin put the Assembly down for three years. Let us therefore have a little balance.

Can the Minister confirm whether, when the Secretary of State was discussing the internal affairs of Northern Ireland—the date of an election to the Assembly in Northern Ireland—he consulted the Foreign Minister of the Irish Republic? This would be in contravention of strand 1 of the Belfast agreement.

Lord Caine (Con): I am grateful to the noble Lord. He will not be surprised to hear that I would not characterise my right honourable friend the Secretary of State's approach to this as attempting to blackmail any party in Northern Ireland. He was rightly setting out the legal position in which he found himself, at one minute past midnight on 28 October. As the noble Lord is aware, having consulted political opinion widely in Northern Ireland, the Secretary of State took the view that an election would not be the right course at this time—hence the extension and the legislation.

As far as the noble Lord's other point is concerned, of course the Secretary of State has numerous discussions, but the important point is that strand 1 issues are—and remain—for the United Kingdom Government and the Northern Ireland parties. That is clear. We are always committed to the three-strand approach to Northern Ireland, including for the internal affairs of Northern Ireland, which are matters for the UK Government in discussion with Northern Ireland parties.

Lord Judge (CB): May I return to the protocol, please? On how many occasions have there been negotiations and discussions specific to the issues raised in the protocol between the UK Government and the European Union, first, at Secretary of State level and, secondly, at any ministerial level? When will the next such meetings take place at each of these levels?

Lord Caine (Con): Forgive me if I misheard the noble and learned Lord. Is he referring to discussions between the UK Government and the European Union?

Lord Judge (CB): Yes, on protocol issues.

Lord Caine (Con): I cannot give the noble and learned Lord a precise date for the next meeting, but there are ongoing discussions, as he well knows. The Foreign Secretary and Maroš Šefčovič have now spoken and met on a number of occasions. I can only reiterate what I said in response to earlier questions: we are determined to do whatever we can to secure a negotiated agreement that will remedy the defects in the protocol, preserve what works and facilitate a situation in which all parties can go back into a restored Executive for the good of the people of Northern Ireland.

Lord Judge (CB): On how many occasions have meetings taken place, specific to the protocol, at Secretary of State level and ministerial level, with EU equivalents? There can have been only so many—one, two, 10, 15. If the Minister does not know the answer, I am perfectly happy to receive a letter.

Lord Caine (Con): If the noble and learned Lord will forgive me, I will endeavour to write to him.

Baroness Bennett of Manor Castle (GP): My Lords, in responding to the noble Baroness, Lady Ritchie of Downpatrick, the Minister said that the Government were not against reforms to the process. I believe that he was referring to reforms of institutions, in particular the way in which the Executive are constituted. Will he go further in saying that, to restore full faith in the process for the people of Northern Ireland, reforms are indeed necessary? Further to that, does he agree that it is crucial that people have a full understanding and involvement in the democratic process at all levels; and so, should there end up being a Stormont election next year, it would be absolutely essential that it were not combined with local government elections, as that would further complicate and involve matters that should be kept separate?

Lord Caine (Con): At the moment, the priority has to be to try to re-establish the institutions. Of course, people will bring forward ideas about potential reforms to the institutions, and we are not against that. They have evolved over the years. Reference has been made to the election of First and Deputy First Ministers. The system that we now have in place following the agreement that the noble Lord, Lord Hain, negotiated at St Andrews is different from the one in the original Belfast agreement. There have been subsequent changes around a number of issues such as facilitating official opposition. I do not particularly want to get drawn into specifics on this. The priority has to be to get the institutions back up and running. Of course, next year is the 25th anniversary of the agreement. Assuming that the institutions are back up and running, which I hope they will be, that may well be a time when we need to reflect on whether there are things that can be done to make the institutions work better. Regarding the noble Baroness's last point, I will not speculate on the dates of elections.

Oaths and Affirmations

8.08 pm

Lord Donoughue took the oath.

House adjourned at 8.09 pm.