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PARLIAMENTARY DEBATES
(HANSARD)

# HOUSE OF LORDS
## OFFICIAL REPORT

*ORDER OF BUSINESS*

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The abbreviation [V] after a Member's name indicates that they contributed by video call.

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 28 November 2022*

*2.30 pm*

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

## Introduction: Lord Roberts of Belgravia

*2.37 pm*

*Andrew Roberts, having been created Baron Roberts of Belgravia, of Belgravia in the City of Westminster, was introduced and took the oath, supported by Baroness Finn and Lord Godson, and signed an undertaking to abide by the Code of Conduct.*

## Introduction: Baroness Lawlor

*2.42 pm*

*Sheila Margaret Mary Lawlor, having been created Baroness Lawlor, of Midsummer Common in the City of Cambridge, was introduced and took the oath, supported by Lord Black of Brentwood and Lord Balfe, and signed an undertaking to abide by the Code of Conduct.*

## Lammy Review

*Question*

*2.47 pm*

*Asked by* ***The Lord Bishop of Gloucester***

To ask His Majesty's Government what progress they have made towards implementing the Lammy Review, published on 8 September 2017.

**The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Bellamy) (Con):** My Lords, the Lammy Review, which the Government warmly welcomed, made 35 recommendations and the Government undertook actions in respect of 33 of them; only two others relating to the judiciary were left on one side. We have now completed 29 out of the 33, and outstanding actions continue in respect of the remaining four. Since the Lammy Review in 2017, our work has evolved considerably and the Government's Inclusive Britain strategy, published in March this year, is central to this work.

**The Lord Bishop of Gloucester:** I thank the Minister for that Answer. Despite it being pledged in the Conservative manifesto, we have heard no more about the royal commission on the criminal justice system. Might the Minister be able to say, first, when we will hear more and, secondly, whether racial disparities will be prioritised by that commission?

**Lord Bellamy (Con):** My Lords, I am not in a position to help the right reverend Prelate on the question of the royal commission on the criminal justice system. However, I can say that we are making considerable progress in matters relating to racial discrimination, which is the subject of this Question.

**Lord Marks of Henley-on-Thames (LD):** My Lords, a key recommendation of the Lammy Review was to set a clear national target to achieve a representative judiciary by 2025. The review identified low recommendation rates for black and ethnic minority candidates as a challenge to judicial diversity, suggesting a skewed appointments system. We are now five years through the eight-year target period. The 2022 statistics, published in July, show slow progress for Asian candidates, but none at all for black and other ethnic minority candidates since 2014. Recommendation rates for black and ethnic minority candidates across the board remained far lower than for white candidates. What do the Government plan to do to address this striking lack of progress in a vital area?

**Lord Bellamy (Con):** My Lords, much effort is being devoted to this problem through the Judicial Diversity Forum. The judicial diversity and inclusion strategy for 2020 to 2025 aims to increase the pool of candidates and attract the best talent. Actions for 2022 include continued MoJ funding for the pre-application judicial educational—PAJE—programme to support lawyers from underrepresented groups to prepare themselves for the judicial application process. There is also a Judicial Appointments Commission—JAC—outreach programme to encourage and prepare applicants for more senior appointments, and a "becoming a judge" scheme especially for ethnic minority solicitors interested in the judiciary. A joint judicial and MoJ programme is in train to improve diversity among magistrates, with an applicant-tracking system to identify ethnic minority candidates. Other professional bodies are also pursuing complementary strategies. In that connection, I pay particular tribute to the Law Society, whose past president, Stephanie Boyce, and present president, Lubna Shuja, are both from ethnic minorities.

**Baroness Gohir (CB):** My Lords, the Prison Reform Trust also conducted research on black and Asian women and found that, although they faced similar experiences to white women in the criminal justice system, they are more likely to receive custodial sentences and more severe sentences for comparable crimes. The research also found that their offending is rooted in domestic abuse. What action are the Government taking to address the specific biases experienced by ethnic minority women; for example, are judges provided with bias and domestic abuse training, is it sufficient, and do they receive refresher courses?

**Lord Bellamy (Con):** My Lords, certainly, judges are provided with domestic abuse training. The Equal Treatment Bench Book places particular emphasis on avoiding bias in sentencing and related outcomes. The judiciary, whose task it is to ensure absolute absence of bias, is well appraised of this problem and working on it.

**Baroness Berridge (Con):** My Lords, I am currently serving on the Joint Committee scrutinising the draft Mental Health Bill. The Lammy Review made it clear that black and minority ethnic prisoners are more likely to have undiagnosed mental health issues, learning disabilities or autism. Will my noble friend the Minister confirm that the scheme of court liaison mental health

[Baroness Berridge]
practitioners being in all courts when people appear in front of them for the first time is going to be rolled out? Will priority be given to youth courts, as it is quite common for young offenders under 21 to have a patchy record in school, which is obviously one of the main places they would be diagnosed as having a learning disability or being autistic?

**Lord Bellamy (Con):** I can give my noble friend the assurance that she seeks. Through the community sentence treatment requirements programme we are working with health agencies to improve access to mental health services for those who need them. In particular, liaison and diversion services are funded by the NHS and should now be present in all police custody suites and magistrates' courts to provide early intervention for vulnerable people, acting as a point of referral and providing a prompt response to concerns raised by police, probation or youth offending teams. I hope that has addressed the question asked.

**Lord Ponsonby of Shulbrede (Lab):** My Lords, in answer to the right reverend Prelate, the Minister said that there had been progress regarding disproportionality. He went on to give the noble Lord, Lord Marks, an example of trying to get a better balance of judges and magistrates. I might characterise those as inputs, but what about the outputs? What about disproportionality in stop and search, in charging, and in ethnic minorities in prison places? What progress has been made on that front?

**Lord Bellamy (Con):** My Lords, stop and search is a matter primarily for the Home Office and the police, but I know that there is special training for police services in relation to this, including better use of body-worn cameras and other action taken to ensure that stop and search is less of a problem than it has been hitherto. In relation to charging, the Lammy report found no discrimination by the CPS in charging decisions, but there is ongoing academic work to establish exactly what the position is as far as the CPS is concerned.

As far as other matters are concerned, this is very much a matter of trust in the system between the ethnic minority and those who are dealing with that person. One of the things in train in the police station is a trial of an opt-in system when legal advice is available. As noble Lords know, free legal advice is available to everyone in the police station. The take-up by ethnic minorities is not very great, because it has to be asked for, but if it is given automatically and the person has to opt out of it, that could make quite a difference in building trust. That is an important initiative currently in train that I hope will bear fruit in due course.

**Baroness Chakrabarti (Lab):** My Lords, returning to the sensitive but vital subject of judicial diversity, it has long been understood that, in order to do its job, our highest court must have at least one senior justice from Northern Ireland and one from Scotland. Yet, to my understanding, not once have we ever had a black or brown senior justice as a Law Lord or, latterly, in our Supreme Court, notwithstanding the Privy Council, Commonwealth and Empire heritage. Is that really acceptable? Is it not time to experiment with time-limited affirmative action?

**Lord Bellamy (Con):** That is a matter for the Judicial Appointments Commission. I cannot challenge the facts that the noble Baroness presents. This is certainly an area on which continued work is necessary.

**Baroness Prashar (CB):** My Lords, one of the Lammy report's recommendations was the development of performance indicators for the Prison Service. Have these been developed? If so, can they be made public so that we can see whether progress has been made against those indicators?

**Lord Bellamy (Con):** Performance indicators in the Prison Service are one of the recommendations that it has not been possible to take forward yet. It is quite difficult to do as it is difficult to devise these indicators. What I can say about the Prison Service is that we are making a strenuous effort to recruit more ethnic minority staff, who, in due course, will work their way up through the system and become more senior. On the latest figures, we are up to about 16%, which is a significant improvement on where we were.

## Glasgow Leaders' Declaration on Forests and Land Use

*Question*

*2.57 pm*

*Asked by* ***Baroness Willis of Summertown***

To ask His Majesty's Government what steps they have taken since they committed to the Glasgow Leaders' Declaration on Forests and Land Use on 2 November 2021; and what plans they have to increase investment internationally to support agroecological transitions in lower and middle-income countries.

**The Minister of State, Foreign, Commonwealth and Development Office (Lord Goldsmith of Richmond Park) (Con):** My Lords, there is no solution to climate change without nature, which is why, as part of our COP 26 presidency, the UK moved nature from the margins of the debate to its centre. We secured commitments from 145 countries, representing 91% of the world's forests, to end deforestation in this decade. Alongside that, we secured financial commitments worth around $20 billion to help those countries deliver, as well as pledges from the multilateral development banks, financial institutions and the world's biggest commodity traders to align their businesses with that goal. Since then, the UK has created the Forests and Climate Leaders' Partnership, which we launched at COP 27, to provide a long-term delivery mechanism for building momentum and holding all those parties to account.

**Baroness Willis of Summertown (CB):** My Lords, I am very encouraged that the Government have committed £3 billion for nature in their climate finance Bill but, another year on and with another COP over, we have no clearer understanding of where and how that money

is to be spent. Can the Minister reassure us that land use for agroecology and other sustainable farming practices that have huge potential for biodiversity, climate mitigation and providing food security in low-income countries will receive some of this funding, and that it will not be focused just on forests? Can he also confirm that supporting those agroecological systems will be included as a key objective in the ongoing integrated review of foreign policy?

**Lord Goldsmith of Richmond Park (Con):** My Lords, I do not think anyone would pretend that we do not need more progress or do not need to accelerate efforts to reverse deforestation, but the pledges that were secured at COP are being delivered. Through the Global Forest Finance Pledge, which is the umbrella pledge for all this, the UK committed £1.5 billion over five years. So far, 22% of that pledge has been spent, so we are on track to meet that commitment. Specifically, we made commitments around the Congo basin; around $300 million of the $1.5 billion that was secured or promised at COP 26 has now been disbursed and spent in that region. Likewise, through our pledge to indigenous people in local communities, we secured a commitment of $1.7 billion from 22 different donors around the world. So far, nearly 20% of that money has already been invested, so we are on track to meet the commitments that we made. I should say, as I have not answered the noble Baroness directly, that a significant focus of UK funding has been on the promotion of agroecology.

**Baroness Jones of Whitchurch (Lab):** My Lords, can the Minister say a little bit more about what is being done to stop the import of soya and palm oil into this country, which is fuelling the deforestation in so many of these developing nations? I know it is a pledge, but we want to see concrete action in the UK now, so perhaps the Minister could update us on the action on that.

**Lord Goldsmith of Richmond Park (Con):** With the noble Baroness's help, we passed the Environment Bill into law. That made provision for a due-diligence law, requiring secondary legislation, that is working its way through the system. We needed to consult—and this has been done by Defra—on which commodities should be initially included in the first tranche of the due-diligence legislation. I have pushing for—and I think we will end up with—a very expansive approach, covering all the key commodities, and that will have a direct impact on our own supply chains. We are, however, doing much more than that. We co-chair, with Indonesia, the FACT dialogue, which brings together 28 countries representing the vast bulk of deforestation caused by agricultural commodities, as well as the main consumer markets. We are working together to try to agree a mechanism for breaking the link between commodity production and deforestation, the former being responsible for about 80% of the latter. We are making progress, but it requires us to talk to countries that do not necessarily agree with us on every issue, so we have to go as far as we are able to go while pushing all the time for greater ambition.

**Lord Purvis of Tweed (LD):** My Lords, women are disproportionately represented in the production of agricultural businesses, but they are massively underrepresented in their ownership. This is largely due to there being too many restrictive legal frameworks that reduce the ability of women to secure investment for ownership and for their own entrepreneurial liberties and freedoms. Will the Minister put forward the case for gender-lens investment through the City of London, British International Investment, and any UK support, because the most transformative thing that we could do for agriculture in developing countries would be to empower women for ownership?

**Lord Goldsmith of Richmond Park (Con):** I thank the noble Lord for making an important point. The main focus, when it comes to supporting a shift towards sustainable land use, at least from the point of view of the UK and ODA, is on supporting smallholders, who are disproportionately responsible by default for much of the deforestation that we see, for example, in the Congo Basin, Indonesia and elsewhere. Almost all the work that we are doing—whether it is the global agriculture and food security programme, or the agricultural breakthrough, which we launched at COP 26, to which 13 countries signed up—is about helping smallholders achieve climate-resilient, sustainable agriculture and ensuring that that model is the most attractive and widely adopted option for farmers everywhere. That, in turn, has a disproportionate impact on women, who tend to make up a disproportionate number of those who actually engage in smallholder farming.

**Lord Collins of Highbury (Lab):** My Lords, just picking up the theme here of how we transition countries, the Minister talks about the very good work that the Government have done on deforestation, but what is he doing to link with other government departments, particularly the BII, in order to ensure that what we are doing in one area is reflected in the other? If we are spending money investing in deforestation through the sorts of things raised by my noble friend, and then he is pumping money into stopping it, are we not defeating the whole objective?

**Lord Goldsmith of Richmond Park (Con):** The noble Lord is right. It would be wrong to pretend that all of our policies are lined up across the whole of government and are entirely consistent. What was said at COP 26, or more recently at COP 27, by us and by all the consumer countries is not reflected, for example, in our trade policies. That is just a statement of the obvious. There is much more work to be done to align the way we approach trade with one of the biggest consumer economies in the world. Countries want access to our markets, and we need to incentivise a move towards sustainability by removing barriers, for example, on commodities grown in Costa Rica, or tuna caught in the Maldives or timber produced and logged in Gabon. In each of those countries there are models of sustainability. We would be able to do much more that way than we could ever do through the use of aid. This is something that we are working on through government. The UK was responsible, at the

[Lord Goldsmith of Richmond Park]
last G7 last year, for persuading all the G7 countries to commit to aligning their entire ODA portfolios, including ancillary bodies such as BII, with our broader climate and nature agenda. There is a lot of work to be done to make that happen; the commitment is there, and we are making progress here in the UK. As I say, however, there is more work to be done.

**Baroness Boycott (CB):** My Lords, perhaps the Minister could say a little more about the original Question from my noble friend Lady Willis. Where can we find out about these success stories that he points to? If he does not know, can he write to us and leave a letter in the Library?

**Lord Goldsmith of Richmond Park (Con):** There are many success stories. They get overlooked when we have these huge COP 27-type summits, but there are countries around the world providing perfect examples of what can be done. I mentioned that Gabon had broken the link between logging and deforestation. Costa Rica has broken the link between agricultural commodities and deforestation. There are a few other countries as well. We do not need to invent anything new. We just must make those examples of best practice the norm. If we can do that through our ODA and other tools, such as trade policy, we will be making a very significant difference.

The agricultural breakthrough that I mentioned earlier, which was launched at COP 26 with 13 countries endorsing it, has identified agroecology as one of the first priority areas for the next three years, and the 13 countries have all signed up to ensure that agroecology receives the funding needed to give it the boost that we want it to have.

**Baroness Bennett of Manor Castle (GP):** My Lords, after COP 27, the Alliance for Food Sovereignty in Africa said:

"It was very disturbing to see a large contingent of corporate lobbyists influencing the process while small-scale farmers have been shut out and drowned out".

Does the Minister agree that this has been a problem through the COP process? Are the Government acting, ideally to exclude but at least to tone down, the impact of big food—the agrochemical companies, the seed companies, the commodity trading giants—which has such a loud voice in the COP process?

**Lord Goldsmith of Richmond Park (Con):** I half-agree with the noble Baroness. There is no doubt that the big vested interests have a disproportionate impact on all such international fora, and that is sometimes reflected in decisions that are made. However, we cannot hope to stop deforestation unless we have co-operation now from the 13 or 14 biggest agricultural trading companies. A few months ago, I co-chaired, with John Kerry, a meeting where we summoned the 12 biggest agricultural commodity traders, to try to pressure them to deliver progress by COP 27, and to show us the road map they intend to follow to break the link between their purchasing of commodities and deforestation. While they did produce that road map for COP 27, and while some of it was very good, particularly in relation to palm oil, it was disappointing in other areas. However, we must keep up the pressure and continue that discussion with those commodity traders.

## Money Laundering Regulations: Politically Exposed Persons

*Question*

*3.07 pm*

*Asked by* ***Baroness Hayter of Kentish Town***

To ask His Majesty's Government what further consideration they have given to the impact of Anti Money Laundering Regulations on Politically Exposed Persons.

**The Parliamentary Secretary, HM Treasury (Baroness Penn) (Con):** My Lords, the recent review of the money laundering regulations concluded that there is still work to do to better understand the risk profile of domestic politically exposed persons—PEPs. It is crucial that the Government fully explore and understand any potential consequences of changing requirements on domestic PEPs before making any amendments to the UK's anti-money laundering regime. This work is ongoing and part of the Government's wider economic crime strategy.

**Baroness Hayter of Kentish Town (Lab):** I thank the Minister for that Answer, but I am afraid that I do not understand it. On 5 July, she said that the review had been concluded and that no change was needed, despite all the evidence that she has had from Members of your Lordships' House. Unbeknown to us but very helpfully, after that, the Lord Speaker wrote to the FCA on 21 July. However, the FCA's reply on 15 August simply repeated that firms should act proportionately in dealing with PEPs. Two hours ago, we all received a letter from the Minister which says: "It cannot be acceptable that Parliamentarians and their families are denied access to personal finance." However, as we will hear from the noble Lords, Lord Vaizey and Lord Kirkhope, and others no doubt, banks are still refusing to handle accounts of their family members, and other colleagues of mine are finding that their accounts are being closed. The system is not working. Can the Minister agree to meet me and other concerned Members of your Lordships' House, together with the FCA and HMT officials, so that we can make progress? Clearly, led by itself, HMT is unable to do so.

**Baroness Penn (Con):** I would be very happy to meet with the noble Baroness and other interested Peers to see what more we can do. I will clarify one point. The review of the money laundering regulations concluded earlier this year. One of the outcomes was that there was more work to do to better understand the risk profile of domestic PEPs. That work is ongoing. When we have a better understanding of the risk profile and any potential consequences of changing the classification of domestic PEPs, we will take our work forward accordingly. In the meantime, it is important that people are treated fairly by the financial institutions that they work with. We have included a list of points

of contact for some of the major banks so that people who are having problems can receive help where it is needed. If Members have issues, I encourage them to make use of the Financial Ombudsman Service, if they need to, as a route to address any problems.

**Lord Kirkhope of Harrogate (Con):** My Lords, I thank my noble friend the Minister for her letter, which clarifies the current position to some extent. As one of those who was involved for a long time in drafting these regulations in Brussels, it was absolutely required that we should put "proportional" into them—unusually for regulations in Brussels. Can the Minister do more to force the FCA and the financial institutions to take some notice of that proportionality? Can we please make sure that this indiscriminate application to public servants—and their families, including my own—of draconian measures can be put aside, and that we can take a sensible and proper view towards anti-money laundering arrangements?

**Baroness Penn (Con):** I absolutely agree with my noble friend on the importance of that word and of a proportionate approach being taken in the implementation of these regulations. I know that concerns have been raised in the past. We have convened previous meetings with the FCA and the banks to make this message known to them. Hopefully, the points of contact that we have provided will provide a further remedy to any noble Lords who are affected. We are also looking at the broader system to see whether we can change the designation of domestic PEPs. However, we need to look very carefully at this and take our time to make sure that we do that work properly.

**Lord Sharkey (LD):** My Lords, the FCA guidelines, which are five years old, make clear that Members of this House should be treated as low risk unless there are other factors at play. There is no point to these guidelines if they are not being enforced. What assessment have the Government made of the FCA's record on enforcement of the guidelines? Have any sanctions ever been imposed on those who break them?

**Baroness Penn (Con):** My Lords, as I have said, we have had an ongoing dialogue with the FCA around the guidelines. In turn, they have had engagement with those that they regulate. I do not have any statistics for the noble Lord on enforcement action. However, one area where we have some statistics is that, since 2018, the Financial Ombudsman Service has received fewer than 10 complaints in this area. That is not to say that people have not experienced problems, but I would encourage them to use the points of contact and, where they are experiencing problems, to advance those complaints, so that we can have better data with which to assess the impact of the issue.

**Lord Vaizey of Didcot (Con):** My Lords, I have used my noble friend the Minister's point of contact. My son was refused an account with Starling Bank. I got through to a senior executive there, who stated to me very clearly that: "It is our policy not to give accounts to the relatives of Members of the House of Lords." That is about as clear a breach of the regulations as you could have. Will the Minister use her convening power to collect in one room the banks, the FCA and Treasury officials? Let us sort this out and introduce some common sense.

**Baroness Penn (Con):** I cannot comment on an individual case, but I can be absolutely clear with my noble friend that the FCA has been clear that designation as a PEP should not be a reason to end a business relationship. I said to the noble Baroness, Lady Hayter, that I am very happy to have a meeting, and I will use all the efforts of my convening power to bring to the table those I cannot directly commit to attending the meeting today.

**Lord Hunt of Kings Heath (Lab):** My Lords, the Minister has said on two or three occasions that great care is needed in any review of the regulations, despite the fact that it is quite clear that the FCA guidance is not being followed by a number of banks. What is this huge amount of work that still needs to be done before we see a change in the regulations?

**Baroness Penn (Con):** My Lords, there is a difference between looking at the FCA guidance and whether it is being properly adhered to and whether that could help solve the problem that noble Lords are talking about. We have made continuous efforts to look at that but, given the wider sentiment we have heard in this House, we also want to look at whether we can make a more substantive change to how domestic PEPs are regulated. That is a wider piece of work that could have unintended consequences, so we need to look at that carefully.

**Lord Forsyth of Drumlean (Con):** My Lords, what was the point of us leaving the European Union to take back control if Ministers cannot direct the FCA to show a bit of common sense? I declare my interest as chairman of a bank.

**Baroness Penn (Con):** My Lords, the standards for our anti-money laundering regulations come from the FATF, which defines an international approach. My noble friend is right that we have the opportunity, having left the EU, to adapt the anti-money laundering regulations to make them more proportionate and more effective. We have already done that in a number of areas, and the piece of work we are going to do, looking at the evidence around the risk of domestic PEPs, is a further area in which we can do some work.

**Lord Macpherson of Earl's Court (CB):** My Lords, I declare an interest as chairman of Hoare's bank. To pick up on the point made by the noble Lord, Lord Forsyth, it is now several years since we left the European Union. The Treasury has regulatory powers to change the relevant legislation, and the Government are determined to prove the benefits of Brexit. Surely it is time to use those powers to make progress on this issue.

**Baroness Penn (Con):** I agree with the noble Lord that we should make use of the new powers we have. As I said to the House previously, we have already made a series of amendments to the money laundering regulations to reduce unnecessary burdens—for example,

[Baroness Penn]
scrapping the requirement for the creation of a bank account portal, which was seen as disproportionate. There is more work to do in this area, and that work is under way. We published the review of our anti-money laundering regulations in June, and we are committed to consulting on broader changes to our approach. The main focus of that is on the supervisory bodies for anti-money laundering regulations, but this issue is also being looked at as part of that work.

## Farmers and Landowners: Tax Consequences

*Question*

*3.18 pm*

*Asked by* ***Lord Carrington***

To ask His Majesty's Government what plans they have, if any, to ensure that farmers and landowners do not suffer any disadvantageous tax consequences if they change the use of their land away from agriculture to enter long-term arrangements that (1) deliver improvements in biodiversity, or (2) sequester carbon, under current government schemes.

**Lord Carrington (CB):** In begging leave to ask the Question standing in my name on the Order Paper, I declare my interest as a farmer and landowner. I also take this opportunity to humbly apologise to the House for failing to declare these interests during a supplementary question I was scrambling to ask during last week's Question on the private rented sector.

**The Parliamentary Secretary, HM Treasury (Baroness Penn) (Con):** My Lords, farming is going through the biggest change in a generation. The Government are introducing policies in England that work for farm businesses, food production and the environment. Some stakeholders have raised concerns that tax rules, particularly inheritance tax rules, might be a barrier to land use change in certain situations. The Treasury, HMRC and Defra have been working closely to consider the potential need for changes to the tax system, including where rules may need to be clarified.

**Lord Carrington (CB):** I thank the Minister for her kind words; however, we need a little more action. It would seem to be a platitude to say that the tax system should align with the Government's climate change and environmental objectives but, over a year since the passing of the Environment Act, there is still no legislation looking at how the tax system effects the sequestration of carbon and biodiversity net gain. Can the Minister confirm that these activities will have the same tax status as traditional farming activities, and be considered as trading income rather than investment income? Secondly, can she confirm that these activities will attract the same inheritance tax reliefs currently available? Without such reliefs, higher agricultural land values as a result of carbon sequestration and biodiversity net gain will disincentivise the farmer from joining these schemes.

**Baroness Penn (Con):** I am afraid that I cannot give the noble Lord the Answer he desires. I can confirm that HMRC is discussing the issues he has raised with Defra both to clarify how existing law applies, for example, to the production, sale and use of carbon units in different environmental schemes, and to look at the inheritance tax question he raised. The Government have shown that we will act to clarify the tax rules where appropriate for the farming programme. For example, legislation is being introduced to clarify that payments under the lump sum exit scheme for farmers are treated as capital receipts and, therefore, charged to capital gains tax or, for companies, to corporation tax as chargeable gains.

**Lord Palmer of Childs Hill (LD):** My Lords, I hear what the Minister says but the government paper of October 2021 said that the Government would

"review guidance on the tax treatment of trees and woodlands, to provide greater clarity to landowners on how new and existing trees on their land affect tax liabilities."

Nothing has been forthcoming. Can the Minister update the House on the progress of the review? She mentioned HMRC but most people do not know what the guidance is.

**Baroness Penn (Con):** My Lords, we are iterating our approach as we develop these schemes. Quite a lot of them are new, and many different aspects are being piloted or developed. It is important that, as development happens, we take into account the tax considerations and implications of the new schemes. I can reassure noble Lords that we are aware of some of these questions and issues. We are looking at them very closely and, as the policies are developed, we are taking that into account in the Treasury's input into Defra schemes.

**Lord Jones (Lab):** My Lords, does the Minister guarantee that her taxation policies will not bear down unjustly and negatively on the upland farming areas of England and Wales? I have in mind the Borders, Cumbria, the Pennines, Cefn Gwlad—the heartland landscape of Wales—and the moorland communities of the south-west. Does she acknowledge that, already, besides taxation, the big problems are elevation and climate, and that these historic communities do not need further problems arising from her department's taxation policy?

**Baroness Penn (Con):** I reassure the noble Lord that we are cognisant of the need to ensure that our tax policy and our environmental land management schemes are working with and not against each other. It is an area of some complexity. With respect to how different farmers are affected—the noble Lord mentioned upland farmers—we are trying to look at the whole system and its different levels of complexity to make sure that we get to the right approach.

**Baroness Bakewell of Hardington Mandeville (LD):** My Lords, the current environmental land management schemes have three elements: the sustainable farming incentive, which is up and running, and the local nature recovery and landscape strands, which are still in pilot stage and will not be fully launched until 2024. Farming is a profession that requires very long-term

planning. How do the Government expect farmers to engage fully with ELMS if they do not know what the impact on them will be, either financially or in expected tax commitments?

**Baroness Penn (Con):** Part of what the noble Baroness alighted on reflects our approach: as we pilot and iterate these schemes, we will learn and look at their implications for taxes. How they are designed might have different impacts, so we cannot prejudge that. I reassure noble Lords that tax rules should not have a bearing on many environmental activities under the ELM schemes, such as improving soil health. Many farmers already undertake these activities or have changed their land use within the tax rules currently in place.

**Baroness Hayman of Ullock (Lab):** My Lords, I listened carefully to the Minister's responses. There are a lot of doubts among farmers about what ELMS will actually mean, and there is too much uncertainty to allow them to plan properly for the future. Does the Minister properly understand why some parties are just not comfortable about entering into a scheme for which the tax implications are unclear, and which might not even exist in a few years' time? Farmers need clear advice today, so when will the Government be able to provide that clarity?

**Baroness Penn (Con):** As I said, many of the tax rules should not have a bearing on many of the environmental activities under ELMS. We already have several schemes under way, with a high take-up among farmers. But we understand that there could be broader implications, particularly for the landscape recovery scheme, and we are carefully looking at this. The 22 initial projects are receiving funding through that scheme, and people have felt able to sign up to them under the existing tax rules and systems. But we will look at those projects and implications as part of our design.

**The Earl of Caithness (Con):** My Lords, I urge my noble friend to look urgently at this problem, which is very serious for farmers and landowners, who cannot make a decision with any certainty, given that the tax regime might change. What incentive is there for a farmer to do the good thing for biodiversity if they will be taxed badly for it?

**Baroness Penn (Con):** As I said, the tax rules should not have a bearing on many environmental activities under the ELM schemes. We are cognisant, particularly where there may be a change of land use, that this could invoke questions of tax treatments—although, even if the land may not be used for agriculture any more, it may often still qualify for business property relief, for example, as an alternative inheritance tax relief.

**Baroness Meacher (CB):** My Lords, following up the question from the Labour Front Bench, could the Minister indicate the timing? When will the Government be able to clarify these issues in relation to the many parts the Minister referred to?

**Baroness Penn (Con):** As I understand it—I am working hard to make sure that I fully understand the tax implications of these schemes, but I am not yet as well versed in these things as my noble friend Lord Benyon—we are still designing the landscape recovery scheme and piloting different approaches. Those schemes are not expected to be rolled out in full until 2024, so that work is ongoing. On other schemes that are already in place, we do not expect the larger-scale schemes for farmers, such as the sustainable farming initiative, to have significant tax implications for farmers.

## Energy Bill Relief Scheme Pass-through Requirement (Heat Suppliers) (Northern Ireland) Regulations 2022

## Energy Bill Relief Scheme and Energy Price Guarantee Pass-through Requirement and Miscellaneous Amendments Regulations 2022

*Motions to Approve*

*3.29 pm*

*Moved by* ***Baroness Bloomfield of Hinton Waldrist***

That the Regulations laid before the House on 3 and 4 November be approved.

*Relevant document: 18th Report from the Secondary Legislation Scrutiny Committee. Considered in Grand Committee on 22 November.*

**Baroness Bloomfield of Hinton Waldrist (Con):** My Lords, on behalf of my noble friend Lord Callanan, I beg to move the Motions standing in his name on the Order Paper en bloc.

*Motions agreed.*

## Investigatory Powers Commissioner (Oversight Functions) Regulations 2022

## Investigatory Powers (Covert Human Intelligence Sources and Interception: Codes of Practice) Regulations 2022

## Proceeds of Crime (Money Laundering) (Threshold Amount) Order 2022

*Motions to Approve*

*3.30 pm*

*Moved by* ***Lord Sharpe of Epsom***

That the draft Regulations and Order laid before the House on 18 and 19 October be approved.

*Relevant document: 16th Report from the Secondary Legislation Scrutiny Committee. Considered in Grand Committee on 24 November.*

*Motions agreed.*

## Clean Air (Human Rights) Bill [HL]

*Report*

*3.30 pm*

*Relevant documents: 4th and 7th Reports from the Delegated Powers Committee*

*Report received.*

## Procurement Bill [HL]

*Order of Consideration Motion*

*3.30 pm*

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

That the Bill be considered on Report in the following order: Clauses 1 and 2, Schedules 1 and 2, Clause 3, Schedule 3, Clauses 4 and 5, Schedule 4, Clauses 6 to 39, Schedule 5, Clauses 40 to 54, Schedules 6 and 7, Clauses 55 to 69, Schedule 8, Clauses 70 to 83, Schedule 9, Clauses 84 to 108, Schedule 10, Clauses 109 and 110, Schedule 11, Clauses 111 to 119, Title.

*Motion agreed.*

## Procurement Bill [HL]

*Report (1st Day)*

*3.31 pm*

*Amendment 1*

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

**1:** Before Clause 1, insert the following new Clause—

"Procurement and covered procurement

(1) In this Act—

(a) "procurement" means the award, entry into and management of a contract;

(b) "covered procurement" means the award, entry into and management of a public contract.

(2) In this Act, a reference to a procurement or covered procurement includes a reference to—

(a) any step taken for the purpose of awarding, entering into or managing the contract;

(b) a part of the procurement;

(c) termination of the procurement before award.

(3) In this Act, a reference to a contracting authority carrying out a procurement or covered procurement is a reference to a contracting authority carrying out a procurement or covered procurement—

(a) on its own behalf, including where it acts jointly with or through another person other than a centralised procurement authority, and

(b) if the contracting authority is a centralised procurement authority—

(i) for or on behalf of another contracting authority, or

(ii) for the purpose of the supply of goods, services or works to another contracting authority.

(4) In this Act, "centralised procurement authority" means a contracting authority that is in the business of carrying out procurement for or on behalf of, or for the purpose of the supply of goods, services or works to, other contracting authorities."

Member's explanatory statement

This new Clause would distinguish between "procurements" and "covered procurements", the latter relating specifically to public contracts, so that provision in the Bill can be more clearly applied to one or the other, and consolidate certain definitions previously found elsewhere.

**The Minister of State, Cabinet Office (Baroness Neville-Rolfe) (Con):** My Lords, as we begin Report, I start by thanking noble Lords for their contributions in Committee, and for the lively debate there. For those in the House coming to it fresh today, I say that this is an important Bill which follows two years of hard work and preparation, which I have the honour of taking over from my noble friend Lord True, who now leads this House.

Each year, £300 billion is spent on public procurement and we seek to make it quicker, simpler, more transparent and better able to meet the UK's needs than the current patchwork of former EU rules, while remaining compliant with our international obligations. There will be a central Cabinet Office online platform to bring in new players, to improve value for money and to accelerate spending with SMEs. There will also be a comprehensive training programme for those involved in all the new rules and conventions—for example, on managing conflicts of interest. It is, however, a very technical Bill, and I am sorry that we had to withdraw a number of government amendments tabled in Committee to allow further discussion. This was largely successful, so we will come first to a number of amendments in my name, most of which were withdrawn on day one in Committee. As we go through, there will be further technical amendments and other amendments to respond to points made in Committee, notably to stimulate economic growth and to reduce burdens on SMEs. I thank noble Lords for their patience with the sheer number of amendments.

Amendment 1 and the amendments consequential on it introduce new technical definitions of "procurement" and "covered procurement". I know these concepts caused some concern in Committee, so I will try to clarify matters. "Covered procurement" means those procurements that are covered by the vast majority of the provisions in the Bill. They are mostly procurements by contracting authorities, above the relevant thresholds for goods, services and works, which are not exempted from the Bill. These are the procurements which most of us will have had in mind during our deliberations in Committee.

However, the Bill also covers some aspects of procurements which go beyond this, which is why we have a wider definition of "procurement", meaning any procurement. That allows the Bill to make some limited provision in relation to matters such as below-threshold procurements—for example, in Part 6—and notably to comply with international rules or certain treaties. I understand that the term "covered procurement" may seem unusual, but it is one included in our international procurement agreements, including the GPA—the WTO agreement on government procurement—and familiar to the procurement community.

Amendment 1, and a number of other government amendments, streamline fundamental concepts that are relied on throughout the Bill and will improve the readability and consistency of the legislation. Amendments 2, 5 and 6 recast the definition of "contracting authorities" to ensure that the right bodies are covered. We are committed to a definition that is broadly consistent in effect with both the existing regulatory scheme and with our international commitments under free trade agreements. Feedback from our ongoing dialogue with stakeholders has indicated that the effect of certain wording differences could lead to some bodies being incorrectly brought within, or excluded from, the scope of the rules. I am grateful for these views, particularly

those from the Local Government Association, as they will help to ensure correct application. I am also grateful for its constructive approach to the Bill, which represents a big change for its members, and we appreciated its input.

The amended definition removes the reference to

"functions of a public nature",

as this does not align with the existing definition. It makes clear that the notion of contracting authority oversight can include oversight by more than one authority. Lastly, it ensures that certain bodies that are publicly owned but operate commercially can operate outside the procurement regime.

Amendment 187 ensures that educational establishments are fully and appropriately excluded from the rules on below-threshold contracts, as well as those relating to implied payment terms in public contracts, payment compliance notices and reporting on payments made under public contracts. This mirrors the approach taken in the current procurement rules and ensures that burdens on low-value contracts in the education area are applied in a proportionate fashion. Amendments 98 to 102, 117, 119, 191, 193, 197, 201 and 202 are consequential.

Amendments 24, 25, 26, 27 and 28 provide direction to contracting authorities when a mixed contract involves two or more different elements which could each classify it as a "special regime" contract. We expect that such situations will be rare, but could arise occasionally. Our amendments clarify which regime will apply to their mixed contracts in such circumstances by discouraging unrelated requirements being combined in one procurement. I hope that sentence is clear. More importantly, we must also ensure that the rules concerning mixed contracts are compliant with our international trade agreement obligations.

This group also includes other minor changes, including Amendment 7, which ensures that thresholds are applied properly to frameworks, and Amendment 8, which ensures that frameworks for the future award of exempted contracts only are also exempt. Frameworks involving a mixture of elements covered by both the Bill and the forthcoming healthcare procurement regulations will be subject to the same basic tests as set out in Clauses 4 and 9 on mixed contracts, which determine which rules will apply. This is important to prevent abuse of the exemption provisions; it also includes Amendment 185, which corrects a mistaken reference to a power for Northern Ireland departments, which unfortunately does not exist.

Amendment 170 is a technical adjustment to Clause 111 to make it clear that any regulations made to disapply the Bill to procurements in scope of the forthcoming healthcare procurement regulations can be made whether or not the procurement regulations are yet in force. Finally, Amendments 194, 195 and 196 amend the index of defined expressions in Clause 115.

I thank noble Lords for their patience, and will turn to the amendments tabled by other noble Lords when I have heard from them. I beg to move.

**Baroness Brinton (LD):** My Lords, I shall speak to my Amendments 3 and 173. I thank the Minister and the noble Lord, Lord True, for responding to my questions, in private meetings but also at previous stages of the Bill, about why the NHS is treated differently from every other part of the public procurement sector covered by the Bill. The problem is that I have not yet heard a clear answer to that; nor, indeed, did those noble Lords who took part in the Health and Care Act during its time here get a clear answer from the Health Minister as to why this was proposed. More recently, in Committee, the Minister said that it was because only clinical services would be covered by these special arrangements for the NHS. I will come in a minute to the reasons for my concerns that that is not the case, but I start by saying very simply that Amendment 3 puts the NHS in the Bill, in the definition of a public body that has to observe the details of regulation under the Bill.

Moving on to the practical problems, the key issue is what is said in the National Health Service Act 2006 and the Health and Care Act 2022, which attempts to amend it. The specific amendment has not been enacted yet, but we can all assume, with the permission of the House, that it is this Bill that is holding that up. The Health and Care Act adds new Section 12ZB to the National Health Service Act, which says:

> "Regulations may make provision in relation to the processes to be followed and objectives to be pursued … in the procurement of (a) health care services … and (b) other goods or services".

The problem is that the new section goes on to say:

> "Regulations under subsection (1) must, in relation to the procurement of all health care services … make provision for the purposes of ensuring transparency; ensuring fairness; ensuring that compliance can be verified; managing conflicts of interest".

That is a very different bar of compliance than the Government want to see for every other part of the public sector covered by the Bill. At the strategic level, it will be enormously helpful to understand why the Government feel it is appropriate for the NHS not to be included, but my practical problem is that we have relied somewhat on the assurances of Ministers at the Dispatch Box that only clinical services would be caught by the new SIs under the Health and Care Act and the NHS Act 2006. I have just read out the parts that show that is absolutely not the case. In fact, there is a catch-all in "other goods or services". So, while we spent a little time in Committee trying to discuss where the boundaries are, it seems to me that there are no such boundaries, and that leaves me very greatly concerned about how this will work in practice.

I have tabled Amendment 173 because if Amendment 3 is carried, Clause 111 is not needed. There is also an argument that if, for any reason, Amendment 3 is not carried, Amendment 173 will stand in its own right, but the two are inextricably linked. These two amendments are saying that the NHS should be covered in the Bill. I end by saying to the Minister that, despite the many amendments from noble Lords all around the House, I think everyone agrees that the Bill is better than the procurement arrangements we have had in the past, particularly in attempting to get transparency and accountability. The problem is that the arrangements for the NHS are not visible; they are SIs at the discretion of any Secretary of State for Health, and we have not even seen those in draft yet. I hope the Minister can give me some very clear reassurances or explanations, otherwise I may have to test the opinion of the House later.

*3.45 pm*

**Lord Alton of Liverpool (CB):** My Lords, I rise to support Amendments 3 and 17 tabled by the noble Baroness, Lady Brinton. In so doing, I echo what she said about how this Bill is better than the place we started from. Having spoken at Second Reading and in Committee and attended the meeting that the noble Baroness, Lady Neville-Rolfe, kindly organised so that we could learn more about the intricacies and granular detail of the Bill, I commend the Government for what they are trying to do. Although, I will give some painful examples to the House in support of what the noble Baroness, Lady Brinton, just said, I totally exempt the noble Baroness, Lady Neville-Rolfe, and the noble Lord, Lord True, with whom I had a number of meetings in the run-up to the presentation of this Bill in the House. They have both been exemplary as Ministers.

The noble Baroness and I have been in correspondence over the weekend about some of the points I am about to raise. The reforms outlined by the Government are based on what I think are laudable principles of public procurement set out in the Green Paper. They are value for money, public good, transparency, integrity, equal treatment and non-discrimination. I urge noble Lords to keep them in mind as I proceed through my remarks.

Ministers have told us that streamlined new procedures will mean better commercial outcomes that deliver more value for money for taxpayers. This amendment would ensure that those public interest principles also extend to the National Health Service, as I believe they should. The NHS should not be regarded as a side issue or of little consequence, as it were. It should be within the same remit. In the year before Covid—2018-19—the DHSC spent around £70 billion on procurement in England, up from £68.3 billion in the previous year. Spending on health is far and away the most significant area of government procurement spending. It is more than three times defence spending. Around £18 billion is spent on medicine and, coming to a point that the noble Baroness made in her remarks a few moments ago, nearly £6 billion per year is spent on hospital consumables, which include gloves and syringes.

During Covid, vast sums were spent on procuring PPE. I have made a point regularly in your Lordships' House, as other noble Lords have done, particularly from the Opposition Front Bench, about the kind of PPE that we have been buying from overseas, especially from the People's Republic of China. The House of Commons Library, in a note published earlier this year, said that current estimates of the total cost of Covid to the Government range from about £310 billion to £410 billion, the equivalent of about £4,600 to about £6,100 per person in the United Kingdom. The portion of this spent by the Department of Health was put at £75.3 billion. Gross spending on public sector procurement increased by £53 billion, or 17%, between 2019 and 2021. Most of this increase was due to a £43 billion increase in health spending—a rise of 44%—and it is estimated that contracts for £14.6 billion were awarded for PPE.

I understand the argument that the Government have made on a number of occasions about the urgency of the public health crisis and that many public procurement procedures were expedited. In some cases, those procedures resulted in suppliers being chosen without the contract being put out to tender or otherwise advertised. I hope that part of the purpose of the Bill is that we have better procedures in place should another pandemic occur. Concern about how this was done led to a debate in the Commons on 21 June 2021 on a petition calling for a public inquiry into government contracts granted during Covid-19. Since the Minister will have seen the outrage in the Commons last week about profiteering from unusable PPE and widespread concern about politically connected companies benefiting from government contracts, I hope she will feel able today to respond to specific questions, some of which I asked in your Lordships' House in January and March this year, during Committee and Report on the Health and Care Bill, to which the noble Baroness, Lady Brinton referred. I refer the House to col. 635 on 1 January and col. 1032 on 3 March.

Even before that, on 13 December 2021, I asked

"whether any … person, or … organisation, will be censured for defaults involving the 47 VIP public contracts for facemasks and surgical gowns; and what steps they have taken in connection with defaults associated with their contract with PPE MedPro."

I referred the House to a report in the *Daily Telegraph* which stated:

"Ministers handed almost £150m to Chinese firms with links to alleged human rights abuses in Xinjiang amid a race to PPE after Covid hit.

The Health Department paid £122m to Winner Medical, which uses cotton produced by a supplier that works in the controversial region".

That is in Xinjiang, where it is said that a million Muslims are incarcerated and where the former Prime Minister, Liz Truss, said that a genocide is under way. It continued:

"Another £19m contract went to pharmaceutical firm China Meheco and £16.5m was paid to Sinopharm, both of which have been linked to labour programmes in the province."

In Committee I specifically asked about a *Guardian* report concerning Medpro, and on 19 January I was repeatedly told that details about PPE contracts are "considered commercially sensitive". I have never been able to understand—this goes right to the heart of the noble Baroness's amendment—why the Treasury could account for the £4.3 billion lost in fraud under the Covid support scheme but was unable to justify or identify the loss on PPE.

Even worse, I was told, "we have no plans to censure a single individual or organisation". In January I asked why not, and I ask the same question again today. In January I was told that the Government are seeking to recover moneys paid to PPE Medpro in relation to a contract for the provision of gowns. It would be helpful for the House to know more about the remit of the public inquiry into Covid 19, chaired by my noble and learned friend Lady Hallett, and whether it will deal in detail with procurement under the terms of reference, especially in the sections dedicated to preparedness and our economic response.

Perhaps the noble Baroness could establish whether it will examine the concerns raised by the National Audit Office: first, the potential unequal treatment of

suppliers in procurement processes; secondly, poor procurement practice due to procuring at speed—for example, retrospective contract awards, a lack of documentation on key procurement decisions and a lack of documentation on the management of potential conflicts of interest; and thirdly, lack of transparency over what contracts were awarded and how. We must not allow the concerns raised by the National Audit Office to happen all over again, and these amendments help us to do that.

But there are continuing challenges which need a response too. I was shocked to learn that we bought £1 billion-worth of lateral flow tests from the People's Republic of China and spent around £10 billion of taxpayers' money in the PRC on over 20 million items of PPE. Some 24.1 billion items have a country of origin recorded as China, including 10.7 billion gloves. This raises a lot of questions about dependency—lessons which you might have thought we had learned after Germany's experiences with Putin—but it also raises questions about national resilience. Why could things such as this not have been manufactured here? Indeed, companies in this country that tried to get contracts, and which are capable of manufacturing these things, have told me that they could not even get into the competitive system because we suspended it. If nothing else, this begs a lot of questions about why such things could not be made in the UK.

I was also shocked to learn—I repeat this because I thought it almost unbelievable until I saw it revealed in a parliamentary reply in another place—that we have a further 120 million items of PPE that are still in China, and which it is costing taxpayers some £770 million each and every single day to keep there. I repeat: £770,000 each and every day to keep them—

**Noble Lords:** Oh!

**Lord Alton of Liverpool (CB):** The millions and the thousands can multiply very rapidly in this debate. I apologise, but I think you get the point. It is over £20 million in the course of a year—£770,000 each and every single day.

I gave the noble Baroness notice of my intention to ask about this. Who authorised those acquisitions? Who decided that they should stay there? How much has it cost to date to store these items? How much has been budgeted to keep them in store at that cost of £770,000 every day, and for how long will they be stored? How much of the PPE that has been bought has proved to be defective and unusable? I would also like to know, first, how the Government intend to report the money returned to public funds by defaulting PPE suppliers through the actions of the faulty contract PPE recovery unit. Secondly, individual settlements are protected by commercial secrecy, so how will Parliament and the public be notified about money returned to public funds by defaulting PPE suppliers through the actions of the faulty contract PPE recovery unit? Thirdly, how do the Government intend to provide transparency and accountability in relation to money returned to public funds by defaulting PPE suppliers through the actions of the faulty contract PPE recovery unit?

It is clear that the NHS should be subject to far greater scrutiny, transparency and accountability. For all those reasons, I support Amendments 3 and 173 spoken to by the noble Baroness, Lady Brinton, which include the NHS in the definitions of a public authority for the purposes of the Bill.

**Lord Hunt of Kings Heath (Lab):** My Lords, it is a great pleasure to follow the noble Lord, Lord Alton. When he speaks about the frailty of the NHS supply chain—I must declare my past presidency of the Health Care Supply Association—I am sure he is absolutely right to put these penetrating questions to the Minister.

I have two amendments in this group, Amendments 171 and 172, but I also want to speak to Amendments 3 and 173 in the name of the noble Baroness, Lady Brinton. She has rightly pointed to the potential confusion between two pieces of legislation in relation to the National Health Service and the procurement regime that it is to adopt in the future. The difficulty is compounded because, of course, we have not seen the draft regulations in relation to Clause 111, nor have we seen the draft regulations in relation to the amendment made in the Health and Care Act 2022 to the National Health Service Act 2006, after Section 12ZA. The 2022 Act gave huge powers to Ministers to establish their own procurement regime through regulations.

Clearly, there is every potential for confusion as to how these two sets of legislation are to work together, particularly if only NHS clinical services are to be covered by the disapplication in the Bill. That leaves a lot of questions for those working in the health and social care sectors as to how they are to operate the new processes. Given the nature of NHS commissioning and services, there are big questions about what happens if a contract incorporates clinical and non-clinical services. Under which set of regulations is procurement to be undertaken? Large hospital contracts—PFI contracts—often contain a mixture of clinical and non-clinical services, and the terms of the contract can sometimes last for 20 or more years.

Indeed, the more fundamental question is how we define "clinical services". Some hospitals contract with private sector operators to provide, say, laboratory services the staff of which are employed by the private sector contractor. I would have called those clinical services; they are clearly directly related to clinical outcomes for patients. I am not at all sure how that is going to be covered by the two separate pieces of legislation. Of course, the NHS Confederation, which represents the bodies that operate the health service at the moment, including integrated care systems and NHS trusts, is obviously concerned about the confusion and potential distinction between the two sets of legislation.

*4 pm*

We are in a situation where the 2022 Act was bringing in, as I understand it, a new set of collaborative arrangements, following the legislation from the noble Lord, Lord Lansley, in 2012, which focused more, I believe, on a marketised approach to health. At the local level, integrated care systems are meant to draw together not just the NHS but local authorities to develop common services and to integrate services as much as possible. Again, it is perfectly possible that a service could be clinical, social care or a combination

[Lord Hunt of Kings Heath]
of both, and in many cases it would be desirable to speed up the flow of patients through hospital to give them better provision and support in the community. In my view, that would be a clinical service but some of those services would be applied to social care, and under this provision I assume that social care services are outwith the curtail of this legislation. What is an integrated care system to do if it is attempting to agree a contract which applies to both services? Listening to Health Ministers is exactly what integrated care systems are meant to do.

I do not know when Third Reading is but there needs to be an awful lot of information provided and work done between now and them so that we can fully understand the implications of what is contained in Clause 111. There has been no impact assessment, as I understand it, in relation to the interrelationship between these two pieces of legislation. At the very least, those people working in the health and social care sector need to have some assurance that before this Bill becomes an Act much more information and awareness are made known. In the meantime, the noble Baroness, Lady Brinton, is right to pursue what she is seeking to do in her amendment.

**Baroness Noakes (Con):** My Lords, I have Amendments 4 and 190 in this group. Some questions have been raised by the Benches opposite about whether I was here for the commencement of the debate. I assure the House that I heard every word of the Minister's opening remarks from my place and I am not usually regarded as invisible in your Lordships' House.

Before I get to my amendments, let me say that I have much sympathy with the amendments tabled by the noble Baroness, Lady Brinton. I think we have to stop the culture of exceptionalism for the NHS and bring it within the ordinary rules; other noble Lords have said why that is. We should allow an exception only if there is a very good case for it so I will be listening very carefully to what my noble friend the Minister has to say about that when she concludes this debate.

My amendments each cover a distinct issue. I will start with Amendment 190 because that is the easier of them. Noble Lords may have noticed that my noble friend the Minister has added her name to Amendment 190 and I am grateful for the Government's support in dealing with a technical issue that I raised in Committee following the eagle-eyed scrutiny of the Bill by Professor Sanchez-Graells of the Centre for Global Law and Innovation at the University of Bristol.

The Bill had defined how to value contracts including VAT when the contracting authority paid for the goods or services that it was procuring but failed to deal with the converse situation when it received money, which can arise under a concession contract. Amendment 190 puts this right and so sums receivable under contracts will be valued including the related value added tax. I look forward to moving this amendment formally in due course.

Amendment 4 is an amendment to government Amendment 2. Amendment 2 has virtually rewritten most of Clause 1 but my amendment would have also been proposed in relation to the text of the Bill as introduced. It is about control and how to define it, which I raised in a couple of amendments in Committee.

A public authority is defined in the amended Clause 1(2) proposed by Amendment 2 as including a person who is

"subject to public authority oversight",

which is in turn defined in amended Clause 1(3) as being

"subject to the management or control of … one or more public authorities, or … a board more than half of the members of which are appointed by one or more public authorities."

Thus, if a board is involved, control is determined by the fact of appointments rather than the capacity to appoint members of the board. That is an unusual concept for those of us steeped in company or tax law.

The Clause 1 approach to control is in contrast to its use in determining whether vertical arrangements exist in order to qualify as an exempted contract under Schedule 2. The Schedule 2 definition has its own problems, which I spoke about in Committee, but its core concept is to use the Companies Act 2006 definition of control, which is based on capacity to control. I believe that the issues with Clause 1 and Schedule 2 were not satisfactorily dealt with when I raised these points in Committee, so I have returned to them today, to highlight that the Bill is not internally coherent in its approach to determining whether organisation A controls organisation B.

My solution is to import the Schedule 2 definition into Clause 1, save for paragraph 2(3) of Schedule 2. I personally think that sub-paragraph (3) is very odd in the context of Schedule 2, but it certainly does not belong to the approach for control in Clause 1. I have no intention of dividing the House on this matter and I am by no means confident of my drafting, but I believe that the Government should look again at the robustness and coherence of the approaches they have taken in the Bill.

**Lord Lansley (Con):** My Lords, I have no amendment in this group, but I want to refer to government Amendment 34. I entirely agree with the proposition that the Bill enables public procurement to be put on a better path than it has been in the past. Many of those working in procurement across the public services have welcomed the Bill. As it happens, they also welcome the scrutiny we are giving it, because it is leading to improvements to the Bill. I did not attempt to count the number of government amendments we dealt with in Committee, but they were in the hundreds. In addition to those, I calculate that we have 153 government amendments on Report, so if it takes us a while, it is not our fault. None the less, it is a good job and it is right that we should do it. That is why I raise the following question on government Amendment 34.

My noble friend will recall that these amendments were not moved in Committee because there was some difficulty about what "covered procurement" was relative to "procurement". At the time, I supported the Government's amendments, because it seemed right to ensure that the broader scope of the Bill and the regulatory requirements encompassed within it should be applied to larger procurements and not smaller ones. I now support the insertion of "covered" before

"procurement" in all the government amendments—except Amendment 34. Why do I single it out? Including "covered" means that procurements which are above the threshold and not exempt are subject to the Bill and the full range of its requirements—see Schedule 1 for the thresholds and Schedule 2 for the exemptions. Clause 2 makes it clear that public contracts are those that are above the threshold and not exempt. Okay, fine: "covered procurement" makes a distinction between those that are exempt and of lesser value and those that are of a higher value and included.

Clause 11 relates to procurement objectives. Procurement objectives are statements, not least by Parliament as well as by the Government, about what those who are engaged in procurement should regard as their responsibility. The essence of Clause 11 is that:

"In carrying out a procurement, a contracting authority must have regard to … delivering value for money … maximising public benefit … sharing information"—

so that people can understand the authority's procurement policies and decisions—and

"acting, and being seen to act, with integrity."

In my submission, these are not regulatory requirements; they are the basis on which contracting authorities should be behaving. We will come on to debate Clause 11 and will deal with its proposals then. But it seems to me that, however we end up stating in Clause 11 that these are procurement objectives for contracting authorities, they should apply to all contracting authorities and to all their procurements.

Interestingly, the Government resist this on grounds of flexibility. I am not sure in this context what that means: flexibility not to have value for money; flexibility not to act with integrity? But the Government have not disapplied the operation of Clause 12 and the national procurement policy statement. The Government want to have the power to apply the statement to all procurements, so we do not get "covered" in front of procurement in Clause 12(1) but we do get "covered" in relation to procurement in Clause 11. This must be wrong. It must clearly be right that not only the procurement statement but the objectives on which it must be based must apply to all procurements.

So I put it to my noble friend that this is not a technical amendment. There may be many that are technical amendments, but this is a substantive amendment that has an unhappy consequence that it would disapply the procurement objectives to a significant number of the lower-value procurement activities in the public sector. So when we reach government Amendment 34, I invite my noble friend not to move it. I hope that she will at the very least do that on the grounds that this should be revisited before Third Reading.

**Baroness Bennett of Manor Castle (GP):** My Lords, I rise briefly having attached my name to Amendment 173 in the names of the noble Baroness, Lady Brinton, and the noble Lord, Lord Scriven. I attempted to attach my name to Amendment 3, but somehow that transferred to government Amendment 2, which I am guessing everyone has already worked out was a mistake—part of the general confusion we have with this Bill. Perhaps it is just, as the noble Lord, Lord Lansley, outlined, that the flood of government amendments has overwhelmed the administration of Report.

The noble Baroness, Lady Brinton, and the noble Lord, Lord Hunt, have already set out the issues very clearly. The noble Lord, Lord Alton, gave us a masterclass, having made himself an absolute expert on the issues of procurement, particularly around Covid. I want to add one extra balancing thought to that. The issues of privatisation and contracts do not apply only to the procurement of materials; they apply to the procurement of services, including the clinical services to which the noble Lord, Lord Hunt, referred. It is important that this does not get lost.

I will refer to a study published in the *Lancet* public health journal by academics from the University of Oxford in June. It showed that outsourcing since 2012 had been associated with a drop in care quality and higher rates of treatable mortality. This is peer-reviewed research published in a very respected journal that shows that privatisation has had and is having a disastrous effect. To quote the authors of that study:

"Our findings suggest that further privatisation of the NHS might lead to worse population health outcomes."

I think it would be unrealistic to expect the public to engage with the details of the kind of debate we are having this afternoon, but it is important, and I have no doubt at all that the public is gravely concerned to see that we have maximum transparency. Indeed, I think there is strong public support for reversing the privatisation of the NHS—but, wherever we are letting contracts for the NHS, we must have maximum transparency and clarity about the manner in which that is done.

*4.15 pm*

**Lord Maude of Horsham (Con):** My Lords, I have a very specific point to raise by way of reassurance. It is clear from the debate so far that these are complex areas that are particularly complicated because of the interaction between this Bill and the previous Health and Social Care Act; I wish my noble friend the Minister well in disentangling that and making it all clear to your Lordships.

My concern is around the provisions as they affect public service mutuals. This programme has always had cross-party support. It began under the Labour Government in the Tony Blair years, specifically in the NHS. It was then taken up enthusiastically by the coalition Government. I led the programme with the support of Liberal Democrat colleagues, in particular the noble Lord, Lord Wallace of Saltaire. This was a programme where, in particular services right across the public sector, groups of public sector workers were able to spin themselves out of the public sector and form themselves into employee-owned and employee-led entities. They then provided that service, whatever it was, to what was in effect the contracting authority under a negotiated contract.

Technically, this is procurement and, in good practice, should be subjected to a competitive tender. Indeed, we had some difficulty with the then EU public procurement regime that made it legally impossible to do this. I was able to negotiate with Commissioner

[Lord Maude of Horsham]
Barnier a change to the EU procurement directives, which enabled a mutual to spin itself out without a competitive process for a relatively limited period before being subjected to a retendering process.

This was a very benign programme. Mutuals that spun themselves out demonstrated almost overnight a dramatic improvement in productivity—something close to 4% annually. More than 100 of them spun out. The largest number came from the health and social care sector. They did not have to do this but nearly all of them—certainly all the ones from the health and social care sector—chose to be a not-for-profit, social enterprise.

They brought together four powerful elements. The first was entrepreneurial leadership. The second was an empowered and liberated workforce. The third was commercial discipline, in the sense that they would all talk about themselves as a business even if they were a not-for-profit; that commercial discipline was crucial. The fourth element was the public service ethos. Bringing all that together created a powerful alchemy that delivered improvements in efficiency. Costs were able to be reduced, there was a reduced fee basis through the life of a contract and quality improved.

Staff satisfaction also improved enormously. Whenever I visited these mutuals, I always asked people whether they would go back and work for the NHS, the council, the Government or wherever they had come from. I never heard anyone say anything other than an immediate "No". When asked why, they would all say something like, "Because now we can do things. We're freed from bureaucracy. We're freed from constraints. We can make things happen quickly".

So my question for my noble friend the Minister, to be answered whenever she is able to do so, is whether she can provide some reassurance that the arrangements in the complex interaction between this excellent Procurement Bill and the Health and Social Care Act will, if the Government wish to accelerate this programme again, allow such arrangements to be negotiated directly between the contracting authority and the emerging spun-out entity without the need to go through a competitive process.

**Lord Wallace of Saltaire (LD):** My Lords, we will return to the question of not-for-profits, mutuals and social enterprises in group 6, when we have Amendments 41 and 123 in my name and the name of my noble friend Lord Fox. I very much hope that we will have the support of the noble Lord, Lord Maude, on that. There was, in the Green Paper where we started this process, a very strong emphasis on the useful role that non-profits and social enterprises would have. That has disappeared from the face of the Bill. We wish to make sure that it reappears.

**Lord Coaker (Lab):** My Lords, I thank the Minister and her predecessor for their engagement with us and other noble Lords on this Bill as it made its progress through your Lordships' House. I join with other noble Lords in saying to the Minister that we all believe, from where I am speaking, that this is a great improvement, and the Bill will make a big difference; we are generally very supportive of it. It is important, as other noble Lords have done, to start with those remarks to set the context for this discussion and those which will follow.

I do not want to speak for very long, but I will start with Amendment 3, in the name of the noble Baroness, Lady Brinton. I very much support the amendment, which seeks to put on the face of the Bill—for the avoidance of doubt, for the avoidance of the sort of discussion that we are having here this evening and for the avoidance of the sort of discussions that will go on, as to which set of regulations procurement for the NHS comes under—that procurement includes the NHS in Clause 1. The important point, following the excellent speech by the noble Baroness, Lady Brinton, was set out in my noble friend Lord Hunt's question to the Minister, which encapsulated the problem that we are going to have under two sets of regulations.

I thought that my noble friend put the argument very well in his question—and I am going to repeat it—about the sort of thing that will happen without clarification of where we are with respect to procurement. What happens if a procurement contains both clinical and non-clinical parts and services? Which Act and which regulations regime would apply? That encapsulates the problem in one, because the answer is that it will not be clear at all if we carry on with the current two-system regulatory regimes that will operate for the NHS. I am always very practical about these things and, of course, noble Lords will have seen as well that there is actually a clause—Clause 111—that makes it perfectly clear that there is a power for Ministers to disapply, through regulations, this Act in relation to procurement by the NHS in England. Therefore, on the one hand we have the health Act of 2022; on the other hand, we have a Bill going through that, in some sense, is supposed to include the NHS but, in other senses, is not supposed to do so. We do not know where the boundary is going to come between clinical services and goods and services, so there is a whole realm of difficulty and problems.

I said at the beginning of my speech that all of us are supportive of the Bill, but we need to resolve these difficulties. We cannot just say, "Well, the regulations will sort it out", or "Good sense or common sense will deal with it." There is a real legislative problem that we should try to resolve before we pass the legislation. The noble Baroness, Lady Noakes, pointed this out in a couple of important technical amendments. As always, we are thankful to the noble Baroness for trying to improve the Bill and to make suggestions, one of which, I understand, the Government have accepted. That is the sort of spirit in which we take the Bill forward.

Therefore, I hope that the Minister is listening carefully to what the noble Baroness, Lady Brinton, my noble friend Lord Hunt, and the noble Lord, Lord Alton, have said. We all noticed that the noble Baroness, Lady Bennett, was not a supporter of Amendment 2. We say that loudly and clearly so that her future in the Green Party is assured, but Amendment 3 is what the noble Baroness put in, and for some reason it appeared under Amendment 2. We are all very clear which amendment the noble Baroness supports.

The comments made in the short speech by the noble Lord, Lord Lansley, on government Amendment 34, are extremely important, showing how one word here or there can fundamentally change the Bill. He is quite right to point out that Clause 11 refers not to thresholds but to objectives. What is procurement trying to achieve? As the noble Lord outlined, by inserting "covered", the Government imply that it is only covered procurement that takes account of the various points that are listed in the Bill. The noble Lord read out four, but I choose just one, to show how important it is that the Government listen to what he has said and think again about moving their Amendment 34. It is acting and being seen to act with integrity. The one thing that you would expect any procurement process to act under, whatever the threshold, whatever the regulations, whatever law it comes under, whether it is for £10 or £10 million, is integrity. Yet as it reads now, the only procurement that this clause will relate to as an objective, if the government amendment is agreed to, is covered procurement. That was the crucial point that the noble Lord made—as an objective. It is not an objective. It is closer to being law, that you are supposed to act openly, honestly and transparently. However, leaving that aside, it is an extremely important point that the noble Lord has made. In full support of what he has said, I hope that the Government have listened to his very well-made points, particularly when he went on to relate them to Clause 12, which seems to be the opposite of that. That point was well made.

The government amendments before us in many ways improve the Bill. I thank the Minister for listening to what was said to her and for trying extremely hard to table amendments that have improved many parts of the Bill. There are important tweaks that the noble Baroness, Lady Noakes, has pointed out. There is a fundamental point that was raised by the noble Lord, Lord Lansley. However, the points raised by the noble Baroness, Lady Brinton, and supported by many noble Lords, point to a fundamental choice for us. We must resolve this issue about procurement and the NHS. The noble Lord, Lord Alton, pointed out some of the difficulties that have arisen, but for all of us, clarity, certainty and clearness in legislation is crucial, particularly when it comes to procurement. We have the opportunity to sort this out. I hope that noble Lords will support the amendment tabled by the noble Baroness, Lady Brinton, should she put it to the vote.

**Baroness Neville-Rolfe (Con):** My Lords, Amendment 3, tabled by the noble Baroness, Lady Brinton, of Kenardington, and the noble Lord, Lord Scriven, of Hunters Bar, would, as the noble Baroness said, explicitly name the NHS in the definition of a contracting authority. We are also debating Amendment 173, to which the noble Baroness, Lady Bennett of Manor Castle, added her name, and Amendments 171 and 172, to which the noble Lord, Lord Hunt, spoke so eloquently.

There is a concern, which I understand after several meetings with those involved, about the interplay in health between this Bill and the arrangements across the NHS in the light of the Health and Social Care Act. I very much enjoyed the meetings that I had with the noble Baroness, Lady Brinton, and thank her and the noble Lord, Lord Alton, for their kind comments on the Bill more generally, as well as my noble friends Lady Noakes and Lord Lansley. It has been a pleasure to work on this Bill across the House. I thank the noble Lord, Lord Coaker, for his comments, although we are no longer working together from the Back Benches.

*4.30 pm*

Having looked at the matter carefully, I will make some general points before I reply on the individual amendments. Parliament debated the Health and Care Act only very recently. The passing of the regulation-making power in that Act showed that Parliament recognised that, in certain instances, the NHS is a special case. We ensure that it is off the table in trade agreements, and the will of Parliament was that certain healthcare services should not be subject to our regime because there is often no market and because it creates undue bureaucracy to require NHS bodies to contract with themselves. Some of the points made by the noble Baroness, Lady Bennett, may have also been in mind.

The Bill provides for new and separate rules for healthcare services to patients and service users, although not for goods except those that are an integral part of the delivery of a clinical care services contact. I made this point in Committee, as referenced by the noble Baroness, Lady Brinton. The new provider selection scheme regulations will establish the new NHS regime in the coming months, with a new emphasis on collaboration.

That is the background. I also assure noble Lords that the Cabinet Office procurement team will be involved in signing off the new arrangements; there will be guidance on important issues; and the regulations, which are under development, will be subject to the affirmative resolution procedure in both Houses. I am sorry that we do not have either set of draft regulations for noble Lords yet, but I hope that I can give some sense of the direction. Against this background, I will comment on the amendments.

Regarding Amendment 3, there is no doubt that NHS organisations are contracting authorities. In addition to applying to only a narrowly defined subset of healthcare services, the scope of the forthcoming healthcare procurement regulations will explicitly limit the field of authorities that can use these regulations to a defined list of bodies involved in health and social care. I reassure noble Lords that the central government authorities list, which includes the NHS and which is brought within scope of the current definition of "contracting authority", will be replicated in the operation of the Act by naming central authorities in our regulations. There are a great many contracting authorities, which change frequently over the course of time. Our international commitments call for regular updating, and it makes sense to continue to identify central government authorities in regulations and not on the face of the Bill.

Amendments 171 and 172 would significantly extend the scope of Clause 111 so that the Bill could be disapplied for contracts for all kinds of goods and services which could be said to support the integration of health and social care services. This would weaken the regulation of non-healthcare procurement by enabling

[Baroness Neville-Rolfe]
procurers to use the lighter DHSC rules when the full rules would be more appropriate, and would indeed present compliance risks with our international trade commitments.

The noble Baroness, Lady Brinton, made an important point about how the mixed contracts containing some elements of healthcare services and some of non-healthcare services need to be treated. The DHSC's recent consultation on proposals for its new provider selection regime acknowledges the need for integrated procurement, such as combined health and social care services. Integrated procurement supports greater collaboration between the NHS and its partners, which in turn supports more joined-up care for people, including those with complex needs. I think we all agree that this is important.

Existing procurement legislation and the provisions in the Bill provide for mixed procurement approaches to ensure that there is clarity on which rules apply when contracts involve a mixture covered by different legal regimes. My officials have worked closely with the DHSC to ensure that the healthcare regulations address mixed procurement harmoniously with the provisions of the Bill.

We expect the wider Cabinet Office rules to apply to mixed contracts that involve a provider selection regime element and another healthcare or non-healthcare element if those elements could reasonably be supplied under separate contracts. If they could not be, the Cabinet Office rules will apply where the non-provider selection regime element has the higher value.

Amendment 173 comes from a different angle. It would delete the power at Clause 111 to disapply the provisions of the Bill to certain healthcare services that are in scope of the regulation-making powers in the Health and Care Act 2022, and make the Bill, when it is an Act, apply as well to all procurement by NHS England. I think this is a recipe for confusion.

The Procurement Act will apply to procurement by NHS England, whether it is buying goods, services or construction, but will not apply where NHS England is buying healthcare services that are to be purchased under the provider selection regime. For this flexibility to work, Clause 111 needs to disapply the Procurement Act in relation to the tightly defined subset of healthcare services to patients and service users that will be governed by the provider selection regime when procured by relevant authorities. I assure noble Lords that it will be used for this purpose only and that these limitations on usage will be set out in the forthcoming regulations.

Because of the importance of integrated care, on occasion there may be mixed contracts under the provider selection regime containing elements that, if procured separately, would have been procured under this Bill. I will work extremely closely with the DHSC to ensure that the provisions are not used to circumvent the more stringent procurement obligations in the Bill. Indeed, Clauses 4 and 9 are designed specifically to ensure that authorities are not able to design contracts to avoid the new rules. The Government will also be able to issue guidance—that is an important point—or change the regulations if the mixed contracts turn out to be a problem.

**Lord Scriven (LD):** Like most noble Lords, probably, I have listened to what has just been said and am more confused now than when the Minister started. I ask a very simple question: if the Bill applied to NHS procurement, as it does to the rest of the public sector, would it not harmonise the procurement of NHS provision, whether clinical or non-clinical, including social care? That would make it simpler, not just for the procurement body but for organisations that might wish to tender for NHS clinical services.

**Baroness Neville-Rolfe (Con):** That is a point, but I did try to explain in my introduction that there was concern during the passage of the Health and Care Act, to which I was not party, that the NHS arrangements—I see that the noble Baroness, Lady Brinton, is nodding her head. Perhaps she is nodding it negatively.

**Baroness Brinton (LD):** The important thing the House needs to hear is that during the passage of the Health and Care Act, Members from all sides of your Lordships' House asked repeatedly why special arrangements were being made for NHS procurement when we knew that there was a Procurement Bill coming down the line and had not seen any detail of it. That is the question we are all waiting to hear the answer to.

**Baroness Neville-Rolfe (Con):** I think I have been clear on the background to why it is different. I have also promised that regulations and guidance are being put together and will make very clear the differences: where the NHS rules need to apply and where the Procurement Bill needs to apply. That is the way in which these Bills have been constructed together. There are reasons. Especially on small NHS contracts involving social care, clinical services and so on, it clearly makes a great deal of sense to have a separate regime.

I am sure we will come back to that at the end, but out of courtesy I turn to the other amendments. Amendment 4, tabled by my noble friend Lady Noakes, proposes to rework the notion of control in the definition of a contracting authority in amended Clause 1(3)(b), to be consistent with the notion of a controlled person in Schedule 2. We have looked at this again in dialogue with the concerned stakeholders, notably the Local Government Association.

The meaning of control in Clause 1 is different from that in Schedule 2, and they need to be kept separate. The use of "control" in Clause 1, which sets out the contracting authority definition, is intended to ensure that contracting authorities that have a board where public authorities appoint more than half the members are themselves considered to be contracting authorities. This might include, for example, some centralised procurement authorities.

By contrast, the "controlled person" for the purposes of Schedule 2 is much narrower and intentionally very limited as it is intended to capture only a narrow group of entities, closely owned and controlled by contracting authorities. It requires that the controlling contracting authority is a "parent", within the meaning of the Companies Act 2006. Although this might cover some of the same ground as majority board appointments, the concept used in Clause 1, it is not

the same thing, and the text of the amendment can be satisfied in other ways. There is also a secondary activity threshold, which means that 80% of the activities carried out by the controlled person must be on behalf of its controlling authority. I am afraid that neither factor is appropriate to the contracting authority definition and their inclusion would have the effect of taking many organisations outside the scope of the contracting authority definition.

I recognise that, as my noble friend said, consistency is often desirable, but these terms achieve different aims. It is important that the Procurement Bill covers, as closely as possible, the same scope of bodies as in the existing procurement regulations, both for certainty and continuity for our authorities and to ensure compliance with the definition of a contracting authority in our free trade agreements.

I should, in passing, thank my noble friend Lady Noakes for her Amendment 190, which reflects discussion in Committee and which the Government are glad to support.

Moving on, I come to some of the very wide points made by the noble Lord, Lord Alton, although it is possible that some of these will come up again later on Report. It may be disappointing to the noble Lord, but we cannot go into the detail of individual contracts. Where a contract has been found to have underperformed or the PPE provided was not up to standard, the Department of Health and Social Care is working to reach a successful outcome—this includes mediation—for the taxpayer.

Offers for the supply of PPE came from a wide range of people from within government and outside. No matter where they came from, offers went through a robust process of checks and controls led by officials. This included price and quality checks as well as due diligence and credibility. As for Medpro, this is a live issue; we are currently engaged in a mediation process with PPE Medpro and I am therefore unable to comment on the specifics of this contract.

More positively, however, the Covid inquiry will cover procurement and the distribution of key equipment and supplies, including PPE and ventilators. In my view, that is quite right. It will also identify the lessons to be learned from all this and inform preparation for future pandemics across the UK.

**Lord Alton of Liverpool (CB):** I thank the Minister; that is a helpful reply and I am indebted to her. She has referred us to later amendments—I think she is referring to the amendment tabled by her noble friend Lady Stroud in the 10th group, on modern day slavery, which I am supporting—but a number of my questions go much wider than that. I would be appreciative if, between now and our discussion on Wednesday, she could give further consideration to what she can answer, some of which is not covered specifically by the point she has just made about confidentiality. Could she touch on what the noble Baroness, Lady Brinton, is saying now about how the NHS should be caught under the same terms as everything else that she has been arguing? Our failure to do this has been highlighted by the noble Lord, Lord Coaker, and others, and demonstrates an inconsistency in how we handle these things.

**Baroness Neville-Rolfe (Con):** I understand. I have tried to answer, although I am obviously somewhat limited by confidentiality. I would also draw the noble Lord's attention to the Boardman report, of which he is well aware. Nigel Boardman went through the Covid processes and his comments were, on the whole, accepted. As I said, I will look at what the noble Lord, Lord Alton, said and see whether there is anything useful to add before we meet again on Wednesday.

I turn to my Amendment 34 and the comments made by my noble friend Lord Lansley, of Orwell, with whom I have had useful meetings. He is concerned that the procurement objectives in Clause 11 should apply to all procurement, not just to covered procurement. I am afraid I do not agree, as he and I have discussed. This is too wide-ranging and the Clause 11 objectives will not be relevant to the award of all types of non-covered procurement. The concept of procurement is crafted very widely and captures all contracts. For example, it is difficult to see how a contracting authority would be able to apply principles such as having regard to the importance of transparency or the wider public benefit in relation to employment contracts or leasehold agreements exempted under Schedule 2 to the Bill. In addition, it is difficult to see how a contracting authority could have regard to the importance of transparency in a procurement exempted on national security grounds.

*4.45 pm*

We have to be realistic about this. Of course contractors and suppliers must act with integrity—that point was made and I very much agree with it—but that is not a reason to change the whole shape of the Bill and put on contracting authorities new requirements that go very much wider than the sort of thing that we have debated. I hope the noble Lord can see the difficulties that the expansion of these obligations beyond covered procurement would create for contracting authorities, and I hope he will feel able not to press—

**Lord Lansley (Con):** My noble friend used the important word "security" in relation to security contracts, but surely Clause 11 and the procurement objectives apply to security contracts that exceed the threshold set in Schedule 1. In what sense is it inappropriate for the objectives or principles set out in Clause 11 to be applied simply because those thresholds fall below about £5 million?

**Baroness Neville-Rolfe (Con):** I should reflect further on this. Clearly, some parts of the Bill are carved out. We have discussed this in relation to the NHS and we will discuss it on Wednesday in relation to the Ministry of Defence. We have to be very careful about national security—there is agreement on that across the House. I have been advised that the sheer breadth of Clause 11 would have a damaging effect if we apply this right across the board on procurement, and I am disturbed about that. I am happy to look at that further and talk further to my noble friend Lord Lansley.

**Lord Coaker (Lab):** We would all be grateful if the noble Baroness reflected further on Clause 11 and government Amendment 34, as she said.

**Baroness Neville-Rolfe (Con):** I turn finally to my noble friend Lord Maude, who brought in the importance of social enterprises in the health area, which I was extremely keen to hear about and would like to discuss with him further. It seemed to me, when reflecting on what he said, that the greater flexibility to award contracts—which was behind the Health and Social Care Act and the PSR regulations that were being brought forward—was an argument in favour of the approach that we have set out and for some different arrangements in the NHS. I find myself in the slightly awkward position of trying to defend these different arrangements for the NHS because I am worried about the implications for things similar to those that my noble friend raised.

I think that I have dealt with all these comments. I will reflect further on Amendment 34. It is a bit difficult not to move it—

**Noble Lords:** Oh!

**Lord Wallace of Saltaire (LD):** My Lords, it would be perfectly acceptable to come back to that at Third Reading. I think that the House would accept that.

**Baroness Neville-Rolfe (Con):** I am a little rusty, so I was just trying to understand what the possibilities were. I thank noble Lords for clarifying that we have some time to reflect on this; it is extremely helpful. I respectfully ask noble Lords not to press their amendments. I will move the government amendments in my name when we reach them, other than Amendment 34.

*Amendment 1 agreed.*

***Clause 1: Contracting authorities***

*Amendment 2*

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

**2:** Clause 1, page 1, line 5, leave out from first "authority" to end of line 10 on page 2 and insert ", or

(b) in the case of a utilities contract, a public authority, public undertaking or private utility,

other than an excluded authority.

(2) In this Act—

"public authority" means a person that is—

(a) wholly or mainly funded out of public funds, or

(b) subject to public authority oversight,

and does not operate on a commercial basis (but see subsection (8A));

"public undertaking" means a person that—

(a) is subject to public authority oversight, and

(b) operates on a commercial basis;

"private utility" means a person that—

(a) is not a public authority or public undertaking, and

(b) carries out a utility activity.

(3) A person is subject to public authority oversight if the person is subject to the management or control of—

(a) one or more public authorities, or

(b) a board more than half of the members of which are appointed by one or more public authorities.

(4) The following are examples of factors to be taken into account in determining whether a person operates on a commercial basis—

(a) whether the person operates on the basis that its losses would be borne, or its continued operation secured, by a public authority (whether directly or indirectly);

(b) whether the person contracts on terms more favourable than those that might reasonably have been available to it had it not been associated with a public authority;

(c) whether the person operates on a market that is subject to fair and effective competition.

(5) The following authorities are excluded authorities—

(a) a devolved Scottish authority;

(b) the Security Service, the Secret Intelligence Service and the Government Communications Headquarters;

(c) the Advanced Research and Invention Agency;

(d) any person that is subject to public authority oversight—

(i) only by reference to a devolved Scottish authority, or

(ii) by reference to an authority mentioned in paragraph (b) or (c)."

Member's explanatory statement

This amendment would change the definition of contracting authority to better deal with the difference between a public authority and public undertaking and to exclude certain bodies which, despite their relationship with public authorities, operate on a commercial basis.

**Baroness Neville-Rolfe (Con):** I beg to move.

*Amendment 3 (to Amendment 2)*

*Moved by* ***Baroness Brinton***

**3:** Clause 1, in subsection (2), in the definition of "public authority", in paragraph (a), after "funds" insert "including the NHS"

Member's explanatory statement

This amendment includes the NHS in the definition of a public authority for the purposes of this Act.

**Baroness Brinton (LD):** My Lords, I am very grateful for the Minister's response, and I thank my noble friend Lord Scriven for signing my amendment, and the noble Baroness, Lady Bennett, for intending to do so. I also thank the noble Lords, Lord Alton and Lord Coaker, the noble Baroness, Lady Noakes, and others who have spoken in support of it.

I am really grateful to the Minister for trying to explain why there would be less confusion if we had the arrangements currently being proposed under the Health and Care Act in relation to the National Health Service Act 2006 and those in the Procurement Bill. She said that Parliament had debated this only very recently, but I have covered that by saying that, when the then Health and Care Bill went through, we did not know what was being proposed in the Procurement Bill. The details of the Procurement Bill are so much more detailed than was intended or understood during the debate on the Health and Care Bill, so that is a problem.

I am astonished at the idea that accepting my Amendment 3 would create undue bureaucracy; the exact converse is true on all the points the Minister made. When you actually look at Section 12ZB, which will be inserted into the National Health Service Act 2006

after the passage of this Bill, you see that it does not make this clear in its reference to clinical services, which is not legally defined. It not only talks about "health care services" without defining what a healthcare service is, but goes on to say,

"and other goods or services that are procured together with"

them. The mini-debate we had a few minutes about how that would be decided and managed between the Cabinet Office and the Department of Health seems as though it would create a phenomenal amount of bureaucracy and the chance for people to abuse the system.

The Minister said that the arrangement would mean that the Department of Health could ensure that the provision in the Health and Care Act would not be used by the NHS to avoid the more stringent terms in this Bill. However, that seems to be exact reason why the NHS should abide by those stringent terms. For that reason, I would like to test the opinion of the House.

*4.53 pm*

*Division on Amendment 3 (to Amendment 2)*

*Contents 196; Not-Contents 183.*

*Amendment 3 (to Amendment 2) agreed.*

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Chakrabarti, B.
Chandos, V.
Chapman of Darlington, B.
Clancarty, E.
Clark of Calton, B.
Clement-Jones, L.
Coaker, L.
Collins of Highbury, L.
Coussins, B.
Craig of Radley, L.
Crawley, B.
Cunningham of Felling, L.
Davidson of Glen Clova, L.
Dholakia, L.
Donaghy, B.
Doocey, B.
Drake, B.
D'Souza, B.
Durham, Bp.
Erroll, E.
Faulkner of Worcester, L.
Featherstone, B.
Foulkes of Cumnock, L.
Fox, L.
Gale, B.
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German, L.
Goddard of Stockport, L.
Gohir, B.
Goudie, B.
Grantchester, L.
Grender, B.
Griffiths of Burry Port, L.
Grocott, L.
Hain, L.
Hamwee, B.
Hanworth, V.
Harris of Haringey, L.
Harris of Richmond, B.
Haskel, L.
Hayman of Ullock, B.
Hayman, B.
Hayter of Kentish Town, B.
Healy of Primrose Hill, B.
Hendy, L.
Henig, B.
Hollins, B.
Hope of Craighead, L.
Howarth of Newport, L.
Humphreys, B. [Teller]
Hunt of Kings Heath, L.
Hussain, L.
Janke, B.
Janvrin, L.
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Jolly, B.
Jones of Moulsecoomb, B.
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Khan of Burnley, L.
Kilclooney, L.
Kramer, B.
Laming, L.
Layard, L.
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Leong, L.
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Mallalieu, B.
Mandelson, L.
Mann, L.
Marks of Henley-on-Thames, L.
Masham of Ilton, B.
McNicol of West Kilbride, L.
Meacher, B.
Merron, B.
Mitchell, L.
Monks, L.
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Osamor, B.
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Parminter, B.
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Pitkeathley, B.
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Primarolo, B.
Prosser, B.
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Randerson, B.
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Rebuck, B.
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Rennard, L.
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Sahota, L.
Scott of Needham Market, B.
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Sharkey, L.
Sheehan, B.
Sherlock, B.
Shipley, L.
Sikka, L.
Smith of Basildon, B.
Snape, L.
St John of Bletso, L.
Stansgate, V.
Stern, B.
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Stoneham of Droxford, L. [Teller]
Storey, L.
Strasburger, L.
Stunell, L.
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Thomas of Winchester, B.
Thornhill, B.
Thornton, B.
Thurso, V.
Tomlinson, L.
Tope, L.
Touhig, L.
Truscott, L.
Tunnicliffe, L.
Turnberg, L.
Twycross, B.
Tyler of Enfield, B.
Uddin, B.
Wallace of Saltaire, L.
Wallace of Tankerness, L.
Walmsley, B.
Warwick of Undercliffe, B.
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Watson of Invergowrie, L.
Wheeler, B.
Whitaker, B.
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Wigley, L.
Wilcox of Newport, B.
Willis of Summertown, B.
Wood of Anfield, L.
Woodley, L.
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Wrigglesworth, L.
Young of Old Scone, B.

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Agnew of Oulton, L.
Ahmad of Wimbledon, L.
Altmann, B.
Altrincham, L.
Anelay of St Johns, B.
Arbuthnot of Edrom, L.
Arran, E.
Ashcombe, L.
Ashton of Hyde, L.
Barran, B.
Bellamy, L.
Benyon, L.
Berridge, B.
Bethell, L.
Black of Brentwood, L.
Blackwood of North Oxford, B.
Bloomfield of Hinton Waldrist, B.
Borwick, L.
Bottomley of Nettlestone, B.
Bourne of Aberystwyth, L.
Bridges of Headley, L.
Browne of Belmont, L.
Browning, B.
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Caithness, E.
Callanan, L.
Camrose, V.

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Colgrain, L.
Cork and Orrery, E.
Cormack, L.
Courtown, E. [Teller]
Craigavon, V.
Crathorne, L.
Cromwell, L.
Cruddas, L.
Cumberlege, B.
Curry of Kirkharle, L.
Dannatt, L.
Davies of Gower, L.
De Mauley, L.
Deben, L.
Deighton, L.
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Duncan of Springbank, L.
Eaton, B.
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Fall, B.
Farmer, L.
Finn, B.
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Foster of Oxton, B.
Fraser of Craigmaddie, B.
Frost, L.
Garnier, L.
Geddes, L.
Gold, L.
Goldie, B.
Goldsmith of Richmond Park, L.
Greenhalgh, L.
Greenway, L.
Hamilton of Epsom, L.
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Herbert of South Downs, L.
Hintze, L.
Hodgson of Abinger, B.
Hodgson of Astley Abbotts, L.
Hogan-Howe, L.
Holmes of Richmond, L.
Hooper, B.
Horam, L.
Howell of Guildford, L.
Hunt of Wirral, L.
James of Blackheath, L.
Jenkin of Kennington, B.
Johnson of Lainston , L.
Johnson of Marylebone, L.
Jopling, L.
Kamall, L.
Keen of Elie, L.
Kirkhope of Harrogate, L.
Lancaster of Kimbolton, L.
Lansley, L.
Lawlor, B.
Lea of Lymm, B.
Leicester, E.
Leigh of Hurley, L.
Lexden, L.
Lilley, L.
Lindsay, E.
Lingfield, L.
Manzoor, B.
Markham, L.
Marland, L.
Maude of Horsham, L.
Mawson, L.
McColl of Dulwich, L.
McCrea of Magherafelt and Cookstown, L.
McInnes of Kilwinning, L.
McIntosh of Pickering, B.
McLoughlin, L.
Mendoza, L.
Meyer, B.
Minto, E.
Montrose, D.
Morris of Bolton, B.
Moylan, L.
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Murray of Blidworth, L.
Naseby, L.
Neville-Jones, B.
Neville-Rolfe, B.
Newlove, B.
Nicholson of Winterbourne, B.
Noakes, B.
Norton of Louth, L.
O'Neill of Bexley, B.
Offord of Garvel, L.
Parkinson of Whitley Bay, L.
Patten, L.
Pearson of Rannoch, L.
Penn, B.
Popat, L.
Porter of Spalding, L.
Rawlings, B.
Reay, L.
Redfern, B.
Ribeiro, L.
Robathan, L.
Roberts of Belgravia, L.
Roborough, L.
Rock, B.
Rogan, L.
Sanderson of Welton, B.
Sandhurst, L.
Sassoon, L.
Sater, B.
Scott of Bybrook, B.
Seccombe, B.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Shephard of Northwold, B.
Sherbourne of Didsbury, L.
Shinkwin, L.
Smith of Hindhead, L.
Soames of Fletching , L.
Stedman-Scott, B.
Stewart of Dirleton, L.
Stirrup, L.
Stowell of Beeston, B.
Strathcarron, L.
Strathclyde, L.
Sugg, B.
Swire, L.
Taylor of Holbeach, L.
Trefgarne, L.
True, L.
Tugendhat, L.
Udny-Lister, L.
Vere of Norbiton, B.
Wei, L.
Wharton of Yarm, L.
Williams of Trafford, B. [Teller]
Wolfson of Tredegar, L.
Wrottesley, L.
Wyld, B.
Young of Cookham, L.
Younger of Leckie, V.

*5.07 pm*

*Amendment 4 ( to Amendment 2 ) not moved.*

*Amendment 2, as amended, agreed.*

*Amendments 5 and 6*

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

**5:** Clause 1, page 2, line 22, at end insert—

"(8A) For the purposes of this Act, a person that operates on a commercial basis but is, as a controlled person, awarded an exempted contract by a public authority in reliance on paragraph 2 of Schedule 2 (vertical arrangements) is to be treated as a public authority in relation to any relevant sub-contract."

Member's explanatory statement

This amendment would ensure that bodies that are awarded contracts by virtue of being controlled by public authorities are treated as public authorities (and therefore as contracting authorities) in relation to contracts awarded for the purpose of performing that contract.

**6:** Clause 1, page 2, leave out line 25 and insert—

""relevant sub-contract" means a contract substantially for the purpose of performing (or contributing to the performance of) all or any part of the exempted contract;"

Member's explanatory statement

This amendment is connected to the Government amendment to add subsection (8A) and would define "relevant sub-contract".

*Amendments 5 and 6 agreed.*

***Schedule 1: Threshold Amounts***

*Amendment 7*

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

**7:** Schedule 1, page 79, line 46, at end insert—

"(2) In this Schedule—

(a) a reference to a contract for the supply of goods, services or works to a particular kind of authority includes a reference to a framework for the future award of such contracts;

(b) a reference to a works contract includes a reference to a framework for the future award of works contracts."

Member's explanatory statement

This amendment would ensure that frameworks are properly taken into account in applying the thresholds in Schedule 1.

*Amendment 7 agreed.*

***Schedule 2: Exempted Contracts***

*Amendment 8*

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

**8:** Schedule 2, page 80, line 5, at end insert ", or

(b) a framework for the future award of contracts only of a kind listed in this Schedule."

Member's explanatory statement

This amendment would ensure that frameworks only for exempted contracts are exempted contracts.

*Amendment 8 agreed.*

*Amendment 9*

*Moved by* ***Baroness Noakes***

**9:** Schedule 2, page 80, line 9, at end insert—

"(3) Sub-paragraph (2) does not apply to contracts of a kind described in paragraph 2 (vertical arrangements) or paragraph 3 (horizontal arrangements)."

Member's explanatory statement

This amendment disapplies the reasonableness test in sub-paragraph 2 to vertical and horizontal contracts so as to preserve the rules which currently apply to public service collaborations.

**Baroness Noakes (Con):** My Lords, Amendment 9 amends Schedule 2 in relation to exempted contracts. Specifically, it seeks to modify how vertical contracts and horizontal arrangements are allowed to qualify as exempt contracts. I thank my noble friend Lord Moylan for adding his name to the amendment. I should explain that this amendment is in splendid isolation in a group all of its own because I thought that the previous group, which took rather a long time, covered rather too many matters and that the issue I am going to raise would have got lost in it. I apologise for pulling it out separately.

I was prompted to table the amendment by a briefing from the Local Government Association. From our proceedings in Committee, I think that I am in the minority among those who have been following this Bill in that I do not have an association with the Local Government Association to declare because I am not a vice-president or one of those things. However, I did recognise that the point raised by the Local Government Association was important and valid, and that is why I have tabled this amendment, and indeed amendments in two other groups that we will consider on Report.

Before I started on this Procurement Bill, I had little technical knowledge of the vast edifice of EU procurement rules, and I had never heard of the Teckal exemption or, indeed, the Hamburg exemption, which deal with vertical and horizontal arrangements respectively. Those arrangements allow contracts within or between local authorities to be exempt from procurement rules. I now know that these exemptions from the need to engage in competitive procurement processes are important for well-established ways of delivering local authority services. I am generally a competition fanatic, but I can see eminent sense in allowing local authorities to organise themselves internally or in collaboration with other local authorities in a way that delivers services to their local communities without dragging in the full force public procurement rules.

The problem lies in sub-paragraph (2) of paragraph 1, which states that a contract cannot be exempt if the relevant goods or services

"could reasonably be supplied under a separate contract".

I am advised that this test is not currently part of establishing whether the Teckal or Hamburg exemptions apply under the existing body of procurement law under the EU, so it appears that, in reformulating EU rules for the purposes of the UK in this Bill, we seem to have opened up a new source of challenge for local authorities that want to use the vertical or horizontal arrangements. I cannot see why the Government would want to create by this Bill new barriers for local authorities in areas where services have been delivered successfully over a long period. So my Amendment 9 seeks to exclude the application of sub-paragraph (2) to vertical contracts and horizontal arrangements under paragraphs 2 and 3 of the schedule. It would leave the reasonableness test in place for all the other contracts dealt with in Schedule 2 but would allow local authorities to continue with their internal structures and their cross-authority collaboration arrangements unhindered. I beg to move.

**Lord Moylan (Con):** My Lords, I am pleased to have added my name to this amendment in the name of the noble Baroness, Lady Noakes. I would like to start by thanking my noble friend the Minister for all the hard work she has done to bring us this far, and for her sympathetic approach to the House. I would also like to thank her for something that I had not expected to see on the part of the Government. The process of drafting legislation is normally arcane and obscure—it is carried out by civil servants and parliamentary draftsmen before anything ever reaches us. But in this case, in this rare Bill, we have actually seen the legislation being drafted, and redrafted, and redrafted further, time and time again, as it progresses with literally hundreds of government amendments. It has been very difficult to follow what is going on, but illuminating as to how laws are actually made—something which I think Bismarck said the public "should never see", if that is helpful advice to my noble friend.

In Committee, I gave an example of how the Teckal exemption works and how I had experienced it myself during my many years in local government. The Teckal exemption is the EU legal name for the vertical exemption, where local authorities or public bodies come together in order to establish a subsidiary, controlled entity; and there are rules and limits as to what it can do outside—percentages of work and effort and so on—that show whether it qualifies for that exemption so that the local authorities in question do not have to tender it publicly.

There are further examples that I did not mention in relation to horizontal relations between public bodies and local authorities. I find myself, quite by chance, sitting within a foot or two of the noble Lord, Lord Greenhalgh, who had the privilege and honour of being the leader of Hammersmith and Fulham Council in the past, when I had a modest role to play at an adjacent local authority. One of the things we did was to come together to share many of our services, between ourselves and in some cases with a third local authority.

That was an example of horizontal collaboration so that, for example, highway services, library services and things of that sort became shared. I simply say to my noble friend that I think this collaboration would be ruled out under the reasonableness test. Let us say that you are a local authority wishing to share services—or contract services, in some cases—with the local authority to your west. It is, of course, reasonable that the local authority to your east—assuming that you are not entirely surrounded by one local authority—could equally well provide those services. This is not simply about the private sector being an alternative to collaboration; it would be reasonable for another local

[LORD MOYLAN]
authority to provide those services rather than this one. If that was the case, you would be stymied; you would not be able to do it without having a tendering process.

*5.15 pm*

The clause is so badly drafted that I think it completely puts an end to horizontal arrangements. My noble friend Lady Noakes has expressed this very well; it is a very simple matter to correct this. It is not the Government's intention, I am sure, to tie everybody up in knots in this way. It would be very simple for my noble friend on the Front Bench simply to say that my noble friend Lady Noakes has got this absolutely right, and that she will bring forward an amendment in just those terms at Third Reading so that we can solve this and put it to bed.

**Lord Fox (LD):** My Lords, I will speak very briefly. I have just a couple of points to make before I speak to Amendment 9. First, I join the chorus of welcome for the collaborative spirit that the Minister has managed to engender among noble Lords working on the Bill. Secondly, the noble Lord, Lord Lansley—who I see has slipped out—and the noble Lord, Lord Moylan, both mentioned the fog of uncertainty created by the number of government amendments. I have a small mea culpa as to why some of those have been carried over on Report. Those of your Lordships who were in Grand Committee will remember the outrage caused by 340-odd government amendments landing without an explanation. That caused me to push them back, so I am afraid that I am responsible for their reappearance. However, that did what we wanted it to do: it gave us time to understand and follow those amendments. I think this amendment arises from the perspective we have had in that time.

Two things have happened which I never thought would: first, I find myself in almost complete agreement with the noble Lord, Lord Moylan; and, secondly, he appears to be calling for the emulation of the EU in British law. When we get to the retained EU law revocation Bill, I am sure he can join me to make similar entreaties from his position at the back of the Chamber. Joking aside, the point here is whether this was deliberate or an accident; we are waiting to hear from the Minister on that. This issue reflects a number of debates, certainly the one we have had on Amendment 34—which I trust will come back at Third Reading rather than being agreed here—and one that we will have in a later group in which the noble Earl, Lord Lindsay, has highlighted another issue.

More generally, whatever happens to the Bill on Report, there is a real need for people to sit down with cold towels on their heads and go through the Bill line by line one more time before we get to Third Reading. Because there have been so many amendments, it has been almost impossible to follow properly what is happening. We have all done our best, and the Minister has worked like a Trojan—as have your Lordships—but I think that there is a strong call for further work to be done once we get through Report stage on Wednesday evening.

With that, I support the attempts of the noble Baroness, Lady Noakes, in Amendment 9 to get some clarity on this, and I support the spirit of her speech.

**Lord Greenhalgh (Con):** My Lords, I rise because I was named by my noble friend Lord Moylan, and because this is a subject that I feel very passionately about, as someone who spent 16 years as a councillor and six years as a council leader. Indeed, I am very proud of the work we did to collaborate. It is something that came to me a little late in my local government career, because I used to believe in two things: competition and fear—that is, fear of failure—but collaboration is also important in local government.

My noble friend Lord Moylan pointed to the vision we had in west London to come together to collaborate to drive down costs. In fact, when it came to library services, it was very much in the back offices that we could make savings so that libraries could stay open and the public could be served by excellent libraries. We worked very carefully across a whole range of areas, such as highways and helping children across west London who needed safeguarding and support to find potential parents who could look after them, in a way that would not have been possible without collaboration.

I am also a huge fan of mutualisation. I know that is coming up in group 6, but I want to say that as someone who was a pathfinder of the work that my noble friend Lord Maude brought forward. The organisation that was spun out of the council to provide school support services exists today and is trading very well with officers I had as senior officers in Hammersmith and Fulham. They preferred a life outside the council. I pay tribute to that movement. It had real vision behind it. It did not involve competition and was really about empowering people to provide the services that they were already providing in a better and more comprehensive way. I think that was a tremendous pathfinder and I only wish that it could have been rolled out more widely across local government and the public sector.

I probably should have declared my business interests as set out in the register before starting to speak. However, I can honestly tell noble Lords that I have absolutely nothing to do with public procurement in my business life because today it takes a long time. It is really difficult and the barriers to entry are very great. I am sure the purpose of this Procurement Bill is to make sure that public procurement works for the benefit of those services and we can use competition in a sensible way and it can be streamlined. I think the purpose of the amendment from my noble friend Lady Noakes is to ensure that, where local trading companies exist, they will not fall foul of the reasonableness test and things have to be put out to competition. In fact, as a council leader I bought a communications service from the City of Westminster because of the expertise it had in comms. That was an expertise that existed only in Westminster City Council, and I did not think that that needed to go out to competition. So I think we need to be sensible.

As a true loyalist, I support the Government if they can point out how a reasonable test can work to ensure that there is not unnecessary tendering in this

instance. Provided I get those reassurances, I am happy to support the Minister in her endeavours to ensure that we sort out these areas and preserve areas such as local authority trading companies that provide an important part of services in local government.

**Baroness Hayman of Ullock (Lab):** My Lords, I thank the noble Baroness, Lady Noakes, for her introduction to her amendment which was very clearly laid out. Again, I would like to join with other noble Lords who talked about the number of government amendments, not just here but in Committee. People who were here on the first day will probably remember that I was a little bit cross about it. But in response, the Minister has really grappled with our concerns in the lead-up to Report and I appreciate the time that she has spent doing that.

I will be brief. I will just say that we strongly support the noble Baroness, Lady Noakes, with her amendment. She clearly laid out why this is important for local authorities and by including her amendment you increase the efficiency of the public sector when it is structuring the way it delivers its services, much of which do not need to include the procurement laws that we see before us. All I would say is that it is important that we can ensure that local authorities and other public sectors bodies within this area can continue to deliver better public services and make savings, as the noble Lord just mentioned, by collaboration, working together and sharing services. That makes eminent sense, and I would hope that the Minister will be able to reflect on that.

**Baroness Neville-Rolfe (Con):** My Lords, Amendment 9 tabled by the noble friends Lady Noakes and Lord Moylan—whom I am very glad to see back in this place—seeks to preserve the rules which currently apply to public service collaborations at paragraph 2 and 3 of Schedule 2. It was also very good to hear from my noble friend Lord Greenhalgh with his extensive local government experience.

I agree that the Bill needs to preserve these rules but believe that we have already done so. Paragraph 1(2)—to which the noble Baroness referred—says that a contract is not exempted if the main purpose of the contract could reasonably be supplied under a different contract, and that contract would not itself be an exempted contract. This provision serves to close a loophole where contracts that are mixed—that is that they contain both exempted activities and not exempted activities—might be inappropriately exempted from the regime.

However, unlike the exemptions for specific activities, all types of goods, services and works contracts are capable of being exempted under the vertical and horizontal exemptions, so the second part of the test at Schedule 2(1)(2)(b) is not met. The contract would remain exempt.

While I believe that we have preserved the rules, the Bill needs to be better understood by users and stakeholders. My noble friend Lord Greenhalgh also made some good points about unnecessary tendering. I met the Local Government Association, as I was concerned about this provision, and my officials are engaging with it following its representations to reach a common understanding. They will come back to me with an amendment that could be put forward in the House of Commons to clarify this provision, should one prove necessary. It will take a bit of time. Accordingly, I ask my noble friend to withdraw the amendment.

**Baroness Noakes (Con):** My Lords, I thank all noble Lords who have taken part in this short debate and those noble Lords who supported this amendment. I was delighted to hear what the Minister had to say, which was in the spirit of the quest for a good procurement system for this country that has permeated the way we have operated on this Bill to date. I am sure that the discussions with the Local Government Association will prove fruitful. On that basis, I beg leave to withdraw the amendment.

*Amendment 9 withdrawn.*

*Amendment 10*

*Moved by* ***Baroness Bloomfield of Hinton Waldrist***

**10:** Schedule 2, page 84, line 2, leave out from "contract" to end of line 3 and insert "that is required to be awarded in accordance with the public service obligations regulations.

(2) In this paragraph, "the public service obligations regulations" has the meaning given by section 136(11) of the Railways Act 1993."

Member's explanatory statement

This amendment would specify what public passenger transport services are within scope of this exemption.

**Baroness Bloomfield of Hinton Waldrist (Con):** My Lords, the next group covers a number of government amendments concerning our agreeing to implement the recommendations made by the Delegated Powers and Regulatory Reform Committee in its report on the Bill, published on 14 June 2022. This report was gratefully received, and the Government wish to thank the committee for its contributions. The Government have also tabled amendments to implement other recommendations from the DPRRC, which we will discuss when we debate amendments relating to utilities.

There are a number of places in the Bill where we apply financial thresholds which trigger obligations on a contracting authority. Amendments 175 to 178, 181 and 182 relate to the publication of contracts, the publication of information about payments, the requirement for pipeline notices and obligations relating to notices to be published in relation to below-threshold contracts. As drafted, these thresholds are to be amended by way of secondary legislation subject to the negative procedure.

However, the Delegated Powers and Regulatory Reform Committee recommended that where these thresholds are increased above inflation, they should be subject to the affirmative procedure. This is to ensure greater scrutiny where there is a change in transparency. This amendment actually goes further than the report's recommendation. It ensures that where these thresholds need to be changed for any reason, the affirmative procedure should apply. We consider that the same rationale applies in relation to the threshold for publication of KPIs, which was not mentioned in the report, and will bring forward an amendment to achieve this as soon as parliamentary time allows.

[Baroness Bloomfield of Hinton Waldrist]

The one exception is Clause 80, which, in relation to below-threshold contracts, prohibits the prior exclusion of suppliers on the basis of suitability. In this case, it is reasonable to maintain the use of the negative procedure, given that the thresholds applicable to this clause are aligned to the government procurement agreement thresholds which are also amended by the negative procedure.

Amendment 10 addresses the DPRRC's concern that the power to define public passenger transport services as exempt under Schedule 2(17) gives a wide discretion to Ministers. This amendment removes the power entirely and defines the services to be exempt by reference to the "public service obligations regulations", which are defined by reference to Section 136(11) of the Railways Act 1993.

*5.30 pm*

Amendment 12 relates to Paragraph 34 in Schedule 2, which carries over an exemption for concession contracts for the operation of a public service obligation for air services contained in the existing regime. These are air services provided for public interest reasons, where availability of other modes of transport or other air services is insufficient to serve the transport needs of a UK region. They typically require a subsidy, as otherwise they would not be economical to run. Examples include Dundee to London City Airport and Newquay to London Gatwick. This exemption is necessary as public service obligations for air services are awarded under a separate regime.

As it stands, the Bill exempts these types of contracts by reference to air services provided by a qualifying air carrier as defined by secondary legislation. The Delegated Powers and Regulatory Reform Committee has expressed concerns that this regulation-making power is too broad. To address these concerns, this amendment replaces the regulation-making power with a provision which defines the contracts that are to be exempted on the face of the Bill. It does this by defining what the contract does, that is implement a public service obligation, rather than by who the air carrier is. This is a good solution to what has proved to be an intricate technical problem.

Amendment 165 responds to a recommendation of the Delegated Powers and Regulatory Reform Committee. Paragraph 3(3) of Schedule 10 amends Section 15 of the Defence Reform Act 2014 to provide a power to specify an alternative method of determining the price payable under a qualifying defence contract and the circumstances under which that method is to be used. The committee's view was that regulations brought forward under this power should follow an affirmative procedure. The Government accept the committee's view, and hence this amendment. I hope noble Lords will therefore support these government amendments. I beg to move.

**Lord Fox (LD):** My Lords, we should all be grateful to the DPRRC for its vigilance and thoroughness in scrutinising legislation and this is no exception. A familiar sequence is nearly complete: first, the Government present a Bill threatening to take constitutional liberties to take on board powers for the Executive that should be with Parliament; next, the DPRRC highlights these grabs for power in a hard-hitting report; then one of us presents these issues in Committee via a series of amendments; and, we hope, finally, on Report, the Government accede to almost all the DPRRC's concerns, although they often keep one or two extra powers in their back pocket, just in case they need them later.

And so it is today with the arrival of this sequence of amendments and we should note how many there are, which indicates how much the Government were planning to take on board. The music of this dance is beginning to fade and sufficient has been done by the Government for us to move on, but I feel sure that the yen for power snatching by the Executive continues and it is already focused on other Bills. I wish it was not.

**Lord Coaker (Lab):** My Lords, I agree with much of what the noble Lord, Lord Fox, has just said. The Delegated Powers and Regulatory Reform Committee's report was particularly damning and some of the language that it used about the Procurement Bill was, frankly, very surprising. It would be churlish now not to thank the Government for listening to what that committee said and for bringing forward the amendments that the Minister outlined for us. We welcome the change of heart on the part of the Government and hope that they will learn from what has taken place and make sure that we do not have a blanket change, which was what happened here. Normally, there would be two or three arguments about negative to affirmative; this is like a blanket change of heart on the part of the Government, but it is very much to be welcomed.

I wish to highlight government Amendment 165. The Delegated Powers and Regulatory Reform Committee was particularly exercised by the fact that the Government were seeking to change primary legislation in the Defence Reform Act through the negative resolution procedure. It was particularly concerned that the Government were seeking to do that, notwithstanding its other concerns. The Government have re-established an important principle that primary legislation should be treated with the respect that it deserves. I am pleased that the Government have put forward Amendment 165 to ensure that, at the very least, primary legislation in that respect is changed through the affirmative resolution procedure. We welcome the changes the Government have made and think they will be helpful as we make progress, not only in this Chamber but in the other place.

**Baroness Bloomfield of Hinton Waldrist (Con):** It remains for me to thank both noble Lords for their support for these government amendments and their helpful comments. I take on board the comments of the noble Lord, Lord Coaker, about the Defence Reform Act and the comments of the DPRRC in that regard. We will, obviously, be saying more on defence procurement on Wednesday.

**Lord Coaker (Lab):** I am sorry to interrupt. I want to say that the noble Baroness, Lady Goldie, was particularly helpful when I met her and said that she would look to bring about this change. I apologise for not mentioning her.

**Baroness Bloomfield of Hinton Waldrist (Con):** I will make sure that those thanks are passed on.

*Amendment 10 agreed.*

*Amendment 11*

*Moved by* ***Baroness Bloomfield of Hinton Waldrist***

**11:** Schedule 2, page 86, line 35, at end insert—

"32A_ A contract for the supply of goods, services or works wholly or mainly for the purpose of an activity that would be a utility activity if it were not specified in Part 2 of Schedule 4."

Member's explanatory statement

This amendment would ensure that exemptions to the scope of utilities contracts under Part 2 of Schedule 4 apply to exempt those contracts from the Bill where entered into by public authorities.

**Baroness Bloomfield of Hinton Waldrist:** My Lords, this next group refers to utilities. Amendments 11, 13, 14, 17, 20, 21, 22, 169, 174, 180 and 184 relate to an exemption for utility activities exposed to competition. The amendments to Clause 5 and Schedule 4, and a consequential amendment to Schedule 2, are again in response to the concern of the DPRRC that the power to establish a procedure to exempt utilities subject to competition from the Bill amounted to a skeleton clause. The Government will replace this power with one that requires the exemptions to be made by secondary legislation under an affirmative procedure. This will afford Parliament greater scrutiny to review each exemption. The test to be satisfied for an exemption remains that there is fair and effective competition in the relevant utility market, and that entry to that market is unrestricted.

Noble Lords should note that Amendment 22 adds Part 2 to Schedule 4, which sets out the utility activities which are exempt from procurement regulations. These reflect exemptions that exist under the current regime, which are preserved by Amendment 169 in order that they are available under the Scottish procurement regulations.

Amendments 174, 180 and 184 ensure that the affirmative procedure applies to an exercise of the power.

Amendments 15 and 16 ensure that the definition of private utilities and contracting authority interact as intended and that a private utility is only a contracting authority in respect of the utility activities for which the utility has a special or exclusive right.

Amendments 18 and 19 revise the description of a utility activity in the transport sector in paragraph 4 of Schedule 4.

Amendments 56, 71 and 200 speed up procurements and reduce the burden for utilities using a utilities dynamic market—a UDM—by only requiring utilities to provide tender notices of upcoming procurements to suppliers on a UDM or appropriate part of a UDM, instead of having to publish notices. In practice, this means utilities can, for example, provide the tender notice to suppliers on the UDM as part of the associated tender documents as each procurement under the UDM is commenced.

In order to take advantage of this flexibility, the notice setting up the UDM must meet minimum information requirements, which will be set out in regulations under Clause 88. Utilities must specify in the UDM notice that only members of the UDM will be provided with tender notices. The notice setting up the UDM will be published continuously and will remain open so new members can join at any time. If accepted, they would then be entitled to receive tender notices.

Amendment 77 to Clause 48 will allow private utilities to adopt a voluntary standstill period to direct award contracts instead of a mandatory one. This means private utilities will take a risk-based decision on whether to apply a standstill period to a direct award procurement. It is in keeping with only regulating private utilities' procurement to the extent necessary under our international obligations. I will turn to the amendment in the name of my noble friend Lord Lansley in my closing speech, having heard the points he raises. I beg to move.

**Lord Lansley (Con):** My Lords, I am most grateful to my noble friend, not least because she referred to Amendment 169 in her helpful introduction to these amendments on utilities. Happily, we have reached the end of the Bill quite early on; that amendment relates to the very last page—page 118—where, in the present draft of the Bill, Commission decisions relating to public contract regulations, utilities and so on were to be repealed. Her explanation is interesting, in that it retains these European Commission decisions as retained EU law for the benefit of the Scottish regime. I am slightly perplexed as to why they were to be repealed in the first place since, presumably, the Scottish regime would have required them for this purpose regardless. However, that is just a question and it is only a matter of curiosity that I ask it.

My Amendment 23 is an amendment to government Amendment 22. As my noble friend made clear, the DPRRC said that this was a skeleton clause and was particularly unhelpful because it disguised the fact that policy had not been developed. I do not know whether that is the case or not; the point is that Ministers have come forward with a proposal for how these exemption decisions should work in relation to utility activities. I remind noble Lords that there are activities, and there are utility activities. The effect of Schedule 2 is to make it clear that certain activities should not be regarded as utility activities because they are in fair and effective competition and there are no restrictions on entry to that market. The decisions that were made were about electricity, gas and oil extraction, production and generation.

That being the case, the policy decisions in government Amendments 17 and 22, which my noble friend has explained, have the effect in Amendment 22 of saying, "These are the existing exemption decisions". Government Amendment 17 says that, in future, Ministers can add to them or subtract from them by regulation. The point of my Amendment 23 is to ask, "When Ministers were reaching a view as to how these exemption decisions should be made in future, why did they not look at the Competition and Markets Authority, which we have as our own creature for the making of competition-related

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decisions, and put to it the job of determining whether a given activity in the utilities sector—actually, it would also be true in other sectors if exemption decisions were sought—is in fair and effective competition and there are no restrictions to the market?"

If my noble friend says, "Ah, but when Ministers make regulations, they will of course take advice from the Competition and Markets Authority", I will be very happy. If she does not say that, however, I will be nervous, because what is the point of having the Competition and Markets Authority able to make such decisions in lieu of what used to be the European Commission's responsibility if Ministers are going to pre-empt it themselves? I hope that she will be able to give me that reassurance about the use of the CMA for making competition-related decisions.

**Baroness Hayman of Ullock (Lab):** My Lords, I thank the Government for tabling a lot of the amendments, which have helped to bring clarification around utilities; quite a bit of confusion was expressed in Committee. I also remind the noble Baroness, Lady Neville-Rolfe, who is not currently in her place, that she did say that we should be extremely careful about regulating private utilities in Committee. These amendments seriously have her stamp on them; I thank her for that. The noble Lord, Lord Lansley, made some important points. I hope that the noble Baroness, Lady Bloomfield, listened carefully and can give the reassurances that he requested.

*5.45 pm*

**Baroness Bloomfield of Hinton Waldrist (Con):** My Lords, I have indeed listened carefully throughout the passage of the Bill and in our discussions with many noble Lords, including my noble friend Lord Lansley—as has my noble friend Lady Neville-Rolfe.

Amendment 23 from my noble friend Lord Lansley has been tabled to reintroduce the test on whether a utility activity is operating under competitive conditions. I reassure Peers that this competition test has not been removed from the Bill but would be moved from Schedule 4 to the main body of the Bill by government Amendment 17. This amendment would insert after Clause 5(5) a provision that allows an appropriate authority to make changes to the list of exempted utilities by regulations, provided that it is satisfied that the activity is subject to fair and effective competition and entry to the relevant market is unrestricted. Any changes to the list in paragraph 2 of Schedule 4 will be brought about by this power; Amendment 23 is therefore not needed. Similarly, we have addressed the first part of my noble friend's amendment with government Amendments 13 and 14 to Clause 5.

With regard to my noble friend's point about the Competition and Markets Authority, we have engaged with the CMA in preparation for our provisions in this area; we will continue to engage with it and other relevant government and regulatory bodies. However, the important thing is that Parliament is able to scrutinise the exemptions. It is not necessary to prescribe the internal processes leading up to making an exemption. Parliament will have the opportunity to ask what process and engagement has taken place for each exemption when regulations are introduced; that is why we changed the nature of the power so that regulations under the affirmative procedure are required any time an appropriate authority wishes to make or amend an exemption.

I therefore hope that my noble friend Lord Lansley will feel able not to move his amendment and that noble Lords will support the government amendments.

*Amendment 11 agreed.*

*Amendment 12*

*Moved by* ***Baroness Bloomfield of Hinton Waldrist***

**12:** Schedule 2, page 86, line 40, leave out from "contract" to end of line 45 and insert "that—

(a) confers an exclusive right to operate a relevant scheduled air service for a period of four years or a series of periods falling within a period of four years, and

(b) imposes minimum service requirements in respect of that service during those periods.

(2) In this paragraph—

"air service" means a flight, or a series of flights, carrying passengers or cargo (including mail);

"airport" means any area especially adapted for air services;

"relevant scheduled air service" means an air service that—

(a) operates between two airports within the United Kingdom or within the United Kingdom and Gibraltar, and

(b) the Secretary of State considers to be necessary in order to maintain sufficient transport links between the areas served by the airports."

Member's explanatory statement

This amendment would more precisely define the concession contracts subject to this exemption.

*Amendment 12 agreed.*

***Clause 5: Utilities contracts***

*Amendments 13 to 17*

*Moved by* ***Baroness Bloomfield of Hinton Waldrist***

**13:** Clause 5, page 4, line 2, leave out "of a kind specified in" and insert "specified in Part 1 of"

Member's explanatory statement

This amendment is consequential on the Government amendment to paragraphs 7 and 8 of Schedule 4 and the insertion of a new Part of Schedule 4.

**14:** Clause 5, page 4, line 2, at end insert—

"(aa) is not specified in Part 2 of Schedule 4,"

Member's explanatory statement

This amendment is consequential on the Government amendments to paragraphs 7 and 8 of Schedule 4 and the insertion of a new Part of Schedule 4.

**15:** Clause 5, page 4, line 3, at end insert ", and

(c) in the case of an activity carried out by a person that is not a public authority or public undertaking, is carried out pursuant to a special or exclusive right."

Member's explanatory statement

This amendment would ensure that a private utility is only a contracting authority in respect of the utility activities for which the utility has a special or exclusive right.

**16:** Clause 5, page 4, line 4, leave out subsection (3)

Member's explanatory statement

This amendment is consequential on the Government amendment to subsection (2) inserting new paragraph (c).

**17:** Clause 5, page 4, line 21, at end insert—

"(5A) An appropriate authority may by regulations amend Part 2 of Schedule 4 for the purpose of—

(a) specifying an activity, or

(b) removing an activity.

(5B) Regulations under subsection (5A) may not specify an activity unless the authority is satisfied that—

(a) the activity is carried out on a market that is subject to fair and effective competition, and

(b) entry to that market is unrestricted."

Member's explanatory statement

This amendment would allow an appropriate authority to amend Part 2 of Schedule 4, which sets out activities which are not to fall within the definition of utility activity.

*Amendments 13 to 17 agreed.*

### *Schedule 4: Utility activities*

*Amendments 18 to 21*

*Moved by* ***Baroness Bloomfield of Hinton Waldrist***

**18:** Schedule 4, page 90, line 24, after second "the" insert "general"

Member's explanatory statement

This amendment would clarify that networks are to be available to the general public to fall within this utility activity.

**19:** Schedule 4, page 90, line 26, leave out sub-paragraph (2)

Member's explanatory statement

This amendment would remove the definition of "network".

**20:** Schedule 4, page 91, line 2, leave out paragraphs 7 and 8

Member's explanatory statement

This amendment, and the Government amendments to Clause 5, would replace a process for exempting activities from being utility activities with those exempted activities being specified in a new Part 2 of Schedule 4.

**21:** Schedule 4, page 91, line 43, after "this" insert "Part of this"

Member's explanatory statement

This amendment would be consequential on the division of Schedule 4 into two Parts.

*Amendments 18 to 21 agreed.*

*Amendment 22*

*Moved by* ***Baroness Bloomfield of Hinton Waldrist***

**22:** Schedule 4, page 92, line 3, at end insert—

*"PART 2*

*ACTIVITIES THAT ARE NOT UTILITY ACTIVITIES*

10_ Generation of electricity in England, Scotland or Wales.

11_ Production of electricity in England, Scotland or Wales.

12_ Wholesale or retail sale of electricity in England, Scotland or Wales.

13_ Wholesale or retail sale of gas in England, Scotland or Wales.

14_ Exploration for oil in England, Scotland or Wales.

15_ Exploration for natural gas in England, Scotland or Wales.

16_ Production of oil in England, Scotland or Wales.

17_ Production of natural gas in England, Scotland or Wales.

18_ Development of infrastructure for production of oil in England, Scotland or Wales.

19_ Development of infrastructure for production of natural gas in England, Scotland or Wales."

Member's explanatory statement

This amendment would expressly set out the activities that are not to be utility activities under the Bill.

*Amendment 23 (to Amendment 22) not moved.*

*Amendment 22 agreed.*

### *Clause 9: Mixed procurement: special regime contracts*

*Amendments 24 to 28*

*Moved by* ***Baroness Bloomfield of Hinton Waldrist***

**24:** Clause 9, page 7, line 10, after "contract" insert "of the same kind (or at all)"

Member's explanatory statement

This amendment and the other Government amendments to this clause would ensure that one contract cannot benefit from the exceptions applicable to more than one special regime in circumstances where the contract could reasonably be split into more than one contract falling within different regimes.

**25:** Clause 9, page 7, line 20, after "contract" insert "of the same kind (or at all)"

Member's explanatory statement

This amendment would do the same as the Government amendment to subsection (1) of this Clause, but for frameworks.

**26:** Clause 9, page 7, line 25, leave out from "apply" to "the" in line 26 and insert "to prevent the contract from being treated as a defence and security contract if"

Member's explanatory statement

This amendment is consequential on the Government amendments to subsections (1) and (2) of this clause, and ensures that a contract falling within more than one special regime but that is capable of being a defence and security contract would still be categorised as a defence and security contract.

**27:** Clause 9, page 7, line 36, at end insert—

"and a reference to a special regime contract of a particular kind is a reference to a special regime contract of a kind described in paragraph (a), (b), (c) or (d)."

Member's explanatory statement

This amendment would define concepts inserted by the Government amendments to subsections (1) and (2) of this clause.

**28:** Clause 9, page 7, line 37, leave out from "determining" to end of line 38 and insert "whether a contract is a public contract"

Member's explanatory statement

This amendment is consequential on the other Government amendments to this clause and would ensure that the proposition in subsection (3) does not apply when determining whether a contract is a public contract under clause 2 and Schedule 1.

*Amendments 24 to 28 agreed.*

### *Clause 10: Procurement only in accordance with this Act*

*Amendments 29 to 32*

*Moved by* ***Baroness Bloomfield of Hinton Waldrist***

**29:** Clause 10, page 8, line 4, after second "a" insert "covered"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**30:** Clause 10, page 8, line 6, leave out subsection (2)

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**31:** Clause 10, page 8, line 13, leave out "only award a public contract" and insert "not enter into a public contract unless it is awarded"

Member's explanatory statement

This amendment would clarify that a contracting authority may not enter into a public contract unless it is awarded in accordance with the procedures for awarding a public contract in the Bill.

**32:** Clause 10, page 8, line 19, leave out subsections (4) and (5)

Member's explanatory statement

This amendment is consequential on the definitions contained in subsections (4) and (5) being moved to new clause before clause 1.

*Amendments 29 to 32 agreed.*

*Amendment 33*

*Moved by* ***Baroness Hayman of Ullock***

**33:** After Clause 10, insert the following new Clause—

"Procurement principles

(1) In carrying out a procurement, a contracting authority must pursue the following principles—

(a) promoting the public good, by having regard to the delivery of strategic national priorities including economic, social, environmental and public safety priorities,

(b) value for money, by having regard to the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case,

(c) transparency, by acting openly to underpin accountability for public money, anti-corruption and the effectiveness of procurements,

(d) integrity, by providing good management, preventing misconduct, and control in order to prevent fraud and corruption,

(e) fair treatment of suppliers, by ensuring that decision-making is impartial and without conflict of interest, and

(f) non-discrimination, by ensuring that decision-making is not discriminatory.

(2) If a contracting authority considers that it is unable to act in accordance with any of these principles in a particular case, it must—

(a) take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage, and

(b) publish a report within 90 days setting out the principles with which it could not act in accordance and its reasons."

Member's explanatory statement

This amendment would require contracting authorities to pursue a series of principles when carrying out procurements.

**Baroness Hayman of Ullock (Lab):** My Lords, I have a number of amendments in this group. First, Amendment 33 refers back to the principles that we debated at length in Committee; they were originally in the Government's Green Paper and were consulted on. Our concern is that those principles were then left out of the Bill even though the objectives were included, so my amendment

"would require contracting authorities to pursue a series of principles when carrying out procurements."

Amendments 35 and 36 in my name look to

"require social and public value to be considered in the procurement objectives."

We believe that social and public value are important requirements for any contracting authority to consider, so I have asked for that to be put through to the procurement objectives. This would encourage anyone contracting, for example, to work with local suppliers; to encourage contractors to reduce their $CO_2$ emissions; to encourage the hiring of more apprentices; and to encourage greater diversity. If you are going to deliver the levelling up that the Government are so keen on and achieve net zero, it is important to include these principles.

We know that social value is included in the national procurement policy statement but it is not referred to in the Bill itself. We also know that public benefit is mentioned in the Bill, but that is a pretty vague concept. It is not clear to us how social value would sit within that framework.

I also have Amendment 46. We debated at length in Committee the national procurement policy statement. Many concerns were raised about the Government expecting Members to take at face value the fact that certain things can be included in the NPPS, but, of course, we have absolutely no guarantees other than that the Government are saying that they will be. Clearly, once the Bill becomes an Act, we will need to see a new NPPS, so we believe that the Bill should include the set of principles that need to be within that NPPS so we can have confidence that it will deliver what it needs to do.

My Amendment 48 aims to subject the NPPS statement and amendments to the affirmative procedure so that the existing one will remain in force if, for any reason, a new statement is rejected. We think this is an important fallback position.

Finally, my Amendment 96 creates a process to ensure contracting authorities safeguard the public interest when considering whether to outsource or recontract services. This is something that has been raised with us by a number of different contracting authorities that want that flexibility.

There are a number of other amendments in this group which we support, and I will just draw attention to a few. My noble friend Lord Hunt has an amendment on adding accessibility to the objectives. The noble Baroness, Lady Worthington, has an important amendment on defining public benefit. We know how strongly she feels about the environment and, again, we have debated that at length. It is really important that we do not lose that in the further discussions. The noble Lord, Lord Lansley, has a number of amendments that we support, and we look forward to hearing his introduction to them.

Finally, it is really important there is clarity around principles and objectives as this Bill goes through the process of becoming an Act. Good sentiment from the Government and the Minister are not sufficient to ensure that we actually have good procurement at the end of the day. That is what we want to see. I beg to move.

**Baroness Worthington (CB):** My Lords, I will speak to Amendment 42 in my name in this group and in support of Amendments 46 and 47. I will keep my comments brief. We had a very good debate in Committee about what should go into the Bill in relation to the principles that will guide procurement. In my amendment, I sought to be as precise as possible and selected two specific issues relating to climate change and biodiversity loss. The reason for that is that it has been pointed out to me that society's priorities shift over time and primary legislation should be regarded as very serious: you therefore should not put a long shopping list of things into it. However, on these two issues, I cannot imagine a time henceforth when we will not be concerned about the impacts of climate change or biodiversity loss. The Government have a huge lever for change to drive investments into solutions. It would be a great shame if we were not to make it very clear in the Bill that this lever is something that we are willing and want to use.

The more the public purse can create markets and drive investment, the more we can rely on the private sector to come forward with innovation. It will bring down the cost over time. If we do not use public procurement, we will be expecting more from our private sector, and it will debatable whether it will be able to enter into markets that are highly mature and overcapitalised. We are not talking about a level playing field here. If you want private solutions to come in, you have to support them either through government policy, through taxation or through procurement. This Bill is a huge lever that I hope we will pull.

Although I would be delighted to test the will of the House of Amendment 42, it is actually more important that we put these principles in on the operational aspects of this Bill, in which case Amendments 46 and 47, which relate to national policy planning guidance, are hugely important, and I support both of those amendments. I look forward to hearing those who speak to them and to the Government's response.

**Lord Lansley (Con):** My Lords, I am glad to follow the noble Baroness, Lady Worthington. I signed her Amendment 42 and I thoroughly agree with it. Indeed, I agree with all the points she made, including—I am grateful to her for saying it—the importance of focusing on the national procurement policy statement. In a sense, while it would be helpful for Clause 11 on procurement objectives to clarify what is meant by "public benefit", there is always a risk that we either have a broad-ranging—no disrespect to it—but perfectly understandable series of statements, as in Amendment 33 moved by the noble Baroness opposite, or, as with Amendment 42, by narrowing it down, we somehow make people imagine that we have excluded these other terribly important objectives. My noble friend would doubtless say that the more we put into the procurement objectives, the more difficult it will be for contracting authorities to comply with competing considerations and so on. There is a lack of flexibility in that.

I thoroughly agree, therefore, with the proposition that we need to focus on the national procurement policy statement. The Government will publish that. As we know from other contexts, that is what the contracting authorities are going to look at. We know that the NPPS will include the Government's strategic priorities, but we do not know what those are. The question then immediately emerges: is it proper for Parliament to have a view about that, or should we just say, "When the time comes, the Government will say what their strategic priorities are, and that's good enough for us"?

Amendment 47 is limited in precisely the way the noble Baroness who signed the amendment said. It does not tell the Government to have a long list of strategic priorities. They may have their own strategic priorities but, during the Committee debates, noble Lords who were there will recall that there were some clear strategic priorities which the Committee wanted to see reflected in the Government's statement. They included, perhaps most prominently, the environmental issues. One way of doing it which should cause the Government the least possible vexation is to do it by specific reference to the existing statutory targets set out in the Climate Change Act and the Environment Act—that is, to make it clear that they must ask contracting authorities to do the things that they are statutorily obliged to do in any case. They might say that that is unnecessary: actually it is not, because we all know that when these are reflected properly in the strategic priorities of the NPPS, the authorities will do it. If they are not reflected in the strategic priorities in the NPPS, they might be on statute but the authorities may well not do it. We have to make sure that they do it.

Turning to the second strategic priority in Amendment 47—requirements set out in the Public Services (Social Value) Act—I am glad that my noble friend Lord Maude of Horsham is in his place, because he will know that reflecting the strategic priority on that social value legislation is precisely one of the mechanisms for ensuring that social enterprises are given the priority they deserve. For example—I hesitate, in speaking to my noble friend, to cite this—but the European Commission document *Buying for Social Impact*, published in 2018, had a range of examples from across Europe, one of which was from Scotland. The Scottish example said that one of the implications of buying for social impact has been the use of not-for-profit and social enterprises in respect of public procurement. It is therefore a very effective way of bringing that to the forefront.

*6 pm*

Thirdly, on promoting innovation among potential suppliers, I say that we have had that debate many times. The word "innovation" does not appear anywhere in the Bill. If we are to have, as I am sure we must, innovation as one of the clear central approaches to public procurement, for the benefit of public services and the economy, it must be reflected in the NPPS. I

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have altered the wording "among UK suppliers" because I do not wish it to be thought in any way discriminatory. It must be just "among suppliers". When our current Prime Minister was Chancellor of the Exchequer, he put innovation at the forefront of his economic approach to improving productivity. Our present Chancellor of the Exchequer did the same in his Autumn Statement just the other week.

Finally, not least because I cannot imagine that a Government would not put it among their strategic priorities in public procurement, reducing fraud, eliminating waste and avoiding abuse of public money must be a strategic priority for every contracting authority. My point here is a bit like our earlier discussion. If not these, what will the Government put as strategic priorities? These must be among them. They are not limited to these, but it would be incredible if the Government did not include these as strategic priorities—and, from my point of view, if they are in the NPPS, they apply to all procurements. The Government can make it very clear in the statement how these are to be translated from priorities to actions by contracting authorities, but we must wait to see that.

I have other amendments which, unlike Amendment 47, I hope that it will not be necessary to press. Although changing "may" to "must" is a classic of its kind in this House, I am pretty sure that the Government have sufficient incentive to publish a statement that they are certain to do so. Amendment 44, about doing so within 12 months, is simply a probing amendment to see whether the Minister will say when the Government intend to publish such a statement—because, in the absence of it, it is very difficult to see how the overall reforms are to be given sufficient implementation.

My noble friend the Minister has listened very carefully and patiently. I have discussed with her how consultation should be on a draft of the statement. There is a risk that it would be consultation simply on a set of questions. When you get close to a statement of this kind, it is important for public bodies and contracting authorities and their representatives to see the terms in which the Government are proposing to lay a statement and to have an opportunity to comment on the terms of the statement. However, it is not necessary to press this into the statute. I just hope that it will be regarded as the best practice on the part of Ministers when the time comes.

I hope that my noble friend can respond positively to the strategic priorities in Amendment 47. I look forward to hearing what she has to say. However, if it is not sufficiently positive, I may need to test the opinion of the House on Amendment 47.

**Lord Maude of Horsham (Con):** My Lords, I draw attention to my interests as set out in the register. I am co-owner of a company that provides advice to Governments outside the UK on issues of public sector reform, including procurement—a subject that is not dear to very many people's hearts but is to mine. I am delighted to have the chance to speak on this important group of amendments.

I assume that it is accepted everywhere that the primary purpose of good procurement law and practice is to ensure that the goods and services being procured provide excellent value and the best quality for the money. That trade-off between the two should always be primary. The various objectives and principles that are adumbrated in the amendments tabled by my noble friend Lord Lansley, and the noble Baronesses, Lady Hayman and Lady Worthington, are all excellent. I mean no offence when I say that they are motherhood and apple pie. No one would be against any of them, they are good things. The question is the extent to wish you should build into law the obligation for these to be taken into account in the ways laid out in the various amendments.

My noble friend Lord Lansley referred to the Public Services (Social Value) Act 2012, which I was very glad about as I was the Minister responsible for it. It was a Private Member's Bill in the other place, but I was very happy that the Government supported it and saw it into law. It was very much a permissive Act. The objective was to make it clear that procurements were not to be just an arithmetic exercise looking at the pure financial value of bids but that you could look at wider social value.

However, when the coalition Government was formed in 2010 and we started to look at how procurement was being done, procurement policy was being used as a sort of Christmas tree on which many different policies were being hung. My recollection is that there were something like 11 different policies. All of them were very good. None of them was something we did not want to take seriously or thought did not matter. There were environmental and social policies, and others concerning training and apprenticeships; a whole range of interesting and good objectives. I have to say that we fairly ruthlessly stripped them out because, like now, the Government had a significant budget deficit and it is essential that primacy must be given to value for money. So we stripped them out, but that was not in any way to suggest that those factors could not be put into a request for proposal—RFP—or tender document, in the way that a number of your Lordships want to see happen on a routine basis.

The key to this is bespoking. There will be many cases where the inclusion of wider requirements makes sense and will not skew or bias a particular procurement in a way that damages its value for money—but there will be some where this is damaging, and this must be addressed close to the chalkface by those who are doing the procurement. As I said at Second Reading, the key is practices, and getting experts in procurement involved at an early stage so that the procurements can be devised in a way that supports the policy objective. Too often that does not happen. The problem with introducing broad, overarching requirements or even policy statements into the approach is that these get baked in at the policy development stage of a project, and that can then jeopardise and get in the way of the project's effective implementation.

This leads to a broader point. It is essential that those charged with implementation of projects, programmes and policies—implementation professionals with the necessary expertise in procurement, project management, IT and digital, financial management and HR—are involved at the policy development stage. Far too often, that does not happen. That is the stage

when advice can be taken and a procurement devised and formulated in such a way that these desirable other policy objectives can be addressed, but in a way that is proportionate and appropriate in the circumstances.

It seems to me that that is the reason for having that flexibility. The noble Baroness, Lady Hayman, said that the words of Ministers can be warm, encouraging and good, but there is nothing like having good, strong law to bake it in. The problem is that this can be counterproductive. We all know the reality, and it is clear from this debate that procurement is difficult, complex and technical. If it is so for those of us who are here making the law, then it is pretty difficult, complex and technical for those trying to bid for contracts from the public sector. The more complexity and legal rigidity we build in at this stage, the greater the ability of the established universe of vendors and suppliers to freeze out newer, smaller ventures from effectively bidding for and winning these important contracts.

When procurement law becomes too rigid and prescriptive, frankly, it can enable established vendors to present some of the characteristics of an oligopoly. We saw this 15 years ago, particularly in the world of public sector IT contracts. It is really important that we bear this in mind.

A little later, in group 6, we will debate the government amendment that rightly requires contracting authorities to take account of the needs of SMEs, which I wholly welcome. In an earlier debate, the noble Lord, Lord Wallace of Saltaire, mentioned the desirability of including the needs of social enterprise, to which I am very sympathetic, for all the reasons we discussed earlier.

However, the fact is that, the more prescription and rigidity in the law, the greater the scope for the big beasts in the supplier market to use their financial muscle and heft to squeeze out the smaller vendors through judicial review in the courts. Some of them are very trigger-happy in this respect. It is often the smaller, newer vendors who bring the most dynamism and innovation and are most able to bring quality and good value to the needs of delivering services and providing goods for citizens.

While recognising the good values and intentions that lie behind this desire to load all these additional factors on to procurement law and make them explicit, my counsel is that we should tread with very great caution. I do not find myself able to support these amendments.

**Baroness Noakes (Con):** My Lords, I will offer a few general observations. I do not have any amendments in this group, and I will echo some of what my noble friend Lord Maude has just said.

I will make four points. First, I see little point in duplicating in this Bill what is already on the statute book. We have already referred to the Public Services (Social Value) Act 2012. This deals with social value and does not need to be repeated in the Bill. That applies to other matters as well.

Secondly, lists of noble Lords' favourite topics, such as climate change and innovation, run the risk of accelerating the Bill's obsolescence. This is the case even if lists are drafted in a non-exhaustive form. The list itself provides context for interpreting the statute at a later stage. Those interpreting the legislation will look at what Parliament's intention was when we passed it. The sorts of things we put in now will help determine the framework within which that judgment is made.

*6.15 pm*

At the same time, fixing lists at one point in time creates the possibility of irrelevance over time, because things become more or less important. I submit that this is even the case in relation to today's hot topics of climate change and biodiversity, which may well become less important over time. We only have to look at our own experiences over the last 30 years of how our priorities have changed. Most of us would not have included those items on our lists 30 years ago. In 30 years' time, I suspect we will have different things we will need to focus on.

Thirdly, we must beware of unintended consequences, especially for SMEs. Amendment 42, in the name of the noble Baroness, Lady Worthington, seeks to define "public benefit". If certain elements of public benefit are made explicit, it will likely drive procurement officials into a check-box mentality. This could, in turn, conflict with common sense. Is it common sense that every procurement has to consider what every supplier is doing for climate change and biodiversity? Amendment 42 would drive in that direction. In turn, that would probably rule out a lot of small suppliers who do not have the bandwidth to articulate their environmental footprint to satisfy procurement bureaucracies—nor should they need to.

Finally, less is often more in legislation. Amendments 33 and 46 by the noble Baroness, Lady Hayman of Ullock, introduce procurement principles. She does not say how these principles interact with the procurement objectives in Clause 11, even though they cover some of the same ground, such as value for money. She attempts to clarify what each of the principles means by saying what has to be done to meet them, but it is not clear whether these descriptions are exhaustive or illustrative.

For example, take her principle of fair treatment of suppliers, which is to be achieved

"by ensuring that decision-making is impartial and without conflict of interest".

Is that it? What about the role of hidden barriers to entry in contract specification? What about the impact of contract terms on different types of supplier, such as SMEs? It is very hard to be a legal draftsman in opposition, and indeed on the Back Benches. However, excessive specification is one certain route to legislative uncertainty, which your Lordships' House must surely want to avoid. I hope noble Lords will reflect on these points in deciding whether it is necessary to test the opinion of the House.

**Baroness Worthington (CB):** My Lords, I must make this point. Had we taken climate change and biodiversity loss seriously 30 years ago, we would not be in the situation we are in today. We are not seeing the investments we need into clean alternatives; nor have we developed the technologies from which other countries could

[Baroness Worthington]
benefit, and which would benefit our companies through their exportation around the world in order to solve this problem.

Climate change is not going anywhere: we will be debating it for the rest of this century. It seems absolutely incredible that we will not be considering it in 30 years' time. It will be far more urgent then than it is now. We are already 30 years too late.

**Baroness Parminter (LD):** My Lords, I add my support to the noble Baroness, Lady Worthington. There is disunity in Horsham tonight: I disagree strongly with the noble Lord, Lord Maude of Horsham. I went to school in Horsham and was on the council there. However, I take a different view from the noble Lord about the role of procurement.

He talks about procurement's sole purpose being good value. He went on to say that it is "motherhood and apple pie" to have value-driven public procurement policy, but I argue that it is not. That is the point of procurement: to marry good value with being value-led. Why be in government if you are not using all the levers at your disposal—regulation, fiscal incentives and disincentives, and procurement, with its massive spend—to deliver the values your Government want to deliver?

**Lord Maude of Horsham (Con):** My Lords—

**Baroness Bloomfield of Hinton Waldrist (Con):** I remind the House that noble Lords may speak only once on Report.

**Baroness Parminter (LD):** I will be very brief, as I do not want to prolong the discussion. In Committee, the Government made it clear that they would seriously consider the use of the national procurement policy statement as a vehicle to deliver the value-driven approach and support environmental and climate goals. The noble Lord, Lord True, said that they would reflect on that. Well, there has been no reflection. That is why it is so important—vital—that both the Labour Front Bench and the noble Baroness, Lady Worthington, have come forward with two amendments today that will raise the importance and central role of the environment and climate change in the national procurement policy statement. I hope they test the opinion of the House on that, given that there is clearly a disagreement.

I support the point from the noble Lord, Lord Lansley, about Parliament having a say on this and a draft procurement policy statement being put forward. If the Government will not accept that, they need to explain to the House tonight why, if it was good enough for the Environment Act and the environmental principles policy statement, it is not good enough on this occasion.

I strongly believe that we should support the amendments, which make sure that procurement delivers values as well as good value.

**Baroness Finn (Con):** My Lords, much has been made of the importance of social and environmental goals in public procurement. Of course, as many noble Lords have said, these goals have their place—but they should not be the driving force behind a procurement system, forcing it to run slowly and inefficiently and increasing cost to the public purse while disincentivising innovation and the participation of small businesses.

The Bill is a once-in-a-generation opportunity to put in place a robust procurement system that encourages procurers to focus on outcomes that deliver productivity improvements and innovation, reduce the cost to the public purse, and drive efficiency. It should do away with unnecessary and excessive procedural requirements that make it much more difficult for smaller businesses to compete and grow.

We should not lose sight of the fact that there is already much flexibility in the Bill, which is good news for delivery on social and environmental principles. This flexibility is evident in the Bill from the very outset, with the objective to maximise the public benefit and to allow economic, social and environmental matters to be considered. When it comes to awarding contracts, Clause 22 allows for a broad range of award criteria to be included in procurements where they are relevant, including those relating to social and environmental aims.

The Bill also includes a facility for a specific expression of government policy in the form of the national procurement policy statement and the Wales procurement policy statement. These can be used to create obligations to consider social and environmental goals of the day, such as net zero, without compromising the importance of maintaining an efficient and workable procurement regime. That is why I agree with my noble friend the Minister that we must avoid at all costs the inclusion of broad and unfocused obligations in relation to social and environmental matters.

Amendments to the Bill that would place requirements on contracting authorities always to have to include social and environmental benefits when awarding their contracts would slow down the procurement regime and increase risk. They would also significantly disincentivise small and medium-sized enterprises, which do not have the back-office capability to maintain huge reams of social and environmental policies and practices.

In summary, I am heartened that the approach the Government are already taking in the Bill will allow contracting authorities the flexibility to deliver procurement outcomes that address these important social and environmental objectives on a case-by-case basis while retaining value for money at the forefront. With this Bill, we are leaving behind a slow and bureaucratic procurement system that is unnecessarily restrictive in nature. Let us not change one set of restrictive procurement practices for another.

**The Earl of Lindsay (Con):** My Lords, in speaking to Amendments 58 and 82 in my name, I reiterate my support for the opportunity that the Bill offers to reduce burdens on business, especially small businesses, by simplifying the UK regulation of public procurement. I also welcome the Bill's objective of promoting an open and accessible business culture and practices.

That said, we must be careful that important safeguards currently in place in public procurement are not mistakenly, unwittingly or lightly discarded, hence

these two simple and straightforward amendments, Amendments 58 and 82, which align with the Bill's overall objective. In speaking to them, I declare an interest as chair of the United Kingdom Accreditation Service, UKAS. As the national accreditation body for the UK, appointed in statute, UKAS is the sole body recognised by government for the accreditation of organisations providing testing, inspection and certification services, collectively referred to as conformity assessment bodies. In short, we check the checkers, against internationally recognised standards.

The current procurement legislation, the Public Contracts Regulations 2015, stipulates that where conformity assessment is required by a contracting authority as part of a public procurement exercise, that conformity assessment must be accredited. This requirement for accreditation occurs either where the technical specification in the procurement mandates conformity assessment, such as testing or certification, or where an economic operator—a supplier—is required to hold certification as part of its proof of technical competence or management capacity.

The requirement for accreditation within current public procurement legislation is there for a purpose. It provides critical safeguards. It means that the competence, integrity and impartiality of a body delivering a test, inspection or certification must have been verified against international standards, on an ongoing basis, by an independent third party—in other words, by the nationally appointed accreditation body. The removal of these safeguards, which would disappear as the Bill is drafted, could have unintended and damaging consequences. For example, a contracting authority could require products to be tested to a specified standard but, without the safeguard of accreditation, any test certificate would have to be accepted. There would be no assurance of the quality or rigour of either the test or the tester. We saw what happened during the Covid pandemic with the profusion of substandard products that had false or inadequate certificates.

The NHS, when procuring PPE or anything else where it is critical that a product conforms with a specified standard, needs to be able to rely on a robust certification process. Likewise, a contracting authority could require a supplier to have a certificate for its management system, environmental management system, information security system or anti-bribery management system. If the certifier does not need to be accredited to perform that certification, the contracting authority cannot be certain that the relevant certificate is from a body whose technical competence, capabilities and impartiality have been verified by a third party against internationally recognised standards, but the contracting authority would none the less be obliged to accept the certificate.

Hence the serious concerns about the Bill that have been expressed to UKAS by public sector procurers such as the Ministry of Defence. Noble Lords will understand that the MoD—apart from being one of the United Kingdom's largest public sector procurers—is uneasy at the prospect of purchasing goods and services from companies whose management system certificates have been issued by bodies that might not have been accredited to perform those assessments. In case anyone is wondering, several certification bodies in the market are not accredited to or compliant with international standards. It is important to guard against the unintended consequences of encouraging the proliferation of non-compliant conformity assessment and accreditation practice and all the risk that involves. It is equally important to avoid undermining certification bodies that operate as nationally accredited entities.

The safeguards proposed by these two straightforward amendments are rooted in the United Kingdom's national quality infrastructure, which in turn reflects global best practice. They also align with the WTO's Agreement on Technical Barriers to Trade and the Government's commitment to international regulatory co-operation. Furthermore, they would bring the Bill into line with existing government policy on national accreditation.

In closing, I add that the drafting of these two amendments is also aimed at minimising trade barriers by recognising accreditation from any national accreditation body that is a signatory to the global mutual recognition agreements.

*6.30 pm*

**Lord Fox (LD):** My Lords, this is a very important group of amendments. We have had many speakers, so I will be concise. My noble friend Lady Parminter has already made some important points on our part. I will not repeat her comments, but we regard the issue of economic, social and environmental benefits to be paramount and we do not subscribe to the idea that it should not be in some way guided by the legislation or the operational part of the legislation.

I have listened carefully to the other speeches. I am minded to side with the approach of the noble Lord, Lord Lansley, of using the NPPS as the vehicle through which this aim and principle is achieved. I hope that we shall be able to support both him and the noble Baroness in His Majesty's Opposition if they decide to press their amendments. Amendments 35 and 46 bear my name; clearly, I stand by them and the speeches that others have made.

There are two other areas on which I want to speak very briefly. Not least, the noble Lord, Lord Hunt, was unable to be here, but I know that he and my noble friend Lady Brinton have tabled Amendments 38 and 83, which reflect on accessibility. The previous legislation had prior regulations about accessibility and the fact that public procurement should ensure accessibility to all people. It has been lost in the drafting of this Bill. It is not clear to me whether that is a deliberate or accidental dropping of something, so it will be very useful to hear from the Minister what the Government's thinking was on this. If it was deliberate, I would urge them to think again; if it was accidental, there is time to put it right.

Finally, I would like to make a pitch to support the noble Earl, Lord Lindsay, who has unearthed something that must be another unintended consequence of this legislation. I cannot believe that this was deliberately put in place by the Government. His Amendments 58 and 82 are an important way of righting that situation. I hope, again, that the Minister will think again.

In conclusion, we on these Benches absolutely believe that there should be a public purpose to procurement. We feel that the legislators have a role, as well as the

[Lord Fox]
very important role outlined by the noble Lord, Lord Maude, for the professionals, when it comes to implementing that policy. It is really important that we seek to achieve public good through the £300 billion of procurement that this country makes.

**Baroness Neville-Rolfe (Con):** My Lords, we have had an extremely interesting debate—a shorter one than I was expecting—and I am grateful for all the contributions.

I will start by saying that, while I understand that noble Lords rightly wish to pursue their particular interests, many of which I agree with, we have to bear in mind that procurement is, above all, an economic activity. That does not mean that we cannot take other things into account, but no amount of environmental or social benefit could make a procurement satisfactory if it failed to deliver economically on its intended purpose. We need to avoid the Christmas tree that my noble friend Lord Maude referred to. Of course, the NPPS allows for the inclusion of these sorts of policies—including net zero, as the noble Baroness, Lady Parminter, said—but that does not mean to say that we want to put them on the face of the Bill.

In my view, value for money comes first, especially given the financial difficulties that we now face, but it is important to recognise that, as a result of Clause 18, contracting authorities will be working to a new definition, which nobody has mentioned, of "most advantageous tender" rather than "most economically advantageous tender"—that is, MAT not MEAT—so the days of focusing on price alone, not quality or wider matters such as generating UK employment opportunities, are over. Specific policies could also be put into bespoke tender documents, as my noble friend explained.

Secondly, my experience of many Bills is that it is unwise to attempt to define everything in detail at a particular point in time. As the years pass, relative priorities change. Who would have thought two years ago that inflation, the price of energy and the consequences of war would feature so highly on the national agenda? There will no doubt be other surprises—as, indeed, has been the scale of climate change; 20 or 30 years ago, most of us did not realise what would happen.

Thirdly, productivity growth is worryingly low in this country. It is essential that this Bill and the £300 billion of public procurement each year provides a boost and that small businesses are able to secure a share of that, as my noble friend Lord Lindsay's comments implied. Innovation and competition have an important part to play here—I know that my noble friend Lord Lansley feels that strongly; they are two very important objectives. Procurement should be an enabler of innovation rather than increasing barriers to entry for competition, as my noble friend Lord Maude said.

Against this background, I come to Amendment 33, moved by the noble Baroness, Lady Hayman. This seeks to restate the six principles consulted on in the Green Paper. In addition to the 619 responses we received, we have carried out extensive consultation with interested groups, as the noble Baroness will know. As a result, our principles were refined and then translated into the objectives and specific obligations that now exist in the Bill. The language of a Green Paper is not the language of legislation, and we have reflected the principles in a way designed to help contracting authorities understand how they will implement them. That goes for value for money, public good, transparency and integrity.

The public consultation indicated that "fair treatment" was too subjective for contracting authorities to determine by objective standards, so we introduced the concept of "treating suppliers the same" in Clause 11(2); and "non-discrimination" has been converted from an objective to a hard-edged obligation in Clauses 83 to 85. We believe that the combination of the objectives and specific legal obligations in the Bill deals with procurement principles in a more effective and practical way.

Amendment 35 in the name of the noble Baroness, Lady Hayman, changes the recognised concept of "value for money" in the procurement objectives into a more amorphous one, which includes the concepts of "social value" and "equity". I have a number of concerns with what that amendment does. First, it moves contracting authorities away from the well-known concept of "value for money" and creates a new, and perhaps confusing, duty. Contracting authorities will not know this new duty and it will take time, resources and probably a number of costly legal challenges—a bugbear of procurement—to work that out. It is also an unfair burden to place on them in this new regime; we need to minimise legal doubt wherever we can.

It is also worth reminding noble Lords that the current national procurement policy statement already includes social value as one of its key themes. I am also concerned by the assumption that an obligation to have regard to some degree of social value must ensure some degree of equity in procurements. I do not think I am alone in being unclear on what "equity" is supposed to mean in this context, and doubtful that the simple existence of "social value" would deliver it.

Amendments 36 and 42, tabled by the noble Baronesses, Lady Worthington and Lady Hayman, and the noble Lord, Lord Coaker, seek to define "public benefit" to include various social and economic matters. The public benefit objective in Clause 11(1)(b) is deliberately undefined, so it is a flexible concept that gives contracting authorities a wide degree of discretion. These amendments seek to define "public benefit" in a much narrower way, limited only to economic, social and environmental benefits.

As I said at the beginning, we have lost sight of the need for our procurement spend also to be used to increase productivity, drive efficiency and stimulate growth. So let us keep the Bill as clear and simple as we can so that we do not swamp contractors and SMEs in paperwork. Let us instead ensure that we have an appropriate national procurement policy statement that can evolve as times change.

Amendments 38 and 83, tabled by the noble Lord, Lord Hunt, and the noble Baroness, Lady Brinton, but spoken to by the noble Lord, Lord Fox, require contracting authorities to have regard, when carrying out a procurement, to the accessibility of what is being procured for disabled people. I reassure noble Lords that we share the same intent. However, amendments to the Bill are not required: there is no need to change the Bill because, although disability accessibility is of

great importance, it is already catered for in the public sector equality duty in the Equality Act 2010. It is appropriate that these matters are considered at the point that contracting authorities draw up technical specifications, and they must apply the requirements of existing law. My officials, however, would certainly welcome further engagement with bodies representing disabled people as the technical specifications and guidance are developed.

**Lord Fox (LD):** The noble Baroness is right that the public sector equality duty is in the Equality Act, but the current system, which we will lose when the Bill comes into force, incorporates both the PSED and provisions under secondary legislation, such as the Public Contracts Regulations 2015. Therefore, when those regulations were laid, there was a tacit acceptance that the PSED alone was insufficient. If the Minister does not accept the amendments, will she bring forward other provisions in another way to backfill what is clearly being lost as we move from one set of rules to the other?

**Baroness Neville-Rolfe (Con):** My attitude to this is clear, and I have offered to engage on the subsidiary detail of the transformation that we are planning with the Bill.

I turn to the important matter of the national procurement policy statement, which sets out strategic priorities for procurement. Amendment 43—I hope noble Lords will forgive me if I do not mention their names in relation to every amendment they have tabled—would require the Government to publish a national procurement policy statement, rather than just allowing them to do so. This is the so-called move from "may" to "must". Amendment 44 then requires a statement to be published within 12 months of the relevant section coming into force.

I think the clause is right as it is. Think of how much more important issues such as supply chain resilience have become since the outbreak of Covid and the conflict in Ukraine. The current approach enables the Government to react nimbly to changes in priority, which my noble friend Lady Noakes thought was important, and they can issue a new statement as appropriate. However, importantly, I can assure noble Lords that this Government will publish such a statement when the Bill takes effect; indeed, they have already done so in draft. The Bill will put the new statement on a statutory footing. Importantly, the clause provides that, once the statement is published, contracting authorities must have regard to it when carrying out their procurement activity. The amendment as drafted requires a Minister to publish a statement. However, a Minister would be unable to fulfil this requirement were Parliament to vote against it, perversely meaning that the amendment would potentially prevent a Minister discharging the statutory duty. I would therefore prefer to avoid the formula proposed in Amendment 43.

Amendment 46 proposes that, prior to publishing a statement, the Minister must give due regard to a number of specified principles, most of which represent elements core to the procurement regime. This is evident from the drafting of the Bill overall: for example, value for money, integrity and maximising public benefit are set out clearly, and transparency is a specific requirement running throughout the Bill. There is a lot in common here with what I said at the beginning so I will not repeat that.

Amendment 47, tabled by my noble friend Lord Lansley, the noble Baroness, Lady Worthington, and the noble Earl, Lord Devon, would require the inclusion of specific priorities in the national procurement policy statement relating to the achievement of targets and requirements set under the Climate Change Act and other legislation, as well as promoting innovation and minimising the incidence of fraud. As discussed in Committee, the range of topics suggested by noble Lords during the process demonstrates that stakeholders have different priorities for procurement. These matters are already well covered in our statute book. It is important that policy priorities are addressed in a targeted way and that our regime does not contribute to a deterioration in productivity. That said, noble Lords will be reassured to know that many of these themes—net zero, social value and innovation—feature in the current non-statutory statement that we have already published.

*6.45 pm*

Noble Lords have also focused on the scope for increasing innovation and minimising fraud. I hope that, by taking a new approach to small business, we can create a procurement regime that will unleash innovation in the supply chain and build up innovation in this country. On fraud, I agree that recent instances have caused concern, which is why we have a goal to embed transparency throughout the procurement life cycle. I believe this will help to tackle fraud and it has been widely seen as a positive move. However, it would be wrong to tie ourselves down with the NPPS for all the reasons I have stated.

Amendment 45 proposes a public consultation on a draft of the NPPS. I agree that this is in many ways a good idea. We would like to explore what the statement should contain with a wider range of stakeholders across the public sector and elsewhere to ensure that it is as effective as possible. But I worry that consulting on a draft may come too late in the process. It may be best to carry out a consultation on topics to inform the drafting of the statement.

In a similar vein, Amendment 48 would require the publication of a draft statement and moving to an affirmative procedure. I assure the House that the Government are committed to ensuring that any published procurement policy statement is published with the scrutiny of Parliament. The Bill provides for the appropriate process in Clause 12(3) to (6), and noble Lords will be able to pray against the statement or request debates on the NPPS or the issues in it in the usual way. I do not see a strong case to change this procedure, and this was not raised by the DPRRC in its scrutiny of the Bill.

The slightly different Amendments 58 and 82, tabled by my noble friend Lord Lindsay, would stipulate that, where a contracting authority requires a conformity assessment or a certification from a conformity assessment body, this must be from a body accredited by a national accreditation body such as the United Kingdom Accreditation Service—UKAS. I thank my noble friend

[Baroness Neville-Rolfe]
Lord Lindsay for the work he has done as chair of UKAS and the motivations behind these amendments. However, certification can be costly for suppliers. At the heart of our Bill is a desire for contracting authorities to act commercially, innovate and support SMEs. We do not think we need legislation to dictate to contracting authorities what conformity assessments or certification standards should be acceptable. It is often important for the procurement that a conformity assessment is done by a certification body such as UKAS. Contracting authorities are able to set this as a condition of participation under Clause 21, so Amendment 58 is not required, and the same logic applies to Amendment 82.

Having said that, I understand that UKAS has helpfully engaged with my officials over concern that the existing text in Clause 53(5) risks suppliers removed from the competition for failure to meet a requisite standard being able to argue, even in the courts, that a lesser standard is an international equivalent and therefore challenge their removal. We are looking into this point and will revert to the matter if the need arises.

Amendment 96, in the names of the noble Baroness, Lady Hayman, and the noble Lord, Lord Coaker, would require contracting authorities to undertake a public interest test when considering whether to outsource or continue to outsource a public sector service. I do not think that this was raised, but I am happy to write to the noble Lords who tabled the amendment to explain why we feel that the procedures that we are bringing in and our transformational plans should provide the necessary reassurance.

This has been a long debate. I believe that I have made a strong case for keeping the framework of the Bill as it is, but obviously it will also be important that the NPPS contains the right policy provisions. I respectfully request that these various amendments be withdrawn following the reassurances I have been able to give.

**Baroness Hayman of Ullock (Lab):** My Lords, I must say that I am pretty disappointed with the Minister's response to my amendments, particularly to those on the NPPS. I give notice that I intend to test the opinion of the House on Amendment 46, when we reach it. I also let the noble Lord, Lord Lansley, know that, if he chooses to test the opinion of the House on his Amendment 47, we will support him. In the meantime, I beg leave to withdraw Amendment 33.

*Amendment 33 withdrawn.*

### *Clause 11: Procurement objectives*

*Amendment 34*

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

**34:** Clause 11, page 8, line 32, after first "a" insert "covered"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**Baroness Neville-Rolfe (Con):** My Lords, earlier today, we discussed government Amendment 34 on covered procurement, and, as promised, I have reflected on the contributions made by noble Lords. They will have noted that I left the Bill to my noble friend Lady Bloomfield for a while for this very purpose. I have looked at the implications of not proceeding with this amendment with my experts, and I still intend to move it. It is the Government's view that, if it is not agreed, the objectives will still have to be considered for all procurements, including exempted procurements under Schedule 2, which would create the perverse situation I mentioned of needing to consider transparency in those exempted security contracts or—to give another example—contracts with law firms, which would include legally privileged information, and that would not be appropriate. It will also extend to small, low-value contracts, including those let by small authorities such as parish councils.

For these reasons, and those I set out earlier, I move Amendment 34. Should your Lordships disagree, the House can make its view known.

**Lord Lansley (Con):** If that is the argument, why will the national procurement policy statement be applied to all procurements and not just covered procurements?

**Baroness Neville-Rolfe (Con):** As we have discussed, the national procurement policy statement is wide-ranging. In the Bill, we have tried to set up a framework and lots of rules for contracting authorities to try to ensure that they are adopting procedures that will improve and simplify procurement, which, as we all agree in this House, is not in the state it needs to be in. We believe that not moving Amendment 34—that is, not restricting procurement in certain respects—will lead to a great deal more difficulty for contracting authorities, particularly in these exempt areas. We have looked at the exemptions carefully and, contrary to what I think my noble friend thinks, individual procurements would have to be considered in a much more detailed way as a result of the perverse effect without this amendment.

As I said, should your Lordships disagree, the House can make its view known, should it wish. I beg to move Amendment 34.

*Amendment 34 agreed.*

*Amendments 35 and 36 not moved.*

*Amendment 37*

*Moved by* ***Baroness McIntosh of Pickering***

**37:** Clause 11, page 8, line 38, at end insert—

"(e) in relation to the procurement of food and drink, achieving a target of procuring 50% of products and ingredients locally."

**Baroness McIntosh of Pickering (Con):** My Lords, it gives me pleasure to speak to Amendments 37 and 53 in this group. Before I address them, I associate myself with government Amendment 57, on the needs of SMEs. I am grateful to my noble friend the Minister for meeting me last week to discuss these issues. I am also grateful that she listened in Committee; that is why we see government Amendment 57 in this group.

Before I address Amendments 37 and 53, which raise farming issues, I pay tribute to the late Lord Plumb of Coleshill, whose memorial service was held today.

He was a great British patriot and a lifelong European who lived all his life to promote farming at every level and in every position he held. He will be much missed.

Amendment 37 seeks to address an issue that a number of us tried to raise. I recall an amendment I tabled when the Trade Act was going through Parliament, both in Committee and on Report, in which I tried to write into the Bill that, now we had left the European Union, we were told that there would be a great Brexit dividend allowing us to open up public procurement—particularly at local authority level for our schools, hospitals, prisons and defence establishment—and allowing much more locally produced food to be taken at that level. So a number of us, myself in particular, were extremely disappointed to learn that, although we were leaving the European Union and the threshold of €136,000—up until which, I presume, locally produced food could be sourced for local authorities and local establishments—we were nevertheless still bound by the global procurement agreement, which, curiously, comes in at about the same level, $135,000. So in fact, there is no flexibility at all, and a number of us feel disappointed and that we were perhaps misled.

Amendment 37 seeks to add to Clause 11 the procurement objective of,

"in relation to the procurement of food and drink, achieving a target of procuring 50% of products and ingredients locally."

Furthermore, Amendment 53 follows directly from the conversation I had with my noble friend last week. In it, I try to set down what locally sourced food would be:

"(1) Any public contracting authority catering services must take responsible steps to ensure that at least 50 per cent of food and drink is procured locally.

(2) For the purposes of this Part, "locally" refers to products that have been grown, raised or made within 30 miles of the point of provision, or in the same county."

Noble Lords who followed the leadership contest closely may remember that we found a great advocate in none other than my right honourable friend the Prime Minister, Rishi Sunak, who committed to these two provisions and expressed the distinct desire that they be enshrined in law. I am very grateful to him that there is an opportunity in the Bill to have this written into legislation. I quote from the letter he wrote at the time, as a leadership candidate, to the NFU:

"As you know, I represent a large number of farmers in my own constituency. I know that times are tough at the moment; the rise in global gas prices has led to a dramatic increase in input costs including manufactured fertiliser, livestock feed, fuel and energy. I want to help; I hope that by bringing forward 50% of the BPS payment we have given farmers some confidence, but I am very willing to listen if there are other measures that we should be taking."

He went on to say:

"I will also introduce a new target for public sector organisations to buy 50% of their food locally, to back British farmers and improve sustainability."

In my right honourable friend's constituency is probably the largest garrison in the country, at Catterick barracks. I had the good fortune to represent the neighbouring seat—originally, the Vale of York and then Thirsk and Malton. I can testify to the number of defence establishments there and the large number of rural schools in that constituency. There was a large prison in York, and other public procurement establishments that would benefit from this provision.

*7 pm*

I imagine that, if we do not meet the €136,000 threshold, there must be some flexibility in smaller contracts so that local authorities and other providers that are sourcing their procurement will look to source it locally. Not only will that enable us to be more resilient and improve food security and self-sufficiency, but it will help famers, growers and producers of our food in the UK at what is a very difficult time for them.

I hope that my noble friend will look favourably on these two amendments in particular, Amendments 37 and 53. I beg to move.

**Baroness Neville-Rolfe (Con):** My Lords, it may aid the House if I set out the government amendments in this group. I thank my noble friend Lady McIntosh of Pickering, and will respond to her when I have heard other contributions. I share her tribute to Lord Plumb, whom I dealt with in all the stages of my career—at Defra, in Europe and in this House—and I am only sorry that government business prevented me from celebrating with others his wonderful life and success today.

There are a number of amendments in my name relating to SMEs. They are important government amendments to help SMEs to win a bigger share of the £300 billion procurement pie. I know that this issue is close to the hearts of noble Lords from across the House. Throughout Committee, noble Lords questioned whether the Bill had gone far enough in removing barriers to SMEs accessing public procurement. It has certainly been a top priority for me since I was lucky enough to become a Cabinet Office Minister. It is right that we support this vital sector of our economy. At the start of 2022, there were 5.5 million small businesses, accounting for 99% of all businesses in the UK, with over 16 million employees and a turnover of over £2 trillion. We must do more to champion these entrepreneurs.

The new measures that I am announcing today complement the existing provisions in the Bill, which make it easier for businesses to enter public sector supply chains and benefit SMEs. They include greater visibility of upcoming public sector opportunities and preliminary market engagement; developing a supplier registration system, meaning that suppliers need to submit their credentials only once; improvements to commercial tools, such as the introduction of dynamic markets and open frameworks; and, crucially, requiring that 30-day payment terms will apply throughout the public sector supply chain.

I am glad to be moving amendments in three areas to add to this momentum. First, we have introduced a new duty for contracting authorities to have regard to the participation of SMEs. It sends a very clear signal that the Government are open for business to this sector. For the first time, SMEs will be on the face of the Bill, which means that authorities have a responsibility to consider them and the barriers they face. To put this in practical terms, contracting authorities will, for example, need to specifically consider through an SME lens whether the requirements they are asking for are proportionate to the contract. Are the bidding times realistic when some businesses do not have a dedicated

[Baroness Neville-Rolfe]
bidding team? Have they provided clear pipelines of opportunity? Is there a diverse representation of businesses in pre-market engagement?

Secondly, we have further stripped out unnecessary barriers which SMEs face. I thank my noble friend Lady Noakes and the noble Lord, Lord Scriven, for highlighting ideas in Committee. I particularly appreciated the point that he raised, that we need to

"release some of the normal procedures and bureaucracy".—[*Official Report*, 11/7/22; col. GC 385.]

As a result, we have banned authorities requiring the provision of audited accounts to test the financial standing of bidders to bid in procurements, to compete for contracts under frameworks and to join dynamic markets, except in so far as that is required under the Companies Act. This ensures that start-ups and SMEs which are not legally required to file audited accounts due to their size or age will not be shut out of procurements, provided that they can demonstrate their financial capacity by another reliable means.

Thirdly, we are going further to reduce unnecessary costs on businesses by preventing contracting authorities from requiring insurance relating to the performance of the contract, to be in place prior to the award. We know from feedback that this acts as an obstacle to participation.

Following Committee, I have reflected on the points raised by noble Lords during the debates and would like to thank many of them for follow-up discussions on this topic. I have also met trade associations such as the Federation of Small Businesses and the Business Services Association at a recent round table. We hope that the amendments will give SMEs a better chance of winning public sector contracts and allow the public sector wider access to the first-class skills, innovation and ideas that many agile, creative smaller firms offer. In turn, this will allow us to improve and enable the transformation of procurement services. These are all captured in Amendments 40, 122, 57, 70 and 74. Amendments 75, 76, 134, 140, 179, 183, 186, 188, 192 and 203 are consequential amendments, including splitting Clause 43 into two to avoid it becoming unwieldy.

I have also tabled Amendment 55, which requires a contracting authority to provide sufficient information in the tender notice or associated documents to enable suppliers to prepare tenders. It facilitates a clear trigger for the start of the tendering period identified in Clause 51. As the time available for bid preparation is so important, we consider that small suppliers will welcome this practical clarification. Amendments 40 and 122 in my name create new obligations on contracting authorities to consider the removal or reduction of barriers in procurement to small and medium-sized enterprises. We need to make sure that small and medium-sized companies do better in the procurement world.

**Lord Wallace of Saltaire (LD):** I rise to speak to Amendments 41 and 123, which are amendments to government amendments. We welcome Amendment 40 but, as the noble Lords, Lord Maude and Lord Lansley, have said, we need in the Bill to make sure that, as well as SMEs, social enterprises, mutuals and non-profits are eased and get around some of the barriers otherwise placed in their way. I hope that the Minister will be able to give a sufficiently strong assurance that this is what is intended for it not to be necessary to divide the House on this issue, and perhaps even to come back at Third Reading with an adjustment to the current Amendment 40.

In the Green Paper that started this process, the importance of social enterprise, mutuals and non-profits was clearly marked; it has now disappeared altogether. Many of us are conscious that there are those on the libertarian right who think that every form of economic activity should be in the pursuit of profit and that the idea that you can do anything without wanting to make a profit is absurd and against free market principles. The libertarian right in the United States, which clings to such theological doctrines, has begun to infiltrate parts of the Conservative Party and, I am told, was a visible presence at the Conservative Party conference—but I am confident that real Conservatives do not share that absurd theological view. They recognise that there are many areas, particularly in personal services and care, where the different approach that comes from mutuals and non-profits makes a considerable amount of difference. There have been a number of scandals in care homes run for profit in recent years. I speak with passion on this subject because I have had a relative in a charitable care home who was wonderfully well treated in the last few years of her life.

I hope that the Minister will be prepared to recognise that the importance of social enterprise and non-profits needs to be here, and that she will give absolute assurance that this is what the Government intend, and that they do not intend to leave them with the barriers that the Government intend to remove for SMEs.

**Lord Aberdare (CB):** My Lords, my principal interest in the Bill has been whether it would achieve its stated objective of giving small and medium-sized enterprises a better chance to compete for and win public contracts, including SMEs providing specialist services in the construction sector, such as those represented by the Actuate UK engineering services alliance. So I very much support the government amendments in this group that seek to reinforce that objective, notably Amendment 40, explicitly requiring contracting authorities to take account of barriers faced by small firms and Amendments 57, 73 and 74, preventing unreasonable requirements for participation, such as providing audited annual accounts even for firms that do not otherwise need to produce them, or having insurance already in place before the award of a contract.

Other issues of importance to SMEs covered in Committee related to improving payment practices for public contracts and resolving payment disputes. However, since these are not specifically addressed in the amendments in this group, it might be more appropriate to raise them when we discuss the procurement review unit on Wednesday. However, I add my support to Amendment 41 in the names of the noble Lords, Lord Wallace and Lord Fox, adding social enterprises and not-for-profit companies to the beneficiaries of Amendment 40.

On that subject, I also thank the Minister for her recent letter confirming the Government's commitment to resolving a concern I raised in Committee about

whether the drafting of Clause 31, concerning reserved contracts to supported employment providers, actually delivers the Government's intention to implement an approach fully equivalent to that currently in place. I know that community enterprises that use such reserved contracts are much reassured by the commitment given by the Minister and I look forward to the letter she has promised to confirm that the issue has been resolved, and how.

**Lord Lansley (Con):** My Lords, I thank my noble friend for taking up the issue of SMEs, following not least the points she herself made in Committee. We thoroughly agreed with her and I think there was much consensus. I have two amendments in this group, which are by way of probing the issues a little. The first is Amendment 54. The two government amendments on SMEs relate, interestingly, to covered procurements in the first instance and then to below-threshold procurements separately. To that extent, putting it in the Bill and applying it to broader procurement seems to work in this case.

Amendment 54 would specifically include a reference to the capability of small and medium-sized enterprises in relation to preliminary market engagement, which may well be a place where SMEs in particular need to be supported, because they often do not necessarily have all the credentials and capabilities to hand. The second is an amendment to government Amendment 188, which defines "small and medium-sized enterprises" in thoroughly familiar terms to all of us who deal with these things. I tabled my amendment because the origin of the definition is essentially in European Commission regulations.

The reason that the Commission, in addition to the head-count calculation, adds turnover or revenue requirements is that SMEs have to be assessed by reference to that for the purposes of state aid and subsidy control. In this instance, subsidy control or state aid is not relevant, so, when it comes down to capability, the only issue that really matters is head count. Indeed, the Commission itself, in the regulation it put forward, makes it very clear that head count is the "main criterion". I think it would be better to rest only on that, rather than to include the necessity for contracting authorities to look at turnover or revenue.

*7.15 pm*

**Lord Maude of Horsham (Con):** My Lords, I support government Amendment 40. This is very worthwhile. I am also very sympathetic to Amendment 41, tabled by the noble Lord, Lord Wallace of Saltaire. The reality is that not-for-profits, social enterprises and mutuals, when they come to retender or bid for different contracts, because a number of mutuals we supported have grown, both by expanding into different areas for the same group of clients but also by expanding into different geographical areas for different public authorities—and this is very worthwhile—but they are subject to very much the same kinds of constraints that the conventional procurement we inherited in 2010 imposed on SMEs.

I take slight issue with the noble Lord, Lord Wallace. I do not actually believe that there is a conflict between this approach—working to remove barriers to SMEs, social enterprises and so on participating in, bidding for and winning government and public sector contracts—and achieving better value and supporting the aims of the free market. When we went down the path, in the coalition Government, of setting an aspiration of 25% by value, at that stage, of public procurement going to SMEs, the immediate response from the conventional wisdom was, "Oh, that means you're going to abandon best value; you're going to have to effectively subsidise SMEs". Precisely the reverse was the case. Opening up procurement got rid of some ridiculous requirements that were not necessary at all but were imposed by safety-first procurers: for example, that bidders should have to show three years' audited accounts and that there should be turnover thresholds, performance bonds and requirements to show that they had in place the insurance to cover the contract value before they even bid.

The combination of all these things meant that many SMEs and start-ups and some of the most innovative, competitive and dynamic potential suppliers were simply not able to get into the marketplace at all. So there is no conflict between value for money and opening up to smaller businesses: the two objectives go absolutely hand in hand. So I strongly support the amendment the Minister has brought forward, but I urge her to look sympathetically at Amendment 41, because social enterprises, not-for-profits, mutuals and so on suffer from exactly the same disadvantages and obstacles as there were in old-fashioned procurement and it is important, I believe, that they should be included in the same bracket.

**Baroness Noakes (Con):** My Lords, I have Amendment 164 in this group, to which my noble friend Lord Moylan has added his name. Before turning to that, I echo what other noble Lords have said in thanking my noble friend the Minister for her amendments on SMEs. I am very glad that she has taken into the Cabinet Office the evident passion she demonstrated for the cause of SMEs when she took part in Committee on the Bill. Of course, there is no one silver bullet that is going to solve all the problems of SMEs engaging in public procurement, but I believe that most of the amendments before us here will contribute to an important advance in that area.

I have a concern about Amendment 134, which is one of my noble friend's amendments. It keeps the new Clause 11 duty out of the enforcement clause, Clause 92. That is a pity, because it means that SMEs, which think that that duty is not being complied with, will have to fall back on judicial review—and, as we know, judicial review is not a practical remedy available to SMEs. I regret that. I similarly regret Amendment 140 in relation to procurement oversight recommendations, and I hope that the Government will have an opportunity to think again about both those areas when the Bill moves to the other place.

My Amendment 164 is aimed at the same target as Amendment 163 in the name of the noble Baroness, Lady Bennett of Manor Castle, who was not in her place when the debate started earlier this evening. I was expecting the noble Baroness, Lady Bennett of Manor Castle, to explain the amendment, and then I was going to come in behind it. They are both sourced

[Baroness Noakes]
from an amendment suggested by the Local Government Association. It concerns Section 17 of the Local Government Act 1988 and the exclusion of non-commercial interests that is required by that section. Clause 107 allows regulations under this Bill to disapply that duty for below-threshold contracts. The issue raised by the Local Government Association was that that should not be just permissive but should be an absolute requirement.

The noble Baroness, Lady Bennett of Manor Castle, tabled an amendment in the form originally suggested by the Local Government Association. I have been around a little longer than the noble Baroness, Lady Bennett of Manor Castle, and have debated may/must amendments in relation to whether regulations should be obligatory or permissive. It is a good technique for discussing issues in Committee, but when we get to the sharp end of the business of legislation, the Government always resist a regulation-making power being obligatory—and for good reason, because it ties the hands of today's Government and any future Governments. I accept that, and I am sure that the Opposition Benches who may want one day to be making legislation of their own would accept that as well. So I retabled the concept of the amendment by inserting below-threshold contracts into the list of things that could be done with this power, in the hope not that my noble friend would accept the amendment but that she would give a clear commitment at the Dispatch Box today to use the regulation-making power at the appropriate time to ensure that below-threshold contracts are excluded from the ambit of Section 17, as I mentioned. I look forward to hearing what the Minister has to say.

**Lord Hendy (Lab):** My Lords, I rise to speak to Amendment 162A, which rather neatly follows the noble Baroness, Lady Noakes, because it deals with Section 17 of the Local Government Act 1988. Its intention is to remove the prohibition in that provision which prevents local authorities taking into account the terms and conditions of the staff of the supplier, or their legal status. The thought behind this is that public authorities should take into account the terms and conditions and the legal status of those who carry out the work under these public contracts. The restriction applies to local government only and not to other public authorities.

**Lord Fox (LD):** My Lords, I rise to speak on Amendment 73 as my noble friend Lord Clement-Jones is detained in Grand Committee. This amendment requires direct-award contracts included in a framework agreement to be retendered 18 months after the award. This amendment takes a different route from the one we discussed in Committee, but the aim is the same: to prevent direct contracts being used within framework agreements to restrict competition from British SMEs and reinforce the dominance of certain key foreign players in the market. The Minister will remember that we used cloud computing as a major example of where the system has gone off the rails. The SME share of the market has fallen from more than 50% to just 20% in the past five years. In this respect, there is little sign that the Procurement Bill is in reality designed to provide new opportunities to prevent this slide towards—shall we call it "oligopoly", to coin a phrase that was used by the noble Lord, Lord Maude, in a different context?

Rather than preventing such awards, as we attempted last time, we have instead put down an amendment to time-limit the awards. This would introduce a duty to retender, after 18 months, direct contracts awarded as part of a framework agreement under Clauses 38 and 41. This would provide the opportunity to redress the balance and help support UK SMEs. In Grand Committee, the Minister said that my noble friend Lord Clement-Jones had made a lot of points that she was not aware of and promised to study in relation to the important areas of cloud computing and UK businesses. She also emphasised some of the advantages of framework agreements. We are not arguing with that, but that is not the point. This is about detriment to SMEs through the use of direct contracts which are hidden within framework agreements. The problem can be cured. The Minister also said in relation to these agreements that it makes sense for them to be time-limited. I hope she has studied the words of my noble friend and has something to offer that limits the duration of direct contracts that are made within framework agreements.

**Lord Coaker (Lab):** My Lords, I have just a few brief remarks on this group. Before I come on to the main point that I want to make, I shall say that I think Amendment 37, tabled by the noble Baroness, Lady McIntosh, about local produce and the local procurement of foodstuffs is something that is growing in importance. All of us know in our own communities that people individually are doing that, as well as local businesses. I think that before long the 50% target she put in her amendment will grow. I think it is an important amendment. Given the other things being talked about, it should not be lost in the general debate.

I thank the Minister for government Amendment 40, which goes to the heart of the discussion in this group, which is about encouraging small and medium-sized enterprises in the procurement process to do better than they are present, and the responsibility of contracting authorities to achieve that. The real question for the Minister—and, frankly, if there are changes of Minister in future—is how we will ensure that that happens, because successive Governments have tried to encourage small and medium-sized enterprises, and it has not been as successful as we wanted. The question is about how we make this procurement system work in a way that benefits small and medium-sized businesses in the way that we would all want.

I am very supportive of Amendment 41, tabled by the noble Lord, Lord Wallace, which talks about the barriers faced by social enterprises and not-for-profit companies in competing for procurement. I think that is something that will become increasingly important.

I know my noble friend Lord Hendy will speak about his later amendment in more depth. His amendment in this group, Amendment 162A, allows procurement to take into account the terms and conditions of staff and the legal status of subcontractors. I think it is an extremely important area, and I thank my noble friend

for raising it because all of us would wish to see that people are paid properly for the work they do and that nobody is undercut in the winning of various contracts.

The noble Baroness, Lady Noakes, pointed to Amendment 163 in the name of the noble Baroness, Lady Bennett, and her supportive Amendment 164, which she ably put forward. She made some important points which we can look at in due course and to which I hope the Minister will respond.

However, I go back to where I started: the key amendment in this group is government Amendment 40. We are grateful that it has been brought forward and hope that it will encourage greater success for small and medium-sized enterprises in the procurement business in this country. The key for us is to make sure that this time it works and that we do not have another government amendment in two years' time trying to achieve the same.

**Baroness Neville-Rolfe (Con):** My Lords, the noble Lord, Lord Coaker, is right that the challenge is to make the shift to SMEs a reality. I will take that away as my homework. I thank all noble Lords who have spoken, especially the noble Lord, Lord Aberdare, who progressed matters with me and saved me from a further group of amendments.

I was also very interested in the real-life experience of my noble friend Lord Maude as to the difficulties of getting potential small suppliers to apply for government contracts, because in my experience SMEs can represent very good value for money. They do not have the same costs and scale of central services that some of the bigger operators have, and that can feed through into great prices and great service.

*7.30 pm*

I turn first to Amendments 37 and 53, tabled by my noble friend Lady McIntosh. These both seek to ensure that, when food is procured, 50% of the purchases must be from the UK. The second amendment goes further and stipulates that the purchases must be locally from within the UK, with "locally" meaning within 30 miles of the contracting authority. Under the WTO's government procurement agreement, and a number of international free trade agreements, the UK has legal obligations not to discriminate against suppliers from a country that is party to one of those agreements, for procurements over certain thresholds. So, requiring quotas for buying local UK food and drink produce at a national level would be a breach of those obligations.

There is, however, the potential for contracting authorities to develop local purchasing strategies. First, authorities may take advantage of the policy of December 2020, that below-threshold procurements may be reserved to UK suppliers only, or to UK SMEs, or VCSEs, in a particular region or county of the UK. While the Local Government Act 1988, Section 17, currently precludes local authorities from awarding public supply or works contracts by supplier location, we intend to use Clause 107 of this Bill, once enacted, to make secondary legislation to disapply that legislation in respect of this policy, so that local authorities, as well as government departments, can take advantage of this flexibility under the Bill for lower-value contracts; I hope this will be welcome.

Contracting authorities are also free to buy the food and drink that best meets their needs, meaning that they can specify foods that can be grown in the UK, rather than opting for produce that UK growers will be unable to produce. I think that we were all interested and amused to be taken back to the summer, and to hear of the letter written by the then Mr Rishi Sunak to the National Farmers Union. In line with our commitment in the food strategy published earlier this year, Defra has been carrying out a consultation on potential changes to public sector food and catering policy. That is now closed, and Defra will carefully consider the responses before setting out its next steps; I am not in a position to pre-empt the outcome of that process, but we continue to drive progress.

We remain fully committed to supporting our British food producers and farmers on food and, as the noble Lord, Lord Coaker, said, local sourcing is increasingly important—although I would say as a farmer's daughter that food has to be grown where it makes sense from a weather point of view, so it is important to be able to move food around. I do not think that we can yet grow olives in the UK, but it will come with climate change.

Amendments 41 and 123, in the names of the noble Lords, Lord Fox and Lord Wallace, who introduced it, would extend the new obligations with regard to SMEs to cover social enterprises and not-for-profit companies, particularly in areas such as social care. I am glad to say that the duty I have included in the Bill will apply in respect of any small and medium-sized enterprises that meet the relevant definition, including any social enterprises, not-for-profit organisations and mutuals—to pick up a point made by my noble friend Lord Maude. I am glad to say that, in terms of numbers, the vast majority of organisations will meet the definition—but not, of course, the very biggest, and I think that it is right that they should be subject to normal procurement rules.

Amendment 54, from my noble friend Lord Lansley, would emphasise that contracting authorities should use preliminary market engagement to build capacity among SMEs. I fully agree with my noble friend that preliminary engagement should be used to help build SME capacity. However, the duty to have regard to SMEs contained in the procurement objectives will cover this, and much more. For example, not only do I want to see capacity building for SMEs in preliminary market engagement; I want public sector teams to learn via this engagement about new solutions and ways of working from SMEs, which are often, as we have heard, at the cutting edge of innovation. Further existing provisions in the Bill, such as pipeline notices, and separating contracts into lots, also help with SME capacity-building—and as such this amendment is not required.

As regards Amendment 73, the Bill allows for contracts to be awarded without competition in limited circumstances, and these were outlined in Clauses 39 and 41, with detail in Schedule 5. This is the route to making a direct award under the Bill; it is different from a so-called "direct award" under a framework.

[Baroness Neville-Rolfe]
An award without a further competitive process may or may not be provided for under the terms of the framework and, as I explained in my letter to the noble Lord, the framework itself is openly competed for, and the framework terms may provide for further competition between suppliers when a contract and/or a permit is awarded without further competition.

Clause 43 is clear that award without further competition between suppliers is permissible only where this is set out in that original framework, and that an objective mechanism for supplier selection is provided. While I appreciate that the noble Lord is concerned with some examples of problematic operation and consequences in respect of certain frameworks, such issues will not be addressed via this amendment. Additionally, the amendment would have the effect of limiting contracts to 18 months. This is unlikely to meet operational requirements, or deliver value for money in most cases, given the short-term duration. Suppliers are always able to raise specific issues with frameworks via the Government's existing Public Procurement Review Service, which can investigate individual cases such as this one, and in future by the PRU. I believe that the issue of placing contracts without further competition under frameworks is best addressed through our training and guidance, which we will do as part of preparing procurance for the new regime.

Amendment 163 from the noble Baroness, Lady Bennett, would commit English and Welsh Ministers, within six months of the Bill becoming an Act, to make regulations to remove all the obligations on local authorities set out in Section 17 of the Local Government Act in respect of below-threshold contracts. We do not believe that this amendment is desirable. It goes much wider than required, disapplying all of Section 17, not just those provisions which prevent local authorities reserving below-threshold contracts to suppliers, or SMEs, or VCSEs, in a UK region or county. However, detailed secondary legislation will be laid before the new regime comes into force, and disapplication of Section 17 in this regard can be considered as part of that process.

Amendment 164, proposed by my noble friends Lady Noakes and Lord Moylan, would ensure that regulations made under Clause 107 can exclude below-threshold contracts from the duty in Section 17, but I hope that they are reassured by the remarks that I have made in respect of the amendments in the names of my noble friend Lady McIntosh and the noble Baroness, Lady Bennett.

I was glad to hear from the noble Lord, Lord Hendy, and to see his Amendment 162A, which seeks to immediately disapply provisions within Section 17 that prevent local authorities, when carrying out certain procurement functions, considering the terms and conditions of a supplier's contracted employees, or subcontractor terms. As I have explained, the Government are confident that it is more appropriate to include a power for the disapplication of Section 17 on a case-by-case basis, in order to ensure alignment with current and future procurement policy; it is not therefore necessary to do this as a separate amendment. It is an important topic, and I want to reassure the noble Lord, Lord Hendy, that there are other mechanisms to ensure that UK companies, and any company bidding for public sector work, are abiding by legal requirements in respect of employment conditions.

Finally, Amendment 189, tabled by my noble friend Lord Lansley, seeks to redefine "small and medium-sized enterprises" by considering only the business's number of staff, not other factors such as turnover. UK government policy sometimes considers SMEs only in relation to staff numbers: for example, BEIS's publication of business statistics. In other circumstances, for example in the Companies Act, alternative criteria are used; it depends on the purpose. However, we have substantially retained the current definition used for procurement, which is well recognised and established. If we lose the turnover and balance-sheet total criteria, we potentially include well-resourced businesses with significant capital that have acquired, or taken over, government contracts in their portfolio through acquisition, while playing a role in procurement. These are not the types of business we are looking to focus on in the duty to have regard to SMEs. We have, however, included an additional power, my noble friend will be glad to hear, in Clause 114 to ensure that we retain flexibility to amend this definition—for example, if we wish to align with other definitions in future.

Finally, my noble friend Lady Noakes asked why we had exempted the new duty from being enforceable in civil proceedings. We want to ensure that this new duty in the Bill drives cultural change in procurement and improves access for SMEs, as I have already said. However, we do not believe that it is appropriate to make this new duty subject to the remedies regime in Part 9. Any failure to comply will be better suited to a procurement review unit investigation under Part 10, or indeed to a judicial review. SMEs want the opportunity to win public contracts. We believe that this duty will achieve that, but the purpose of the new duty is to stimulate the market for SMEs, not facilitate a new avenue for creative court claims.

I am sorry to end on that slightly negative note; I feel that this has been a very useful debate. I look forward to the House's support for the government amendments, and I respectfully suggest that noble Lords do not press their amendments.

**Baroness McIntosh of Pickering (Con):** I am extremely grateful, particularly to the noble Lord, Lord Coaker, for saying that the way forward is obviously to procure more food locally, and to my noble friend for pointing out that Section 17 of the Local Government Act will in fact be lifted. That is good news. It is pleasing to see that her work has formed a coalition of support for Amendment 40, and I congratulate her on that. I am not suggesting that olives should be grown in this country any time soon, but she will probably be aware that we are only 16% self-sufficient in fruit and vegetables in this country. It is wrong that we should be so dependent on foreign imports. It is a matter of personal regret to me that the scheme that was intended to bring Ukrainian women in to pick fruit and vegetables this year never appeared to come into force, so I hope we can look at that in future years. With those few remarks and the assurances she has given, I beg leave to withdraw Amendment 37.

*Amendment 37 withdrawn.*

*Amendment 38 not moved.*

*Amendment 39*

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

**39:** Clause 11, page 8, line 39, after first "a" insert "covered"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

*Amendment 39 agreed.*

*Amendment 40*

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

**40:** Clause 11, page 8, line 43, at end insert—

"(4) In carrying out a covered procurement, a contracting authority must—

(a) have regard to the fact that small and medium-sized enterprises may face particular barriers to participation, and

(b) consider whether such barriers can be removed or reduced."

Member's explanatory statement

This amendment would require a contracting authority, in carrying out a covered procurement, to have regard to the particular barriers to participation in public procurement that small and medium-sized enterprises may have, and whether they can be removed or reduced.

**Baroness Neville-Rolfe (Con):** I beg to move.

*Amendment 41 (to Amendment 40) not moved.*

*Amendment 40 agreed.*

*Amendment 42 not moved.*

***Clause 12: The national procurement policy statement***

*Amendments 43 to 45 not moved.*

*Amendment 46*

*Moved by* ***Baroness Hayman of Ullock***

**46:** Clause 12, page 9, line 8, at end insert—

"(aa) give due regard to the following principles—

(i) promoting the public good, by having regard to the delivery of strategic national priorities including economic, social, environmental and public safety priorities,

(ii) value for money, by having regard to the optimal whole-life blend of economy, efficiency and effectiveness that achieves the intended outcome of the business case,

(iii) transparency, by acting openly to underpin accountability for public money, anti-corruption and the effectiveness of procurements,

(iv) integrity, by providing good management, preventing misconduct, and exercising control in order to prevent fraud and corruption,

(v) fair treatment of suppliers, by ensuring that decision-making is impartial and without conflict of interest, and

(vi) non-discrimination, by ensuring that decision-making is not discriminatory,"

Member's explanatory statement

This amendment would require a Minister to consider a set of principles before publishing the national procurement policy statement.

**Baroness Hayman of Ullock (Lab):** I would like to test the opinion of the House on Amendment 46.

*7.44 pm*

*Division on Amendment 46*

*Contents 163; Not-Contents 162.*

*Amendment 46 agreed.*

**Division No. 2**

**CONTENTS**

Aberdare, L.
Adams of Craigielea, B.
Addington, L.
Adonis, L.
Alderdice, L.
Allan of Hallam, L.
Alton of Liverpool, L.
Anderson of Swansea, L.
Andrews, B.
Armstrong of Hill Top, B.
Austin of Dudley, L.
Bakewell of Hardington Mandeville, B.
Bassam of Brighton, L.
Beith, L.
Benjamin, B.
Bennett of Manor Castle, B.
Berkeley of Knighton, L.
Berkeley, L.
Blackstone, B.
Blower, B.
Blunkett, L.
Bowles of Berkhamsted, B.
Bradley, L.
Brinton, B.
Browne of Ladyton, L.
Bruce of Bennachie, L.
Burt of Solihull, B.
Campbell of Pittenweem, L.
Campbell-Savours, L.
Chakrabarti, B.
Chandos, V.
Chapman of Darlington, B.
Clancarty, E.
Clement-Jones, L.
Coaker, L.
Collins of Highbury, L.
Crawley, B.
Davies of Brixton, L.
Dholakia, L.
Donaghy, B.
Doocey, B.
Drake, B.
Dykes, L.
Falkner of Margravine, B.
Featherstone, B.
Foulkes of Cumnock, L.
Fox, L.
Gale, B.
Garden of Frognal, B.
Glasgow, E.
Goddard of Stockport, L.
Goudie, B.
Grocott, L.
Hain, L.
Hamwee, B.
Hannay of Chiswick, L.
Hanworth, V.
Harris of Haringey, L.
Hayman of Ullock, B.
Hayman, B.
Healy of Primrose Hill, B.
Hendy, L.
Henig, B.
Hollick, L.
Hope of Craighead, L.
Howarth of Newport, L.
Humphreys, B.
Hunt of Kings Heath, L.
Hussain, L.
Janke, B.
Jones of Whitchurch, B.
Kennedy of Cradley, B.
Kennedy of Southwark, L. [Teller]
Kennedy of The Shaws, B.
Khan of Burnley, L.
Kramer, B.
Layard, L.
Lennie, L.
Leong, L.
Liddell of Coatdyke, B.
Liddle, L.
Low of Dalston, L.
Ludford, B.
Mackenzie of Framwellgate, L.
Mann, L.
Marks of Henley-on-Thames, L.
Maxton, L.
McAvoy, L.
McIntosh of Hudnall, B.
McNicol of West Kilbride, L.
Meacher, B.
Merron, B.
Monks, L.
Morgan, L.
Morris of Yardley, B.
Murphy of Torfaen, L.
Newby, L.
Northover, B.
Nye, B.
O'Loan, B.

Osamor, B.
Paddick, L.
Palmer of Childs Hill, L.
Parminter, B.
Pinnock, B.
Pitkeathley, B.
Ponsonby of Shulbrede, L.
Primarolo, B.
Prosser, B.
Purvis of Tweed, L.
Randerson, B.
Razzall, L.
Rebuck, B.
Redesdale, L.
Rennard, L.
Ricketts, L.
Robertson of Port Ellen, L.
Sahota, L.
Scott of Needham Market, B.
Scriven, L.
Sentamu, L.
Sharkey, L.
Sheehan, B.
Sherlock, B.
Shipley, L.
Sikka, L.
Smith of Basildon, B.
Snape, L.
Stansgate, V.
Stevenson of Balmacara, L.
Stoneham of Droxford, L.
Storey, L.
Strasburger, L.
Stunell, L.
Taylor of Bolton, B.
Taylor of Stevenage, B.
Teverson, L.
Thomas of Winchester, B.
Thornhill, B.
Thornton, B.
Thurso, V.
Tomlinson, L.
Tope, L.
Touhig, L.
Tunnicliffe, L.
Turnberg, L.
Twycross, B.
Tyler of Enfield, B.
Wallace of Saltaire, L.
Wallace of Tankerness, L.
Walmsley, B.
Warwick of Undercliffe, B.
Watson of Invergowrie, L.
Wheeler, B. [Teller]
Whitaker, B.
Wigley, L.
Wilcox of Newport, B.
Wood of Anfield, L.
Woodley, L.
Worthington, B.
Wrigglesworth, L.
Young of Norwood Green, L.
Young of Old Scone, B.

**NOT CONTENTS**

Altrincham, L.
Anelay of St Johns, B.
Arbuthnot of Edrom, L.
Arran, E.
Ashcombe, L.
Ashton of Hyde, L.
Barran, B.
Bellamy, L.
Benyon, L.
Berridge, B.
Bethell, L.
Blackwood of North Oxford, B.
Bloomfield of Hinton Waldrist, B.
Borwick, L.
Bottomley of Nettlestone, B.
Bourne of Aberystwyth, L.
Bridgeman, V.
Browne of Belmont, L.
Browning, B.
Buscombe, B.
Caine, L.
Caithness, E.
Callanan, L.
Camrose, V.
Carrington of Fulham, L.
Colgrain, L.
Cormack, L.
Courtown, E. [Teller]
Craigavon, V.
Crathorne, L.
Cruddas, L.
Davies of Gower, L.
De Mauley, L.
Deighton, L.
Dobbs, L.
Duncan of Springbank, L.
Eaton, B.
Eccles of Moulton, B.
Eccles, V.
Effingham , E.
Evans of Bowes Park, B.
Evans of Rainow, L.
Fairfax of Cameron, L.
Fall, B.
Farmer, L.
Finn, B.
Fookes, B.
Forsyth of Drumlean, L.
Foster of Oxton, B.
Fraser of Craigmaddie, B.
Frost, L.
Garnier, L.
Geddes, L.
Godson, L.
Gold, L.
Goldie, B.
Goodlad, L.
Greenhalgh, L.
Greenway, L.
Hamilton of Epsom, L.
Harding of Winscombe, B.
Harlech, L.
Harrington of Watford, L.
Haselhurst, L.
Hayward, L.
Helic, B.
Henley, L.
Hill of Oareford, L.
Holmes of Richmond, L.
Horam, L.
Howard of Rising, L.
Hunt of Wirral, L.
Jenkin of Kennington, B.
Johnson of Lainston , L.
Jopling, L.
Kamall, L.
Keen of Elie, L.
Kinnoull, E.
Kirkhope of Harrogate, L.
Lancaster of Kimbolton, L.
Lansley, L.
Lawlor, B.
Lea of Lymm, B.
Leicester, E.
Leigh of Hurley, L.
Lexden, L.
Lilley, L.
Lindsay, E.
Lingfield, L.
Livingston of Parkhead, L.
Lucas, L.
Mancroft, L.
Manzoor, B.
Markham, L.
Maude of Horsham, L.
McColl of Dulwich, L.
McInnes of Kilwinning, L.
McIntosh of Pickering, B.
McLoughlin, L.
Meyer, B.
Minto, E.
Montrose, D.
Morris of Bolton, B.
Moylan, L.
Moynihan, L.
Murray of Blidworth, L.
Naseby, L.
Nash, L.
Neville-Jones, B.
Neville-Rolfe, B.
Newlove, B.
Noakes, B.
Norton of Louth, L.
O'Neill of Bexley, B.
Offord of Garvel, L.
Parkinson of Whitley Bay, L.
Penn, B.
Polak, L.
Popat, L.
Porter of Spalding, L.
Reay, L.
Redfern, B.
Ribeiro, L.
Robathan, L.
Roberts of Belgravia, L.
Roborough, L.
Rock, B.
Rogan, L.
Rowe-Beddoe, L.
Sanderson of Welton, B.
Sandhurst, L.
Sassoon, L.
Sater, B.
Scott of Bybrook, B.
Seccombe, B.
Selkirk of Douglas, L.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Sherbourne of Didsbury, L.
Shinkwin, L.
Smith of Hindhead, L.
Soames of Fletching , L.
Stedman-Scott, B.
Stewart of Dirleton, L.
Stirrup, L.
Stowell of Beeston, B.
Sugg, B.
Swire, L.
Taylor of Holbeach, L.
True, L.
Udny-Lister, L.
Vaizey of Didcot, L.
Vere of Norbiton, B.
Warsi, B.
Wei, L.
Wharton of Yarm, L.
Williams of Trafford, B. [Teller]
Wolfson of Tredegar, L.
Wrottesley, L.
Wyld, B.
Young of Cookham, L.
Younger of Leckie, V.

*7.55 pm*

*Amendment 47*

*Moved by* ***Lord Lansley***

**47:** Clause 12, page 9, line 11, at end insert—

"(3A) The strategic priorities to be included in the statement must include, but are not limited to—

(a) achieving targets set under the Climate Change Act 2008 and the Environment Act 2021,

(b) meeting requirements set out in the Public Services (Social Value) Act 2012,

(c) promoting innovation amongst potential suppliers, and

(d) minimising the incidence of fraud, waste or abuse of public money."

Member's explanatory statement

This amendment would require that the priorities listed in the amendment are among the strategic priorities in relation to procurement included in the National Procurement Policy Statement.

**Lord Lansley (Con):** My Lords, Amendment 46 does not in any sense pre-empt Amendment 47, since Amendment 47 adds specific text to the Bill relating to the Environment Act, the Climate Change Act, the Public Services (Social Value) Act, and the promotion of innovation and the minimisation of fraud, waste and abuse of public money. It does so, as my noble friend said in the group we have just discussed, by putting it in the Bill and what is currently in the

national procurement policy statement does not suffice. I move Amendment 47 and beg leave to test the opinion of the House.

*7.57 pm*

*Division on Amendment 47*

*Contents 165; Not-Contents 150.*

*Amendment 47 agreed.*

**Division No. 3**

**CONTENTS**

Aberdare, L.
Adams of Craigielea, B.
Addington, L.
Adonis, L.
Alderdice, L.
Allan of Hallam, L.
Alton of Liverpool, L.
Anderson of Swansea, L.
Andrews, B.
Armstrong of Hill Top, B.
Austin of Dudley, L.
Bakewell of Hardington Mandeville, B.
Bassam of Brighton, L.
Beith, L.
Benjamin, B.
Bennett of Manor Castle, B.
Berkeley of Knighton, L.
Berkeley, L.
Blackstone, B.
Blower, B.
Bowles of Berkhamsted, B.
Bradley, L.
Brinton, B.
Browne of Ladyton, L.
Bruce of Bennachie, L.
Burt of Solihull, B.
Campbell of Pittenweem, L.
Campbell-Savours, L.
Chakrabarti, B.
Chandos, V.
Chapman of Darlington, B.
Clancarty, E.
Clement-Jones, L.
Coaker, L.
Collins of Highbury, L.
Crawley, B.
Davies of Brixton, L.
Dholakia, L.
Donaghy, B.
Doocey, B.
Drake, B.
Dykes, L.
Falkner of Margravine, B.
Foulkes of Cumnock, L.
Fox, L.
Gale, B.
Garden of Frognal, B.
German, L.
Glasgow, E.
Goddard of Stockport, L.
Goudie, B.
Greenway, L.
Grocott, L.
Hain, L.
Hamwee, B.
Hannay of Chiswick, L.
Hanworth, V.
Harris of Haringey, L.
Harris of Richmond, B.
Hayman of Ullock, B.
Hayman, B.
Healy of Primrose Hill, B.
Hendy, L.
Henig, B.
Hollick, L.
Hope of Craighead, L.
Howarth of Newport, L.
Humphreys, B.
Hunt of Kings Heath, L.
Hussain, L.
Janke, B.
Jones of Whitchurch, B.
Kennedy of Cradley, B.
Kennedy of Southwark, L. [Teller]
Kennedy of The Shaws, B.
Khan of Burnley, L.
Kinnoull, E.
Kramer, B.
Lansley, L.
Layard, L.
Lennie, L.
Leong, L.
Liddell of Coatdyke, B.
Liddle, L.
Ludford, B.
Mackenzie of Framwellgate, L.
Mann, L.
Marks of Henley-on-Thames, L.
Masham of Ilton, B.
Maxton, L.
McAvoy, L.
McIntosh of Hudnall, B.
McNicol of West Kilbride, L.
Meacher, B.
Merron, B.
Monks, L.
Morgan, L.
Morris of Yardley, B.
Murphy of Torfaen, L.
Newby, L.
Northover, B.
Nye, B.
O'Loan, B.
Osamor, B.
Paddick, L.
Palmer of Childs Hill, L.
Parminter, B.
Pinnock, B.
Pitkeathley, B.
Ponsonby of Shulbrede, L.
Primarolo, B.
Prosser, B.
Purvis of Tweed, L.
Randerson, B.
Rebuck, B.
Redesdale, L.
Rennard, L.
Ricketts, L.
Robertson of Port Ellen, L.
Sahota, L.
Scott of Needham Market, B.
Scriven, L.
Sentamu, L.
Sharkey, L.
Sheehan, B.
Sherlock, B.
Shipley, L.
Sikka, L.
Smith of Basildon, B.
Snape, L.
Stansgate, V.
Stevenson of Balmacara, L.
Stoneham of Droxford, L.
Storey, L.
Strasburger, L.
Stunell, L.
Taylor of Bolton, B.
Taylor of Stevenage, B.
Teverson, L.
Thomas of Winchester, B.
Thornhill, B.
Thornton, B.
Thurso, V.
Tomlinson, L.
Tope, L.
Touhig, L.
Tunnicliffe, L.
Turnberg, L.
Twycross, B.
Tyler of Enfield, B.
Wallace of Saltaire, L.
Wallace of Tankerness, L.
Walmsley, B.
Warwick of Undercliffe, B.
Watson of Invergowrie, L.
Wheeler, B. [Teller]
Whitaker, B.
Wigley, L.
Wilcox of Newport, B.
Wood of Anfield, L.
Woodley, L.
Worthington, B.
Wrigglesworth, L.
Young of Norwood Green, L.
Young of Old Scone, B.

**NOT CONTENTS**

Altrincham, L.
Anelay of St Johns, B.
Arbuthnot of Edrom, L.
Ashcombe, L.
Ashton of Hyde, L.
Barran, B.
Bellamy, L.
Benyon, L.
Berridge, B.
Bethell, L.
Blackwood of North Oxford, B.
Bloomfield of Hinton Waldrist, B.
Borwick, L.
Bourne of Aberystwyth, L.
Bridgeman, V.
Browne of Belmont, L.
Browning, B.
Buscombe, B.
Caine, L.
Caithness, E.
Callanan, L.
Camrose, V.
Carrington of Fulham, L.
Colgrain, L.
Cormack, L.
Courtown, E. [Teller]
Craig of Radley, L.
Crathorne, L.
Cruddas, L.
Davies of Gower, L.
De Mauley, L.
Deighton, L.
Dobbs, L.
Duncan of Springbank, L.
Eaton, B.
Eccles of Moulton, B.
Eccles, V.
Effingham , E.
Evans of Bowes Park, B.
Evans of Rainow, L.
Fairfax of Cameron, L.
Fall, B.
Farmer, L.
Finn, B.
Fookes, B.
Forsyth of Drumlean, L.
Foster of Oxton, B.
Fraser of Craigmaddie, B.
Frost, L.
Garnier, L.
Godson, L.
Gold, L.
Goldie, B.
Goodlad, L.
Greenhalgh, L.
Hamilton of Epsom, L.
Harding of Winscombe, B.
Harlech, L.
Harrington of Watford, L.
Haselhurst, L.
Hayward, L.
Helic, B.
Henley, L.
Hill of Oareford, L.
Holmes of Richmond, L.
Horam, L.
Howard of Rising, L.
Hunt of Wirral, L.
Jenkin of Kennington, B.
Johnson of Lainston , L.
Jopling, L.
Kamall, L.
Kirkhope of Harrogate, L.
Lancaster of Kimbolton, L.
Lawlor, B.
Lea of Lymm, B.
Leicester, E.
Leigh of Hurley, L.
Lexden, L.
Lilley, L.
Lindsay, E.
Lingfield, L.
Livingston of Parkhead, L.
Lucas, L.
Mancroft, L.
Manzoor, B.
Markham, L.
Maude of Horsham, L.
McInnes of Kilwinning, L.
McIntosh of Pickering, B.
McLoughlin, L.
Meyer, B.
Minto, E.
Montrose, D.
Morris of Bolton, B.
Moylan, L.
Murray of Blidworth, L.
Naseby, L.
Nash, L.
Neville-Jones, B.

Neville-Rolfe, B.
Newlove, B.
Noakes, B.
Norton of Louth, L.
O'Neill of Bexley, B.
Offord of Garvel, L.
Parkinson of Whitley Bay, L.
Penn, B.
Polak, L.
Popat, L.
Porter of Spalding, L.
Reay, L.
Redfern, B.
Ribeiro, L.
Robathan, L.
Roborough, L.
Rock, B.
Rogan, L.
Rowe-Beddoe, L.
Sanderson of Welton, B.
Sandhurst, L.
Sater, B.
Scott of Bybrook, B.
Seccombe, B.
Selkirk of Douglas, L.
Shackleton of Belgravia, B.
Sharpe of Epsom, L.
Sherbourne of Didsbury, L.
Shinkwin, L.
Smith of Hindhead, L.
Soames of Fletching , L.
Stedman-Scott, B.
Stewart of Dirleton, L.
Stirrup, L.
Stowell of Beeston, B.
Sugg, B.
Taylor of Holbeach, L.
Taylor of Warwick, L.
True, L.
Udny-Lister, L.
Vaizey of Didcot, L.
Vere of Norbiton, B.
Wei, L.
Wharton of Yarm, L.
Williams of Trafford, B. [Teller]
Wolfson of Tredegar, L.
Wrottesley, L.
Wyld, B.
Young of Cookham, L.
Younger of Leckie, V.

*8.07 pm*

*Amendment 48 not moved.*

*Amendments 49 and 50*

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

**49:** Clause 12, page 9, line 33, leave out "any" and insert "procurement under a"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**50:** Clause 12, page 9, line 36, after "to" insert "procurement under"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

*Amendments 49 and 50 agreed.*

### *Clause 13: The Wales procurement policy statement*

*Amendments 51 and 52*

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

**51:** Clause 13, page 10, line 22, after "to" insert "procurement under"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**52:** Clause 13, page 10, line 26, after "to" insert "procurement under"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

*Amendments 51 and 52 agreed.*

*Amendment 53 not moved.*

### *Clause 15: Preliminary market engagement*

*Amendment 54 not moved.*

### *Clause 20: Tender notices and associated tender documents*

*Amendments 55 and 56*

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

**55:** Clause 20, page 14, line 32, leave out from beginning to "the" and insert "A contracting authority may not invite suppliers to submit a tender as part of a competitive tendering procedure unless it is satisfied that the tender notice or associated tender documents contain—

(a) information sufficient to allow suppliers to prepare such a tender, and

(b) in particular, details of"

Member's explanatory statement

This amendment would ensure that a contracting authority provides sufficient information to suppliers before the beginning of a tendering period.

**56:** Clause 20, page 14, line 37, at end insert—

"(7) See section (Qualifying utilities dynamic market notices: no duty to publish a tender notice) for an exception to the duty in subsection (1) for contracts awarded by reference to suppliers' membership of certain utilities dynamic markets."

Member's explanatory statement

This amendment is consequential on the Government's new clause on qualifying utilities dynamic market notices.

*Amendments 55 and 56 agreed.*

### *Clause 21: Conditions of participation*

*Amendment 57*

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

**57:** Clause 21, page 15, line 2, at end insert—

"(2A) A condition set under subsection (1)(a) may not—

(a) require the submission of audited annual accounts, except from suppliers who are, or were, required to have the accounts audited in accordance with Part 16 of the Companies Act 2006 or an overseas equivalent;

(b) require insurance relating to the performance of the contract to be in place before the award of the contract."

Member's explanatory statement

This amendment would prevent contracting authorities from requiring audited accounts from suppliers that do not otherwise prepare audited accounts (for example, small companies), or insurance to be in place before award.

*Amendment 57 agreed.*

*Amendment 58 not moved.*

### *Clause 28: Excluding a supplier that is a threat to national security*

*Amendment 59*

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

**59:** Clause 28, page 18, line 35, leave out from first "a" to "intends" on line 36 and insert "relevant contracting authority"

Member's explanatory statement

This amendment and the other Government amendment to this Clause would ensure that the House authorities are not required to seek the approval of a Minister of the Crown to exclude a supplier on the basis of national security.

**Baroness Neville-Rolfe (Con):** My Lords, I rise to introduce a number of government amendments. These include several technical amendments, so I will be brief.

Amendments 59, 60, 108 and 109 exempt the corporate officers of Parliament from the requirement to seek agreement from a Minister of the Crown before excluding a supplier or terminating a contract under the national security exclusion ground. Amendment 85 ensures that the mandatory exclusion grounds capture all Scots law offences equivalent to the already specified English and Welsh offences.

Amendments 86 and 87 refer to the relevant sections in the Theft Act to align with other legislation on economic crimes. Amendment 88 amends the transitional regime for mandatory exclusions to ensure that the correct time period is applied for the mandatory exclusion ground for conspiracy to defraud. Amendment 90 simplifies the exclusion grounds for suppliers which are insolvent or bankrupt. Amendments 92 and 93 amend the rules on how far in the past events can be taken into account as discretionary exclusion grounds in relation to breach of contract and poor performance.

I will turn to the amendments tabled by other noble Lords when I close. I beg to move.

**Lord Fox (LD):** My Lords, I rise to speak to Amendment 89 in my name. I feel that the time pressure has lifted, so perhaps I can make a nice long speech to your Lordships now. Amendment 89 is intended to allow Ministers and contracting authorities to exclude businesses from procurement where there is evidence of financial and economic criminal activity, such as fraud, money laundering, bribery or sanctions evasions, but there has not yet been a conviction by a court.

This follows the debate we had in Grand Committee on Amendment 320, when the Minister made some cogent points about the problems of excluding organisations that had not been convicted—that point was understood. However, given the length of time involved in carrying out investigations and then securing the resulting enforcement action, we remain concerned that there is a real possibility that unsuitable suppliers may be awarded procurement contracts while they are awaiting the full length of the process.

It was therefore with some interest that my attention was drawn to the Government's *Review into the Risks of Fraud and Corruption in Local Government Procurement*. This review looked into the risks of fraud and corruption in local government procurement—not surprising; that is what it was supposed to do—and made the recommendation that the exclusions regime for public procurement should be examined to see

"if more could be done to allow procurers to exclude bidders from the process (with reasonable cause and without the requirement to disclose), for example when there are known concerns with law enforcement that have not yet resulted in a prosecution".

We believe that the Bill provides an opportunity for the Government to fulfil this recommendation, and suggest that the process of studying how to do that, recommended in that report, could happen. I should be grateful if the Minister would bring forward some sort of government process to have that assessment. If this is not the Government's intention, she needs to explain to your Lordships' House why she is prepared to recommend one process for local authorities through a report that had ministerial backing while ignoring the actual issue in the appropriate legislation, which is the Bill. This was the subject of a letter that I wrote to the Minister many days ago and I am still waiting for the reply.

It is in everyone's interest to ensure that the contracting authority can act when it has evidence of financial or economic offences, but formal conviction is outstanding. We understand the problems, but the Government themselves have identified this as an issue with local authorities. The exclusion regime is not just a deterrent for bad actors; it is also supposed to prevent them getting the contracts in the first place.

**Lord Hendy (Lab):** My Lords, my Amendment 91A follows the theme of my earlier Amendment 162A. The thrust of this amendment is that in determining whether to let a public contract to a bidder, a public authority should have the power to take into consideration the conduct of the potential supplier vis-à-vis its staff.

The Government are to be praised for accepting that public procurement is a useful tool to maintain and raise standards, hence the emphasis on public good, even without the benefit of Amendment 46. Clause 29, for example, excludes those guilty of improper behaviour of various kinds. Schedule 6 provides that there are mandatory exclusions, among other things, for suppliers who have been convicted of various offences: corporate manslaughter, homicide, terrorism, theft, fraud, bribery, organised crime, tax offences, and cartel offences.

*8.15 pm*

Under the heading "Labour market, slavery and human trafficking offences", various convictions under the legislation for employment agencies are listed: national minimum wage, gangmasters, trafficking and slavery.

Schedule 7, which covers discretionary grounds for exclusion, permits the exclusion of public authorities to exclude suppliers who are not convicted of such offences, but who have been subjected to trafficking or slavery prevention orders, various environmental misconduct, insolvency, bankruptcy, competition infringement, professional misconduct or serious breach of contract and various other matters.

Clearly, many of the grounds I have listed are capable of applying to the conditions of working life of the staff who carry out these public contracts. That is appropriate because, as the Minister said earlier, public procurement involves nearly £300 billion-worth of contracts each year, which is a substantial part of the GDP, at least 105,000 small and medium-sized enterprises and dozens of larger ones, and millions of workers.

Given that the principle is accepted, my amendment is intended to give public authorities the right to exclude suppliers that breach workers' rights. I suggest that this could not be more important or topical. P&O Ferries is the tip of a sinister iceberg. Wage cuts, unfair dismissals, redundancies without consultation, discrimination, zero-hours contracts and so on are

[LORD HENDY]
rife. Collective bargaining coverage, which could have resolved these issues, is now at its lowest since the 1920s. Looking at the other legal options, there are backlogs of tens of thousands of employment tribunal cases. The waiting time for getting a case on is between a year and two years.

This Bill presents a vitally useful tool for maintaining or raising standards and preventing good employers being undercut by bad ones. I hope that the Government will take at least something from my proposed amendment.

**Baroness Hayman of Ullock (Lab):** My Lords, this has been a short debate, but this group contains some very important amendments that the Minister should consider carefully.

I turn first to the amendment in the name of the noble Lord, Lord Fox. He introduced it extremely clearly and explained why he considered it necessary. He made an important point: if you give a contract to somebody who, not a very long time afterwards, is found guilty of the offences outlined in the noble Lord's amendment, what recourse is there for other people who have bid for that contract and behaved perfectly properly? We know that contracts are often given for a number of years, so this is likely not to be something that happens once in a blue moon; it could become a problem. If the Minister is not inclined to accept the noble Lord's amendment, I ask her to take his concerns back to her department to see whether there is another way to have some kind of recourse or review if such a situation were to arise.

My noble friend Lord Hendy's amendment is incredibly important because, as he rightly said in introducing it, we have Clause 29, which looks at excluding suppliers for improper behaviour—he listed many of the improper behaviours that are included in this—but what is not included is what happens if the rights of an employee or worker are breached. Surely the rights of those who work on contracts and work for people should be fully supported by the Government. We have laws on employment rights for a purpose. Surely, in looking at procurement and who to give what are often extremely lucrative contracts to, this Bill should consider employees' rights and ensure that companies that have behaved improperly by breaching employment rights are excluded.

This seems a very straightforward amendment to add to the Bill. It would give employees more confidence and would give people who are looking to employ people confidence that they are treating their workforce in the way the law of our country dictates. I urge the Minister to support this amendment.

**Baroness Neville-Rolfe (Con):** My Lords, I thank the noble Lord, Lord Fox, for Amendment 89 on financial and economic misconduct. The amendment would permit the exclusion of suppliers where there is evidence of certain economic and financial offences. Of course, suppliers who commit fraud, bribery and money laundering and have failed to self-clean have no place winning government contracts. There are already mandatory grounds for exclusion that cover the most serious offences of this nature, as set out in Schedule 6. It is worth noting that the scope of economic and financial offences covered is significantly wider than in the EU regime that it replaces, including a broader range of theft, fraud and money laundering offences.

However, the mandatory grounds in Schedule 6 rightly require the supplier or a connected person to have been convicted. By providing for exclusion without the requirement for a conviction, the amendment would require authorities to make a judgment as to whether there is sufficient evidence that offences have been committed in order to apply the ground. They would need to make this judgment at a point when the investigating authorities have not reached a view, which would be very difficult. The exclusions regime requires all grounds to be considered in respect of every bidder in a procurement, so authorities would have no choice about whether to consider these matters.

I thank the noble Lord for drawing our attention to the review of finance and corruption in local government. The recommendation in that review was that we consider whether this proposal is feasible. We have given it careful consideration but are not taking it forward, for the reasons I have already touched on. However, I would add that the very fact pointed out by the noble Lord—that investigations by the authorities into these matters, which can apply to many different areas of regulation, often take considerable time—speaks to the complexity of making these judgments within the contracting authorities. There is no reason to think that they would find this any easier than the relevant and proper authorities. In fact, they would find it harder, so it would be a new burden on those investigating suppliers—it could be a significant one—and on suppliers themselves, which I am unwilling to impose.

I turn now to Amendment 91A, tabled by the noble Lord, Lord Hendy, which introduces a discretionary exclusion for "significant" breaches of workers' rights. I pay tribute to the noble Lord's work in this area. In my view, the exclusion grounds already cover the most serious breaches of workers' rights, so the mandatory grounds in Schedule 6 include slavery and human trafficking offences, offences relating to employment agencies and gangmasters, and refusal or wilful neglect to pay the national minimum wage. These are based on the serious labour offences within the purview of the director of labour market enforcement.

The amendment begs the question of what constitutes a "significant" breach. Unless there is a settled consensus on this point, which I am not aware of, it will be difficult for both suppliers and contracting authorities to interpret. We should remember that suppliers will need to self-declare whether they are subject to any of the grounds, and that contracting authorities will need to consider whether suppliers meet the grounds in each procurement that they run. That is quite wide-ranging in relation to employment rights. Questions of whether a breach is significant, and, indeed, whether it relates to rights derived from statute, common law or international obligations, will consume a disproportionate amount of time and resources. I do not doubt that there are a number of behaviours in different areas which the exclusion grounds we have set out might or might not cover; but the purpose of the exclusions regime is to protect against suppliers that may be fundamentally

unfit to compete for public contracts. It is not a means to enforce employment rights, or a lever to incentivise certain behaviours.

What we have introduced in this Bill is a much tougher regime of debarment, with central resources devoted to assessing suppliers and deciding centrally on debarment. This is tough for direct and indirect suppliers, as one bad apple in a company can cause them to be debarred—a very strong incentive to ensure that bad behaviour does not occur in the first place, of course; or, where it does, to take remedial action. However, expanding the exclusion grounds, as proposed in this amendment, will have a chilling effect on engagement in procurement, as I explained from a business perspective before I became a Minister and turned into the gamekeeper. We must be fair and remember that we have an interest in more competitive markets that improve value for money, innovation and productivity. I am grateful to those who have spoken for raising these issues. However, I believe we have done enough in Schedule 6, and I respectfully ask the noble Lords, Lord Fox and Lord Hendy, not to press their amendments, given the lateness of the hour.

The noble Baroness, Lady Hayman, raised a new point about the carry-on consequences of the issues we have discussed in this group. I am not sure that we can do anything about that, but I will certainly have a look at that as the Bill progresses. I beg to move.

*Amendment 59 agreed.*

*Amendment 60*

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

**60:** Clause 28, page 19, line 3, at end insert—

"(4) In this section, a "relevant contracting authority" means a contracting authority other than—

(a) a Minister of the Crown or a government department,

(b) the Corporate Officer of the House of Commons, or

(c) the Corporate Officer of the House of Lords."

Member's explanatory statement

This amendment and the other Government amendment to this Clause would ensure that the House authorities are not required to seek the approval of a Minister of the Crown to exclude a supplier on the basis of national security.

*Amendment 60 agreed.*

***Clause 29: Excluding suppliers for improper behaviour***

*Amendment 61*

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

**61:** Clause 29, page 19, line 6, leave out "a procurement" and insert "the award of a public contract"

Member's explanatory statement

This amendment and the Government amendment to subsection (1)(b) of this clause would clarify that it is improper behaviour relating to the award of a particular contract that is relevant in deciding whether to exclude someone from competing for that contract, and would reflect the change in terminology in new clause before clause 1.

*Amendment 61 agreed.*

*Amendment 62*

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

**62:** Clause 29, page 19, line 8, leave out "of a public contract"

Member's explanatory statement

This amendment and the Government amendment to subsection (1)(a) of this clause would clarify that it is improper behaviour relating to the award of a particular contract that is relevant in deciding whether to exclude someone from competing for that contract, and would reflect the change in terminology in new clause before clause 1.

*Amendment 62 agreed.*

***Clause 30: Modifying a section 18 procurement***

*Amendments 63 to 68*

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

**63:** Clause 30, page 20, line 2, after second "a" insert "covered"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**64:** Clause 30, page 20, line 11, after first "a" insert "covered"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**65:** Clause 30, page 20, line 26, after second "a" insert "covered"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**66:** Clause 30, page 20, line 29, after second "a" insert "covered"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**67:** Clause 30, page 20, line 33, after second "a" insert "covered"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

**68:** Clause 30, page 20, line 36, after first "a" insert "covered"

Member's explanatory statement

This amendment is consequential on the change in terminology in new clause before clause 1.

*Amendments 63 to 68 agreed.*

***Clause 34: Dynamic markets: establishment***

*Amendment 69*

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

**69:** Clause 34, page 23, line 18, leave out "public"

Member's explanatory statement

This amendment would ensure that documents establishing or modifying a dynamic market are not subject to any requirements applicable to contracts under the Bill.

*Amendment 69 agreed.*

***Clause 35: Dynamic markets: membership***

*Amendment 70*

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

**70:** Clause 35, page 23, line 26, at end insert—

"(1A) A condition set under subsection (1)(a) may not—

(a) require the submission of audited annual accounts, except from suppliers who are, or were, required to have the accounts audited in accordance with Part 16 of the Companies Act 2006 or an overseas equivalent;

(b) require insurance relating to the performance of a contract to be in place before the award of the contract."

Member's explanatory statement

This amendment would prevent contracting authorities from requiring audited accounts from suppliers that do not otherwise prepare audited accounts (for example, small companies), or insurance to be in place before award.

*Amendment 70 agreed.*

*Amendment 71*

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

**71:** After Clause 38, insert the following new Clause—

"Qualifying utilities dynamic market notices: no duty to publish a tender notice

(1) The duty to publish a tender notice in section 20(1) does not apply in relation to the award of a contract by reference to suppliers' membership of—

(a) a utilities dynamic market established by reference to a qualifying utilities dynamic market notice, or

(b) a part of such a market.

(2) A contracting authority must instead provide a tender notice to members of the market, or part of the market, for the purposes set out in section 20(1).

(3) A contracting authority may also provide a tender notice to suppliers that have applied for membership of the market, or part of the market, but have yet to be accepted or rejected.

(4) The reference in section 20(5) to a tender notice or associated tender documents includes a reference to a qualifying utilities dynamic market notice.

(5) Section 33(4) (duty to consider applications for membership) does not apply in relation to the award of a contract by reference to suppliers' membership of—

(a) a utilities dynamic market established by reference to a qualifying utilities dynamic market notice, or

(b) a part of such a market.

(6) In this section, "a qualifying utilities dynamic market notice" means a dynamic market notice under section 38(2) (dynamic market notices) that—

(a) relates to the establishment of a utilities dynamic market, and

(b) sets out—

(i) that only members of the market will be notified of a future intention to award a contract by reference to suppliers' membership of the market, and

(ii) any other information specified in regulations under section 88.

(7) In this Act, a reference to publication of a tender notice includes a reference to provision of a tender notice under subsection (2) or (3)."

Member's explanatory statement

This new Clause would relieve a utility that establishes a dynamic market by reference to a qualifying utilities dynamic market notice from the obligation to publish a tender notice.

*Amendment 71 agreed.*

*Consideration on Report adjourned.*

*House adjourned at 8.29 pm.*

# Grand Committee

*Monday 28 November 2022*

## Arrangement of Business

*Announcement*

*3.45 pm*

**The Deputy Chairman of Committees (Baroness Watkins of Tavistock) (CB):** My Lords, if there is a Division in the Chamber while we are sitting, the Committee will adjourn as soon as the Division bells are rung and resume after 10 minutes.

## UNCLOS: The Law of the Sea in the 21st Century (International Relations and Defence Committee Report)

*Motion to Take Note*

*3.45 pm*

*Moved by* ***Baroness Anelay of St Johns***

That the Grand Committee takes note of the Report from the International Relations and Defence Committee *UNCLOS: the law of the sea in the 21st century* (2nd Report, Session 2021–22, HL Paper 159).

**Baroness Anelay of St Johns (Con):** My Lords, I am pleased to introduce our report *UNCLOS: the Law of the Sea in the 21st Century*, which was published on 1 March. It is almost 40 years to the day since the United Nations Convention on the Law of the Sea was adopted by the UN General Assembly. The convention established for the first time a comprehensive international framework for the governance of the world's seas and oceans. Our committee decided to take that anniversary as an opportunity to examine whether UNCLOS remains fit for purpose in the light of 21st-century challenges.

I thank the members of the International Relations and Defence Committee; our specialist adviser, Dr Reece Lewis; and the committee staff for their contributions to the report. I also declare an unpaid interest as chair of trustees of the United Nations Association UK.

The adoption of UNCLOS in December 1982 was the outcome of more than 25 years of international negotiations and represented a major milestone in international law. The clear consensus among those who gave evidence to us was that the convention has been a success in regulating maritime relations between states. UNCLOS has delivered significant benefits for the UK and for the wider international community. These benefits include enshrining the principle of freedom of navigation; establishing standardised rules for states' claims to maritime zones; creating a framework for co-operation on issues such as marine resource management, maritime security and environmental protection; and providing stable mechanisms for dispute settlement. Our inquiry concluded that many of the core rules of UNCLOS remain important in today's world. Moreover, it is in the UK's interests to ensure that they continue to be upheld.

In recent years, however, challenge has come from China to some of the fundamental tenets of the UNCLOS system by making exorbitant claims to territorial jurisdiction over waters in the South China Sea. That impacts on other states' rights to freedom of navigation. It is vital that the Government continue to work with international partners to challenge such actions and ensure that the rules of international law are observed.

Despite the UNCLOS success story, there are weaknesses in the current legal regime. The enforcement of the rules against ships on the high seas is inconsistent. There are gaps in regulation, including on human rights and emerging technologies such as maritime autonomous vehicles. The rules of UNCLOS have not adapted to the pace of climate and environmental degradation. The international community, and of course the UK, must find ways to address these challenges. Today I shall focus on just three of those challenges: enforcement on the high seas, human rights at sea, and climate and the environment.

Under international law, states are responsible for enforcing the law within their own territories, but large swathes of the world's oceans, known as the high seas, are beyond the territorial jurisdiction of any state. UNCLOS seeks to address the risk of an enforcement vacuum over ships on the high seas through the principle of "flag state jurisdiction". Under that principle, the state in which a ship is registered is required to "effectively exercise" its jurisdiction over its ships and their crew, including in relation to maritime safety and security and labour conditions on board. UNCLOS also requires that ships should have a genuine link with the state of registration. That facilitates better enforcement.

In practice, however, a very large proportion of the world's shipping is flagged to open registries, otherwise known as flags of convenience. Open registries have lax conditions for registration and a limited capacity to take enforcement action against non-compliant vessels. The evidence to our inquiry demonstrated that this poses a significant challenge for maritime security and wider law enforcement at sea.

The international community made an attempt to tighten the rules in 1986, through the UN Convention on Conditions for Registration of Ships, but this treaty has never entered into force due to a lack of acceptance by states, including the United Kingdom. In response to our report, the Government acknowledged the risks posed by open registries, but they did not engage fully with our recommendations initially. In particular, they did not clearly explain why they had not joined the 1986 convention. However, following further correspondence with our committee, the Government have now committed to engaging with the International Maritime Organization and to taking a leading role in reviewing the 1986 convention to bring it up to date as a means of reinforcing the need for a genuine link between ships and their registries. I welcome this commitment to improving flag state enforcement and look forward to receiving further updates from the Government as these discussions progress.

The protection of human rights at sea is a real concern, which UNCLOS does not address adequately. Human trafficking, modern slavery and forced labour,

[Baroness Anelay of St Johns]
including in the context of illegal, unregulated and unreported fishing activity, all present pressing human rights challenges at sea. There are barriers to effective protection caused by conflicts of jurisdiction over vessels in different maritime zones and a lack of effective enforcement through flag state jurisdiction on the high seas. As a result, remedies for human rights abuses are often unclear or unavailable.

It is right that people at sea should benefit from the protection of human rights law just as much as those on land. However, the Government appear to take a narrow view of human rights protection at sea: in their evidence to our inquiry and responses to our report, they have focused mainly on labour rights, which are important but not the only matter of concern.

Our committee called on the Government to adopt a clear and unequivocal position on the application of human rights law at sea. Regrettably, they have not done so. In his latest reply to our committee, my noble friend the Minister acknowledged that human rights obligations

"are capable of applying … at sea … provided that there is jurisdiction".

But this suggests that the Government take the view that there are circumstances in which human rights do not apply. I invite my noble friend the Minister to explain his position further today and indicate what the Government's current plans are to work with international partners to improve the protection of human rights at sea. I believe, and the committee agrees, that the UK should set an example internationally in this regard.

We asked the Government to explain what remedies are available in the UK for victims of human rights abuses at sea. The Government's reply refers only to the possibility of submitting a complaint to a Maritime and Coastguard Agency surveyor—and yet the primary role of such persons is ensuring the safety and seaworthiness of vessels. It is also not clear whether MCA surveyors have the power to receive complaints other than in relation to labour rights. I therefore invite my noble friend the Minister to explain further whether the remedies set out are sufficient to allow access to justice in the UK for victims of human rights abuses at sea.

Climate and the oceans are vital to us; they are inextricably linked. The oceans play a unique role in climate regulation by absorbing carbon emissions. At the same time, climate change has a significant impact on marine ecosystems. While UNCLOS imposes obligations on states regarding environmental protection, it does not directly address climate change. Until recently, international efforts to tackle climate change through the United Nations Framework Convention on Climate Change did not give the oceans the attention they deserve. Greater co-ordination is required between UNCLOS and the UNFCCC processes to ensure that the effects of climate change on the oceans are fully covered.

We will all be aware that a welcome step forward on this was taken last year at COP 26 in Glasgow. I invite my noble friend the Minister to report in his reply on any further progress made in this regard at this year's COP 27, in Sharm el-Sheikh earlier this month. I would also be grateful if my noble friend could update Members today on whether any progress was made earlier this month at the council meeting of the International Seabed Authority on negotiations to agree exploitation regulations with respect to deep sea mining. My noble friend will be aware that some Members of the Committee have taken a significant interest in these matters over the last few years.

UNCLOS is a living treaty. It provides a framework for states to develop the law over time. Our report has shown that there are areas where further development is needed to address pressing challenges. As a major maritime power, the UK is in strong position to contribute to this. I hope that the Government will accept our challenge to step up to their leadership role in reforming or supplementing UNCLOS rules in these areas, as well as standing up for the fundamental principles of maritime law which have made UNCLOS a success over the past 40 years. I beg to move.

*3.57 pm*

**Baroness Goudie (Lab):** My Lords, *UNCLOS: the Law of the Sea in the 21st Century* is good, as far as it goes. But 40 years on, there are gaps and enforcement is extremely patchy. Human rights abuses at sea, biodiversity law and environmental degradation are inadequately addressed. I would like to draw particular attention to chapter 4 of the excellent report, on the impacts of climate change, including the implications of rising sea levels on low-lying states and the displacement of people leading to increases in refugees and migration. I also draw particular attention to chapter 5, on human rights and labour protection at sea.

International human rights laws apply to those at sea as well as those on land, but UNCLOS has little to say about human rights. The barriers to application at sea need to be addressed. It is vital to tackle human trafficking and modern slavery, enforced labour and excessive working conditions—which we know are happening as we sit here today—and to avoid flags of convenience providing many loopholes.

Another vital issue is migration at sea by vulnerable groups—including asylum seekers and refugees, who are often in insecure vessels—and rendering assistance to those in distress at sea. This must not be sidelined by immigration and other policies. These are human beings who we must take care of and who are not there for their own purposes. They are there because the situation has made this happen; no one would want to put their children and themselves in these difficulties. I question whether provisions in the Nationality and Borders Act are compliant with our duties in UNCLOS, in particular our international responsibilities under Article 98. Those suffering human rights abuses at sea must have sufficient access to timely and effective justice remedies. In particular, contracted armed security personnel must be regulated. The regulations around this are extremely weak; we really must look at that, not only in this country but in other countries, and join forces. Piecemeal attempts at solutions are not good enough. The UK Government must respond robustly to the report and do much better on human rights violations at sea reports.

*4 pm*

**Lord Teverson (LD):** My Lords, I should declare a non-financial interest as a patron of the British charity, Human Rights at Sea.

When I first came into the Grand Committee, I wanted to make sure that I had the Government's most up-to-date response. I have to tell the Minister that I was hugely disappointed by it, until I read the title, which was *Technology Rules? The Advent of New Technologies in the Justice System*—I had picked up the wrong one. I now have the most recent response, I hope, and will refer to it later.

I was delighted that the committee went into UNCLOS. It is its 40th anniversary and, to me, it is something that all the signatories can be proud of. I see it as the law of 70% of the planet's surface—some of the most important, and indeed some of the most unknown and unresearched, parts of the planet. It has its weaknesses, gaps and challenges, and I will come to each of those.

It is also under threat; this is not an area I will talk about but, in terms of the South China Sea, there is a direct challenge to a ruling under UNCLOS. The Philippines brought that case but has backed off; China has totally rejected it and did not see that jurisdiction as being valid. That is a part of the autocratic world trying to undo the international conventions that have kept the planet at peace and sane over the last 50 years and more. So it is under threat.

One of the main, negative conclusions that the committee came to was that the last thing we should do is renegotiate UNCLOS. We should find ways of improving it and making it the living treaty that was described by many of our witnesses, but we should not undo it. It is a keystone of the rule of law over our oceans.

I follow on from the thoughts of the noble Baroness, Lady Anelay, our chair, on flags of convenience. To me, this is the one area where, to use the wrong analogy, we drive a horse and coaches through the way that UNCLOS is supposed to work. The table shows exactly that Panama has gross tonnage of vessels of about a quarter of a million under its flag, the US has only 10 million, and the UK 8.7 million—in 22nd position. Clearly, everything is out of kilter. We are trying to get a balance: historically, the freedom of the high seas has been very important and something which we would not want to move on. The trouble is that it is abused and there is widespread immunity on the oceans through flags of convenience.

I was delighted to hear that we are now going to sign the 1986 UN Convention on Conditions for Registration of Ships. This seems one of the areas in which the UK should be leading internationally. The original government response, as I remember it in the committee, was that there was not a lot of interest from other nations, so why do it? That raises the question that this must be unsatisfactory to the vast majority of nations—though perhaps not Panama, the Marshall Islands and Malta. But to the rest of us it is important, and something through which we should be trying to get an economic link between flag and vessel. Until we do that, there will be a rather big hole in jurisdiction and how this charter actually works.

Of course, the International Maritime Organization is within a mile of this building. Surely, just due to the fact that it is in that location, we should be able to provide extra leverage to make sure that other nations come alongside us, and we should show that leadership.

I would be interested to understand from the Minister how we can improve port state control and make sure that those measures are more effective, as well as territorial waters. I would not like to stop the right of innocent passage through territorial waters but there needs to be more national responsibility for who goes through those waters.

Human rights is the area that is very much missing, and I completely agree with the comments of the noble Baroness, Lady Goudie, on this. It is not just about human rights themselves but the fact that, where there are these abuses—and all enforcement is difficult at sea—it moves on to other abuses and other breaches of international law. Whether it be illegal fisheries, people trafficking or drug trafficking, all this will continue if we do not take a much stronger approach to the human rights side of UNCLOS and the way that we enforce and legislate with regard to the high seas.

Never mind all those examples, I thought we had a good example with the cruise ship in the Mediterranean, outside of territorial waters. There was an assault on a passenger by a member of the crew; the national was Spanish, and the Spanish courts were not able to do anything, and there was an Italian connection, but Italy was not able to do anything either. The flag state, Panama, was just not interested. There is no recourse, even for that type of person, let alone for those in enslavement on fishing vessels.

I will say just one last thing on human rights. As I said, one of my areas is as a patron of Human Rights at Sea, which is a British charity. It is pushing ahead here with a document called the *Geneva Declaration on Human Rights at Sea*. This has been taken up by New Zealand and other nations but has had indifference, to a degree, from the United Kingdom—though not entirely; we had a very positive meeting with one of the Transport Ministers under the Boris Johnson Administration, but nothing has happened there. Can the Minister look at this further, to see how we can help push that declaration to extend human rights under international law?

Lastly, I will talk briefly about seabed minerals. At COP 27, President Macron said, very abruptly, "We aren't going to do sea mining—I'm going to try to stop it altogether." Similar declarations have been made by New Zealand, Chile and one or two other countries, including Panama and Costa Rica. But the latest government response says—not unreasonably, in a way—that the UK is looking at

> "the Regulatory framework of the ISA, with a view to adopting regulations in July 2023 in accordance with the ISA's road map for their elaboration."

After that, there are a lot of caveats about what we are pushing for as a nation within those negotiations.

My view is very clear on this. We already have enough minerals and despoliation on land. If we believe in natural capital, and particularly in circular economies, we should, not just as a nation but as an international community, make sure that we get those

[Lord Teverson]
minerals through a circular economy and through the exploitation that we already have, not in new domains under the sea. Can the Minister say whether the United Kingdom will back those other nations in saying that, at the end of the day, enough is enough, and we have despoiled our terrestrial domain enough? Let us not let that happen to the seabed, as it inevitably would, whatever regulations we have as regards that future convention.

*4.09 pm*

**Baroness Rawlings (Con):** My Lords, it is always a pleasure to follow the erudite speeches of the noble Lord, Lord Teverson. Our chairman, my noble friend Lady Anelay, and her team chose UNCLOS—an important but, dare I say it, relatively unknown subject regarding the law of the sea. I am most grateful to have served on her committee for nearly three years and for our having the opportunity to debate the UNCLOS report, especially leading up to the conclusion of the 40th anniversary conference on 10 December.

"The seas covering the globe, and particularly those around our coasts, have always been a fascination to many, since to a great extent they hold the key to the state of our economy, our physical health and our safety, to mention but a few of the areas affected".—[*Official Report*, 19/5/1976; col. 1431.]

I quote this from the maiden speech of Earl Strathmore and Kinghorne, during a former debate on the subject, here in the Lords, on 19 May 1976. I would like to highlight three security points emanating from our report that I believe could give cause for concern and to add to what some speakers have already mentioned. The three points I want to talk about are climate change, the South China Sea, including the Spratly Islands, and cable security.

First, on climate change, which has already been mentioned, witnesses identified the Arctic as a region where climate change may have serious and significant maritime security implications. Paragraph 113 of the report says:

"Climate change is likely to lead to additional maritime security challenges, particularly in the Arctic. We ask that in its response to this report the Government provides us with information about how it is monitoring security-related developments in the Arctic".

Secondly, on the South China Sea, I shall not go into all the details, which have been well rehearsed. However, the challenges come in two main forms: long-standing claims, which are at odds with the principles of the treaty, and new claims by rising powers. These are both exemplified by China's actions in the South China Sea. Evidence suggests it is highly unlikely that China will decide to change its policy of claiming exclusive jurisdiction over the majority of the South China Sea but that it will continue to reject the principles of freedom of navigation and freedom of innocent passage, as outlined by UNCLOS. China's stance poses a challenge to international law. The UK Government should continue to work with their partners and allies to protect and preserve the principles of freedom of navigation, not only in the South China Sea but in every region where it is challenged. I urge the Government to keep an eye on this area to make certain there is no trouble regarding our navigation rights, which, as the Minister knows, are so vital.

Thirdly, on subsea cable security, these cables are a critical element of the UK's, and the world's, communications infrastructure. The report says that

"witnesses added that there is also a 'lack of information sharing on cable breaks' which 'poses a threat to the functioning and security of the global subsea cable system and global connectivity'".

Although UNCLOS places obligations on states to allow for the laying and repairing of such cables, these are not always followed in practice. It is crucial that the laws are clear where responsibilities lie for the maintenance and protection of subsea cables. The international regulatory regime is unclear and this must change, considering their significance. The Government should work with partners and others to address this. The UK should work to improve domestic legislation for cables in the UK's territorial waters, as well as working with partners to strengthen the international regulatory regime. I know HMG take all these matters very seriously—and so they should. We were told that these cables were well protected, but I keep reading disturbing reports.

People in all walks of life, not only those directly concerned, are now beginning to realise the importance that should be attached to the UN Convention on the Law of the Sea. This report is long and complex, covering in detail many different security points. I fear that it may not be widely read cover to cover, so I want to ensure that the Minister takes these three vital security points back to his department: the effects of climate change, the freedom of navigation in the South China Sea and the protection of undersea cables.

*4.16 pm*

**Lord Stirrup (CB):** My Lords, this report makes it clear that the United Nations Convention on the Law of the Sea, and crucially the instruments that fall within its overarching framework, have helped to bring a welcome degree of certainty to the governance of the world's waters, which, of course, cover the larger portion of the planet's surface. It also underscores the ongoing importance of the convention and outlines how it continues to be crucial in addressing a range of important and difficult new maritime issues.

However, at the moment, UNCLOS does not answer all questions, nor does it provide a resolution to all issues. The report highlights the current gaps and challenges that are likely to emerge in the years ahead. As a maritime nation that relies on predictable and equitable rules at sea, it is important that the UK continues to take a leading role in the maintenance and development of UNCLOS and its subsidiary instruments.

At the same time, we must recognise that, no matter what we do, there will be issues that UNCLOS will not—or will not be allowed to—resolve. This is not an excuse for slackening our efforts to strengthen maritime governance, but it is important to recognise the limits of what is likely to be achievable and to think about how we manage the consequent challenges to international order. That is what I will focus on today.

The principal difficulty characterises international law more generally: there is no global government, so international law is essentially what the most powerful members of the international community decide it should be. We should not, therefore, be surprised that

UNCLOS relies on consensus. This of course limits its scope when there is disagreement among the major players in the system, although we should note that, where there is consensus, we tend to get a high degree of compliance. However, compliance can also be a significant challenge. Just as there is no global government, there is no global enforcement mechanism that can be brought to bear on those who contravene international agreements. China's repudiation of the 2016 UNCLOS ruling in favour of the Philippines regarding activities in the South China Sea—already mentioned several times this afternoon—clearly demonstrates the limits of the system.

Today I will highlight two challenges where in future UNCLOS may find itself constrained or even neutered. The first concerns the crucial issue of resource exploitation. The report covers the difficulties in regulating the development of deep seabed mining and fisheries management, but these will be greatly exacerbated by another factor, which is also discussed in the report and has been mentioned this afternoon: climate change.

The availability of an ice-free northern sea route from the east to the west will dramatically increase the commercial viability of maritime exploitation of the Atlantic by powers such as China, and this will have serious implications for fisheries. China's demand for fish far outstrips its current supplies. Once its trawlers can access the Atlantic, we are likely to face a huge assault on fish stocks in that region. When I say "trawlers", I am not talking about the sort of vessels that we can see sailing in and out of Brixham harbour; these are ships that are at sea for six months at a time and operate on an industrial scale.

We are likely to see a similar assault on non-living seabed resources. Despite the recent declarations made at COP 27, to which the noble Lord, Lord Teverson, referred, I suspect that the availability of strategic minerals will be like a magnet to resource-hungry nations, and the scale of China's requirements will drive it to exploit the seabed wherever it can. Indeed, its activities in this regard have more than once been referred to as ocean rape. The International Seabed Authority will no doubt do its utmost to regulate such exploitation, but we have seen with the South China Sea how the PRC reacts to rulings that run counter to what it regards as its national interests. While we should continue to support such international governance mechanisms, we should also prepare now for an ice-free, Arctic route and the challenges this will bring. We should discuss with partner nations how together we might respond to those challenges in cases where international agreements prove powerless.

The other problem I want to highlight, already referred to by the noble Baroness, Lady Rawlings, is the security of subsea cables. The committee's report emphasises their importance. Around 95% to 97% of global communications depend on them, and around 25% of the UK's electricity is delivered through such cables. UNCLOS contains important provisions for their laying, maintenance and repair, but there are no comprehensive rules protecting maritime cables.

The report highlights areas where the UK should work to improve the regulatory environment in this regard, which of course is important. Better domestic legislation and closer co-operation with the International Cable Protection Committee are necessary steps in this regard, but, as with resources, we must recognise the likely limits of international law.

Subsea cables are crucial to our security and prosperity, but at the same time they are vulnerable. While accidental anchoring, fishing and natural disasters are the main threats to those cables in normal times, they are also obvious targets for hostile military action or, in future, for terrorist attack. UNCLOS will be of no help in the face of such risks. We need to develop comprehensive plans for the defence of subsea cables, but we also need to recognise that no defence can ever be perfect. This underlines the importance of developing sufficient resilience to be able to cope with successful attacks on those crucial assets. But that, as they say, is a whole other story.

In essence, the committee's report confirms that UNCLOS, along with its subsidiary instruments, has on the whole been a huge success story, and it goes on to argue persuasively that the UK should work to develop the convention's usefulness in the face of future challenges. I say amen to that, but, as I have argued, we must also be aware of the limitations that are inherent in any aspect of international law, UNCLOS not least, and prepare our responses to the inevitable and serious challenges that will face us as a consequence.

*4.23 pm*

**Baroness Fall (Con):** Last year, our committee decided to put together its considerable brain power and powers of persuasion to seek the wisdom either of experts on the law of the sea or of those who have had to navigate it, such as the noble and gallant Lord, Lord Stirrup, and address whether it was fit for the future. I realise that, to some, this might seem a rather niche topic, especially at a time of geopolitical turmoil—I myself had to google UNCLOS on my lap in the committee, hoping that the noble and gallant Lord did not notice—but it is precisely because so much is in flux that we must seek to protect core elements of the multinational system, the rock on which global peace rests.

During our witness sessions, I was once again struck by what a great privilege it is to work among colleagues in this House. I pay tribute to the secretariat of the committee, which is so dedicated and outstanding, and to the amazing tenure as chair of the noble Baroness, Lady Anelay, which is drawing to a close.

Today I shall focus my remarks on how the rapid changes and complexities of today's world contrive to add pressure to, and potentially render pointless, even the most functional elements of our multinational rules-based system. UNCLOS was a fine piece of work when it was put together 40 years ago, with some 168 signatories, to forge some rules upon the unrulable—namely, the world's oceans and seas. It was a considerable achievement, and still is. First and foremost, it was designed to produce boundaries between states and set out their rights to the waterways and resources around them, along with a dispute mechanism to argue these things out. The fact that there is not a mountain of disputes to date is a testimony to the treaty's success.

However, in reality, out there on the high seas things look a bit less functional. We are told that the seas are lightly ruled by codes around flag states, but

[Baroness Fall]
that practice has been weakened by the overuse of flags of convenience and a lack of enforcement in recent years. In other words, it is more of a free-for-all out there than it looks. What were once gaps in UNCLOS risk becoming gaping holes of lawlessness and potential human misery and exploitation, as well as creating security risks.

Challenges that will quickly turn to threats if we do not address them now include climate change, new technologies, human rights, security of critical infrastructure and the protection of marine environments, to name just a few concerns. Some of those fall outside the existing UNCLOS, and you might say they were not the point of UNCLOS in the first place. However, they should be the point of it now. I shall pick up a few of them in turn.

The first is the impact of climate change, an immediate and devastating effect of which is rising sea levels that threaten to destabilise the intricate set of established entitlements for all but a few landlocked states. We are talking here about national boundaries, and in some cases nations' very existence. Our world's maps are being redrawn and the populations who once inhabited those areas may be forced to seek new homes, no doubt many taking to the sea to do so.

That poses many challenges, the first of which is around existing boundaries. Do we hold firm or reassess? In our report, we recommended that "baselines should remain", which I believe must be correct, at least for now. But for how long is that achievable? That depends on how fast and how defining the changes in sea level become, and only nature has the answer to that.

What of those who are forced on to the sea in search of a new home? That takes me to my second area of concern: human rights at sea, or the lack of them. I shall start with those who labour at sea. We learned that, although they are covered by international human rights law, it is extremely difficult to apply in practice, creating a grey area that allows for exploitation. The problem is likely to worsen with the emergence of a global labour force at sea, mining the seabed or tending infrastructure, who may have little or no rights, living and working in a type of seabound modern slavery. We must address this now. Governments recognise, and therefore must be made to enforce, international human rights at sea before things worsen.

On the issue of migration, we know the challenges all too well as we face our own devastating small-boats crisis. Imagine a world where the high seas are full of people seeking refuge, vulnerable to trafficking and neglect and in mortal danger. Nation states struggling with security issues and domestic political pressures seem to have difficulty finding solutions to this issue. These are complex global issues which require multinational solutions and political will to resolve.

Lastly, I turn to a set of issues that loosely fit around security. In an age of increasingly limited resources and new technologies, the deep sea poses both opportunities and new challenges. We have talked of the deep seabed providing new resources, but that needs to be managed so we do not have a free-for-all. We have also talked about subsea cables, which are highly vulnerable to attack, as we saw just recently with Nord Stream.

There are national security issues, as others have mentioned, with navigation and rights of passage in relation to rising sea levels. We see that emerging in the Arctic, and we are aware of the very real issue in the South China Sea.

It is up to all of to protect our precious maritime environments, but under whose auspices is that to be achieved? I commend the Blue Belt Programme, which has been a great success, but we should be doing way more.

We have always prided ourselves on being a great maritime power with a strong global footprint. We must leverage that now as a global convener, to address the important issues around national security, human rights, asylum and nationhood as well as the sustainability of our oceans and seas. The challenges of a rapidly changing geopolitical landscape means that UNCLOS is likely to be irrelevant to the challenges that face us unless we act. We must bang heads together, literally, and think holistically to seek global solutions. We have found that, where there is political will to solve a problem, there is inevitably a way.

*4.30 pm*

**Viscount Waverley (CB):** My Lords, I identify with much of what the noble and gallant Lord said, and I congratulate the noble Baroness, Lady Anelay, and her committee. I should reflect on the committee's first conclusion that

"Enforcement is a weakness of international law",

which I will build into my principal remarks on Russia, China and NATO, including the United States, on matters Arctic.

I will refer to practical challenges on the excessive claiming of maritime zones, given legal problems with UNCLOS permitting states to claim or designate exclusive economic zones—EEZ status—around uninhabited islands and rocks, thus extending territorial rights. Notwithstanding the Philippines-China case study, and China building rocky outcroppings into major installations, with airfields in the Scarborough Shoal, this establishes a quandary on how international law will adapt when islands must be above high tide and when the sea level rises through climate change. Does the state lose EEZ status if an island is submerged or is the reality, in practice, that a ruling against yields little or no practical effects, with limited arbitration processes to adjudicate on the question of propriety on "that rock", in terms of claiming it to be an exclusive economic zone? This requires examination.

More generally, is it the case that domestic law must incorporate international law to take effect and so have legitimacy? How does the United Kingdom view international law and are all NATO countries aligned? Do China and Russia recognise the provisions of UNCLOS?

In this challenging year of global power competition, this report on the law of the sea correctly surmises that the Arctic shipping route along Russia's northern coast—commonly referred to as the northern sea route, or NSR—has long-term security implications. President

Putin attaches enormous significance to the NSR and the economic development of the Russian Arctic. As a petrostate, many of Russia's remaining oil and gas prospects lie in the Arctic, along with significant minerals and other resources. For the Kremlin, energy is bound up with Russian national security and is a principal means of projecting influence abroad; it is deemed to have become strategic in the post-2020 framework, as global competition for resources and markets intensifies.

Putin has also ordered that shipping along the NSR reach 80 million tonnes by 2024, from 30.5 million tonnes in 2019. If fully realised, the vision of the Russian Arctic would be a string of resource hubs producing oil, gas, coal and minerals, linked by a vibrant international shipping route that could take resources west to Europe or east to Asia, as the geopolitical and economic winds blow. Russia has formally designated the waterway that runs from the Kara Sea in the west to the Bering Sea in the east. Along the way, the NSR runs through several straits separating the Russian mainland from adjacent islands—Novaya Zemlya, Severnaya Zemlya and the Novosibirsk islands. The Soviet Union drew straight maritime baselines around these archipelagos, enclosing them and declaring the adjacent straits to be internal waters; in making this an internal waters designation, the Soviet Union relied on UNCLOS language on "historic title".

Here is the difficulty: Arctic waterways have not historically been used for international passage, given their frozen condition. This legal argument is therefore time-sensitive, as navigation is increasingly practicable. The Soviet Union also pointed to UNCLOS Article 234, which grants coastal states special abilities to manage ship traffic in ice-cold waters—another legal base that may be eroding in the Arctic. Here and now are important, but it is the potential quandaries 10 years down the road that make long-term policy decision-making—including on considerations of access to Arctic natural resources, be they fisheries, mining, or oil and gas reserves—essential and political.

The Russian Arctic is already responsible for roughly one-quarter of Russian GDP and the importance of the region will only grow. Given this, the region is of core national importance to Russian leadership, and it is no surprise that the Russian military has been arming it.

Russia has military components in the Arctic—including longer-term play by China, to which I will refer in a moment—and security interests. It has established a military presence there. There is increased aeronautical traffic, including in recent years the installation and refurbishment of advanced radar systems, airfields, small bases and air force missile systems, and Russian strategic capabilities on the Kola Peninsula—the major concentration on the western side of the NSR—have advanced.

Then there is China's increasingly ambitious current activity and plans in the Arctic. We should not lose sight of the fact that China was a related signatory as far back as 1925 but, not wishing to be left out, it has recently opened its first scientific research station in the Arctic, because of its economic value. This coincided with China's first Arctic policy White Paper in 2018, outlining its polar silk road plan and defining China as a near-Arctic state.

Should China's interests be viewed as an opportunity or a threat? It is important to understand the drivers behind its ramping up of activities in the region, particularly in the shaping of economic development, with the NSR opening a new sea lane with a seven-day sailing time from Shanghai to New York.

It is significant that the war in Ukraine has significantly depressed shipping along the NSR, in particular by foreign vessels, with China's main shipping company, COSCO, sending zero vessels through the NSR in 2022. It is unclear to what extent China's interests are a larger strategic play, and to what extent it is being fully transparent. It is clear that China intends to be involved in the governance of the Arctic, with the introduction of the new polar code.

It should be on record that China is interpreting the Arctic and South China Sea issues in different ways, with the core differentiator being sovereignty, and the Arctic being about access. China says that it wishes to enter into strategic and economic partnerships with Arctic and non-Arctic states in new ports and communication infrastructure, thus expanding its belt and road initiative. This has relevance when considering global supply chain issues.

What of the response and strategy by NATO, and particularly the United States, the Arctic Council and observers such as the United Kingdom in all this? Are we to abide by international laws and norms? The Arctic has always had a strategic relevance for NATO as the gateway to the north Atlantic, with the hosting of vital trade and communications links between North America and Europe, so ensuring that the Arctic remains free and open must surely be a priority. However, the United States contests the Soviet—now Russian—designation of the straits along the NSR as internal waters, so the question remains whether the US and UK should conduct a freedom of navigation operation in the Russian Arctic, as has emerged in recent years in conjunction with tensions with Russia.

There are, however, important legal and operational questions about the particulars of the NSR, and the prospect of a FONOP is questionable. An added wrinkle is presented by Canadian claims in the Northwest Passage, which closely mirror Russian claims in the NSR. The United States deems both sets of claims excessive. Therefore, Russia's NSR presents a set of diplomatic challenges to policymakers from a freedom of navigation perspective. I am curious to hear from the Minister the thinking behind what rights non-Arctic stakeholders have—or will have.

If all that was not enough, the list of factors goes on, with the critical undefined climate considerations that could haunt the generations to come. As a whole, the Arctic region is warming faster than any other part of the globe. For example, the Norwegian islands of Svalbard have already warmed 3 degrees centigrade since 1979. The Barents Sea subregion is warming especially quickly, in both air and sea temperatures.

One practical impact of this warming is that the Northern Sea Route is now ice-free for a longer period each year. However, it is important to note that the NSR is frozen in the winter, and the spring and fall "shoulder seasons" are unpredictable. In 2021, more than 20 vessels in the NSR were trapped in ice when an early freeze-up took shippers by surprise.

[Viscount Waverley]

What is the strategy on the development of deep-water ports, search and rescue issues and oil spills? How do the complexities of the mandatory provision for all ships to be escorted by Russian icebreakers play out? A crucial question is what the role and purpose of the Arctic Council moving forward will be. As and when the Arctic moves up, there will be a probability of more states wishing for recognised observer status, which may entail Chinese push-back. Could or should the council's role be better defined—questioning the overall effectiveness of UNCLOS, with the need to strengthen it more generally?

*4.40 pm*

**Lord Collins of Highbury (Lab):** My Lords, I too thank the noble Baroness, Lady Anelay, for her introduction to this debate and her excellent chairmanship of the committee. This has been a really interesting debate. I suspect that we all started by thinking, "What do we know about international maritime law?", but when we think about it, we have all had experience of it. United Nations conventions are a crucial part of the international rule of law. As the noble and gallant Lord, Lord Stirrup, said, it relies on countries taking responsibilities seriously for that to work.

Given the UK's maritime history and our special relationship with the International Maritime Organization—as the noble Lord, Lord Teverson, reminded us, it is just across the river—we should be ambitious about the role we can play in shaping the law of the sea to reflect our values. As the noble Baroness said in her introduction, we have had UNCLOS for four decades, which has provided a stable framework for the governance of global waters. However, there are clear shortcomings to its relevance and application today.

We face new challenges and threats. Recent events in the Black Sea have shown how vital it is that, in an increasingly uncertain world, our seas are underpinned by international law and co-operation, rather than conflict. We have seen how grain ships to Africa can end the threat of starvation. It is vital that we focus on those broader issues. I want to emphasise that it is right that the Government's *Maritime 2050* strategy from January 2019 committed to monitoring contraventions of UNCLOS and to

"deter acts of aggression and mitigate increasing nationalist agendas by supporting rules-based norms".

However, that is easier said than done.

As we have heard in this debate, China, for example, has taken increasingly aggressive steps to bolster its claims to the South China Sea and interfere with established trading routes. It has refused to participate in UNCLOS arbitration. I am pleased that the United Kingdom Government remain committed to UNCLOS and the International Maritime Organization, but we need more than warm words; they must provide the necessary resourcing and capabilities.

Given the recent introduction of sanctions against Russia, the Minister will know just how vital the role of the IMO is in sanctions enforcement. That role has been recently extended and expanded. Can the Minister explain how the department is working with the IMO as part of its development of sanctions?

UNCLOS and the IMO have also played an important role in the fight against piracy, including in the Strait of Hormuz, Gulf of Guinea, and the Gulf of Aden. The Government's integrated review—which I know is being reviewed—pledged to contribute to wider maritime security, including tackling the kind of piracy I have just referred to.

I suspect that if my noble friend Lord West was here, he would be focusing on our ability and capability to keep to the commitments we have made on maritime security. We contribute almost 2,000 civilian seafarers on the Royal Fleet Auxiliary. I hope the Minister can tell us what assessment the Government have made of whether we are making a sufficient and appropriate contribution.

My contribution this afternoon will focus on the issue of human rights and workers' rights. I must declare an interest in that I spent my working life with the Transport and General Workers' Union. It was one of the biggest affiliates of the International Transport Workers' Federation which, certainly for the whole time I worked for the union, was focused on how to enforce international rules and obligations on shippers. Action was taken by members of the International Transport Workers' Federation to try to stop ships leaving port which did not comply with the rules. In recent times, we have seen the scandal of P&O Ferries sacking 800 ferry workers to replace them with agency workers, which highlights some of the poor regulation in the shipping industry for workers. I have had direct representation from organisations representing seafarers. I noticed that Nautilus International is engaged; the RMT has also raised issues, as has the ITF.

As we have heard in this debate, unfortunately, "innocent passage" is too often relied on by rogue employers to employ cheap migrant labour, even on routes that do not pass through international waters. This includes Dover-Calais, which is 21 miles, as we all know, and others that call at UK ports. UNCLOS should never be misinterpreted as the reason to exploit seafarers' terms and conditions of employment.

I welcome what the noble Baroness said about the Government's commitment to reviewing the 1986 convention. I want to focus on the ILO's Maritime Labour Convention as well. In their response to the committee's recommendation in paragraph 214 of the report, the Government say that they share

"the concerns of the Committee regarding … forced labour and other labour exploitation abuses of those working at sea."

They say that they believe that

"the Maritime Labour Convention, 2006 and the ILO Work in Fishing Convention, 2007 (No. 188) provide an effective framework to identify such abuses through port State control",

and they talk about how the Maritime and Coastguard Agency inspections under these conventions ensure that relevant enforcement agencies can address these issues. ILO 188 does not exclude small vessels; indeed, it explicitly

"applies to all fishers and all fishing vessels engaged in commercial fishing operations."

Some more detailed provisions are aimed at larger vessels, but the general provisions apply to all. We have had representation from those unions about the exclusion of fishers.

The Government say that

"Members may, after consultation, exclude 'limited categories of fishers or fishing vessels' from the Convention where 'special problems of a substantial nature' would be caused by application of the Convention."

However, the Government's response does not give us any assessment of how that operates and how extensive it is. I hope that the Minister can assure us about that this afternoon and give some details about how those exemptions may apply. I have certainly had representations saying that we need to do more to protect fishers—particularly workers on platforms, which we have not addressed in detail today.

I want to pick up the point about climate change. I welcome the focus on that issue in the report. We now have an established international consensus that domestic and international shipping must decarbonise. The Clydebank declaration at COP 26 commits the UK and 19 other countries to developing green shipping corridors on international routes. That was further developed at COP 27 with the announcement of the agreement between the UK, the USA, Norway and the Netherlands over the development of decarbonised shipping lines. I hope that the Minister can give us an assessment today of whether UNCLOS and the IMO can support the implementation of that agreement and make sure that it reaches the targets it sets itself.

I very much welcome the report. It highlights how valuable our select committees are in focusing on issues that we would not necessarily see debated in the Chamber but are vital when it comes to our future security with regard to both defence and security and the issue of climate change, along with our obligations under the SDGs, which we need to focus on even more. It is an excellent report and I look forward to hearing the Minister's response.

*4.52 pm*

**The Minister of State, Foreign, Commonwealth and Development Office (Lord Goldsmith of Richmond Park) (Con):** My Lords, I thank my noble friend Lady Anelay for tabling this debate and the committee for its excellent work. I understand that we may be interrupted by a Division. We will come back to whichever point I get cut off at, if that happens, but I will try to progress as much as I can before that.

A lot of questions have been asked and a lot of points made, all of which have been noted. I will do my best to provide as much of an answer as I can, but I hope noble Lords will be indulgent, given that to do so comprehensively would take us into the early hours. I will cover as much as I possibly can.

We welcome this inquiry, for all the reasons that have been acknowledged by the speakers in this debate. I thank all noble Lords for their consideration and their insightful contributions. This year, as has been noted, marks the 40th anniversary of the UN Convention of the Law of the Sea, so this is a timely debate as well as an important one. Throughout the inquiry, including in my evidence to the committee, I have explained how the convention has benefited the UK and the wider international community. I have also noted the challenges that exist in implementing it and the action that the UK is taking.

Because of the time allowed for the debate, I will not deal with all the committee's conclusions and recommendations now, although I have done so through various bits of correspondence with the committee. I shall touch on some of the key points and ancillary points that have been raised in the debate. As has been acknowledged, UNCLOS is a major achievement of diplomacy and international law. It provides a detailed codification of the law of the sea. With 168 state parties, it has made a significant contribution to global peace, prosperity and security by providing a comprehensive framework for the governance of the ocean.

The UK has directly benefited in numerous ways, not least with regard to maritime boundaries with neighbouring state, both domestically and through our network of overseas territories. UNCLOS also provides a framework to co-operate with our neighbours on resource management, tackling crime and protecting the environment—all points that have been raised by numerous speakers in today's debate.

UNCLOS freedoms have enabled us to conduct marine scientific research around the globe. Those freedoms also enable the transport, communications and energy connections between nations that underpin both the UK's and the global economy. The UK is an active state party to UNCLOS. We are strongly represented on key bodies, including the International Maritime Organization, the International Seabed Authority, the Intergovernmental Oceanographic Commission and the International Hydrographic Organization. UNCLOS therefore provides a clear, comprehensive framework within which states are able to co-operate.

I want to look at some of the challenges that we and UNCLOS face. As the committee has recognised, attempting to renegotiate UNCLOS would—I will come back to these arguments in a few moments.

*4.55 pm*

*Sitting suspended for a Division in the House.*

*5.05 pm*

**Lord Goldsmith of Richmond Park (Con):** As the committee recognised—a number of noble Lords have made the point as well—any attempt to renegotiate UNCLOS would not attract support from many states and would risk undoing the really delicate balance that has been struck in the existing text as well as many of the benefits we currently enjoy. Where matters require further legal rules, it has been shown that this can be achieved by negotiating supplementary implementing agreements to UNCLOS, or through additional agreements that rely on the framework provisions of UNCLOS.

A number of speakers, including my noble friend Lady Anelay, have raised a question that was in the committee's report as to whether we support a unified approach to human rights at sea. The Government clearly share the committee's concerns over the many instances of human rights abuses at sea—we have heard some of them today. It can be challenging to uphold these rights for those working away from home. Incidents at sea are often invisible to authorities ashore and there are jurisdictional complexities, which have been noted. We recognise that these abuses are often

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linked with a broad range of troubling issues, such as modern slavery, drug trafficking, poor working conditions on vessels, crimes on ships and piracy, which the noble Lord, Lord Collins, referenced.

The noble Lord, Lord Collins, and the noble Baroness, Lady Goudie, raised another issue around our broader responsibilities for seafarers' living and working conditions under our flag and in our ports. The UK is working with international partners and all the relevant international organisations to improve health, safety and living and working conditions for seafarers.

As the committee identified, some flag states are unable or unwilling to properly exercise oversight over ships entitled to fly their flag. This obviously poses a serious challenge for maritime security and law enforcement on the high seas. UNCLOS is very clear; it requires there to be a "genuine link" between the flag state and ships flying its flag. It also requires a flag state to

"effectively exercise its jurisdiction and control in administrative, technical and social matters".

We and a number of the overseas territories and Crown dependencies operate ship registries and co-operate within the framework of the Red Ensign Group to ensure that these registries maintain the highest international standards. The UK and the Red Ensign Group recently passed an audit by the IMO. We continue to champion safety, security and working conditions at an international level, working with partners and drawing on the capabilities of our agencies, such as the Maritime and Coastguard Agency. We continue to improve understanding and robust enforcement of flag state duties and responsibilities. We continue to push for new standards to improve safety, security and working conditions right across the maritime sector globally.

Alongside that, I welcome the committee's recommendation for strengthening port state controls. It was a point made by the noble Lord, Lord Teverson—in fact, he has made it to me a number of times in previous debates—and the noble Lord, Lord Collins. The UK takes this responsibility very seriously. Over the last three years, we have inspected nearly 3,500 ships, and 96 of them were detained for violations of the International Safety Management Code.

Equally seriously, to prevent illegal, unreported, unregulated fishing catches from entering our supply chain, the UK is one of 100 states—I said that as if it were a big number; it is not a big number—to have endorsed the agreement on port state measures, a key international framework for the prevention of IUU fishing. Clearly, 100 states is not nothing, but it is not nearly enough. This is something that really needs to become ubiquitous if we are to close the loopholes that allow illegal fishing to flourish in the way that it does.

As an aside, at the UN Ocean Conference in Portugal, I spoke to the Prime Minister of the Cook Islands, who told me that four in every five fish caught in his country's waters are stolen. You can imagine what that means in terms of revenue for a small-island state of that sort. The same is true right across the Pacific. Even large countries such as Indonesia are finding it almost impossible to deal with IUUs, so you have no hope if you are a small-island state in the Pacific or the Caribbean.

Where there are disputes, we urge parties to settle them through peaceful means. This includes using existing legal mechanisms, particularly those established by UNCLOS. Coercive activities in the South China Sea, cited by a number of speakers, directly undermine and are at odds with the principle of freedom of navigation provided for in UNCLOS. The UK is committed to international law, to the primacy of UNCLOS, and to freedom of navigation and overflight. That is as true in the Arctic as it is in the South China Sea and everywhere else. The UK takes no sides in the sovereignty disputes, but we have regularly raised concerns with China over its conduct in the South China Sea.

The Government share the committee's views on monitoring carefully the development of maritime autonomous vehicles. We instigated a regulatory review to address, among other things, security concerns raised by autonomous technologies and implications for their use by organised criminals and other malign actors. We share the committee's praise for the Royal Navy's work to determine how maritime autonomous vehicles fit within the existing legal regime. The UK will continue to work with our partners and take a lead at the IMO to develop regulations to govern maritime autonomous vehicles within the framework of UNCLOS.

A number of noble Lords mentioned one of the consequences of climate change: the effect of rising sea levels on small island and coastal states. The Government acknowledge the committee's concern about the potential impact of sea level rise on determining maritime zones. As the Grand Committee will understand, this is a complex matter that will affect all coastal countries, particularly vulnerable small island developing states. We are continuing to review this issue with international partners. I have discussed it many times with representatives from small island developing states, particularly in the Pacific, who are asking the international community to engage on this issue. We are doing that, but it is complex, as has been noted.

We continue to work with the SIDS, or small island developing states, to drive global ambition more generally on emissions reductions and support adaptation and mitigation. It was the passion and moral authority of the small island developing states that enabled us to go further at COP 26 than we otherwise might have been able to go. The UK Government have a number of programmes helping SIDS to strengthen their resilience to climate change. That includes the £36 million sustainable blue economy programme, dedicated to supporting resilient ocean economies and marine environments under the flagship Blue Planet Fund. My noble friend Lady Fall talked about the blue belt, but there is a link. The Blue Planet Fund is our relatively new £500 million fund. It has a very broad remit and is doing excellent work, thanks to colleagues in both Defra and the FCDO. Many programmes are developing under the Blue Planet Fund, but some are designed to contribute also to our international development strategy vision to see SIDS achieve economic and climate resilience by 2030.

In response to my noble friends Lady Rawlings and Lady Fall, and the noble Baroness, Lady Goudie, on climate change, COP 26 undoubtedly raised the profile of oceans within the context of climate. We established the link between nature and climate more generally. We made it clear, and I think it is accepted, that there is no solution to climate change without nature; there is no net-zero plan that is credible unless it has nature at its heart. That is true of the terrestrial environment; it is true even more so probably of the ocean environment, for all the reasons cited by the noble Lord, Lord Teverson. We raised the status of oceans significantly. That was continued at COP 27, where the Glasgow legacy was cemented. We welcome the progress that was made on that under the Sharm el-Sheikh implementation plan.

A particular focus of COP 27 was on the need for more investment in nature-based solutions to climate change, in recognition that ecosystems such as mangroves, seagrass and sword-grass—and coral reefs as well—are crucial for not only mitigating climate change but adaptation. We have seen some really ambitious programmes around the world that respond directly to the threat of the reality of climate change today and are manifesting in nature-based solutions. Indonesia is planting 600,000 hectares of mangroves—probably the most ambitious coastal restoration programme in the world—and it is doing it, not just talking about it. When Colombia was hit by record storms two years ago, it was noticed that the communities where the mangroves and coral reefs had been degraded were destroyed by the storms, whereas those communities which still had mangroves and coral reefs were battered but not destroyed. As a result, an incredibly ambitious programme of restoration of coastal ecosystems has begun, as a protection or insurance against continued escalation and change.

I will not talk about the blue belt, because my noble friend Lady Fall has already mentioned it, other than to say that it is genuinely one of the great stories of conservation in my lifetime. We now have over 4.5 million square kilometres of extraordinarily valuable and unique ecosystems fully protected, as a consequence of the work of our wonderful overseas territories. It really is a wonderful programme and to those who are not aware of it, I say please look into it, because it is not discussed enough. I think it is a wonderful thing and a source of real pride for the UK.

The noble Baroness, Lady Anelay, and a number of others raised deep sea mining. This, too, is an emerging and undoubtedly very real threat to the marine environment. As your Lordships would expect, we are fully engaged in the ongoing negotiations at the International Seabed Authority with respect to deep sea mining. I note the comments of the noble Lord, Lord Teverson, about the French position. In fact, there was a bit of a wobble there: he might remember that at the Portugal summit there was an announcement that it would push for a moratorium, which was then reversed. Thankfully, the position was reinstated more recently in the run-up to COP 27, so I and the UK Government welcome France's position.

Like many here, I suspect, I would prefer to see no deep sea mining at all. The risks are immense and the effect of pollution or things going wrong when you explore in the way that deep sea mining would involve could be catastrophic. We know that pollution travels in a particular way in water, and that the effects are much greater than on land. This is a genuine threat that has not been taken sufficiently seriously.

Our formal position in the UK is that we will not sponsor or support the issuing of any exploration licences for deep sea mining until and unless there is sufficient scientific evidence about the potential impact on deep sea ecosystems, as well as strong and enforceable environmental regulations, standards and guidelines that are meaningful and will provide the kind of genuine protection necessary. We do not use the term "moratorium" but that is the effect of the policy which we stand on. The bare minimum is a position which says, "No action until we are absolutely sure we can do so safely". It may be that we can never do so, and that science comes about and tells us that we simply cannot engage in deep sea mining in a way which is responsible, in which case our position must reflect that. I suspect that it will be another Minister standing here by the time such a decision is reached, but my view is that we must maintain the precautionary approach we have at the moment.

The UK Government have commissioned an independent peer-reviewed report by experts from the British Geological Survey, the National Oceanography Centre and Heriot-Watt University, which was published on 31 October this year. Defra, FCDO and JNCC officials have recently returned from the ISA Council negotiations in Kingston, Jamaica, where progress is being made. We are working closely with international partners to ensure the highest environmental standards are embedded in the regulatory framework of the ISA, with the view to those regulations being adopted some time in the middle of next year, if they are agreed.

I move on to an issue raised by a number of speakers, including my noble friend Lady Anelay, in her opening speech, and my noble friend Lady Rawlings: biodiversity beyond national jurisdiction. The UK is clearly pushing hard for an ambitious agreement, and we want it to happen as soon as possible. The UK played a key role in the recent intensive negotiations in New York with a view to reaching this agreement. I pay tribute to our officials, who did a phenomenal job.

At the UN Ocean Conference in Lisbon in June, with their help, I brought together key Ministers to try to find a way forward on the tricky issue of monetary benefit-sharing linked to marine genetic resources. The idea there was to talk to some of the developed countries and persuade them to be a little more relaxed about their red lines. You can debate for a thousand years but, if your red lines never move, the debate becomes almost impossible. I think we did move some of those countries and, with the UK in the driving seat, were able to craft an offer to developing countries that is being taken seriously.

We also led work on MPAs, with WWF and other key delegations, by brainstorming ideas and co-chairing discussions during the negotiations to ensure that we achieve more than just "paper parks". We will continue to bring together delegations and interest groups to help achieve consensus before the formal negotiations resume in February 2023. This is a priority for us. We recognise that the UK has done a lot of work drumming up support for the 30x30 target, which I hope will be

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agreed in Montreal in a few weeks—protection for 30% of the world's land and ocean by the end of the decade. If we agree it but fail to agree the ambition at the level of biodiversity beyond national jurisdiction, we cannot deliver 30x30, because it is necessary to deliver much of that protection target by protecting the high seas.

If I have time, I have one further point in response to my noble friend Lady Rawlings and others on security in the Arctic. Global warming is clearly causing numerous profound changes, specifically and disproportionately in the Arctic. Melting sea ice is opening up new sea routes which, in turn, create opportunities for exploitation that were not there formerly. It would be wrong not to recognise that those opportunities exist but, equally, that opening up these routes also creates the possibility of extreme exploitation of the sort articulated by the noble and gallant Lord, Lord Stirrup, on illegal fishing and the ravages that can be caused by some of the gigantic floating factories that he described.

We are committed to supporting our allies and partners through the appropriate regional forums, such as the Arctic Security Forces Roundtable, where we share information on the changing environment, improving collective awareness and deconflicting activity in the Arctic. We are looking for opportunities for continuous further co-operation.

In response to the noble Viscount, Lord Waverley, on Russia, we continue to monitor closely and assess the approach adopted by both Arctic and non-Arctic states including Russia—not least its military postures and any activity that violates international norms and agreements, such as UNCLOS.

A number of speakers asked me to talk about subsea cables. I just point to the first government response to the committee—I am afraid that I do not have the date—where there is a fair bit of information on this issue and the Government's position on protecting those cables. Needless to say, like the committee, we regard undersea communication cables and infrastructure generally to be critical to national and international connectivity and security. I very much share the concerns noble Lords raised.

To conclude, the International Relations and Defence Committee's report makes a valuable contribution to an enormously important topic. We welcome the committee's scrutiny of our approach to UNCLOS and the suggestions and ideas within the report. I once again emphasise my thanks to my noble friend Lady Anelay for tabling this debate and to noble Lords for their contributions.

*5.23 pm*

**Baroness Anelay of St Johns (Con):** My Lords, I thank everybody who has participated in this debate. My noble friend Lady Fall made the point that some may think this is a niche subject; it has proved to be anything but. I will let colleagues into a little secret: I do not decide what an inquiry is to be on. I put together a list, with the help of colleagues. I ask them to volunteer suggestions, the secretariat comes up with suggestions, then I ask colleagues on the committee to give two votes for their first choice and one for their second. The result was a 90% decision in favour of an inquiry on UNCLOS. At the time, this was a surprise to some outside our committee, but our committee then proved that it was absolutely the right thing to do because, as noble Lords have said, we face tremendous challenges on the high seas and on waters everywhere with regard to security, climate change and human rights.

I thank the Minister for some of the updates he has given today. Clearly, we need to consider our future response regarding the security of subsea cables far more, an issue on which we took evidence but that is now front and centre of security threats across the Atlantic. We have seen alleged Russian mischief with regard to gas pipelines. It is not only cables and pipelines; there are many aspects of security at sea that threaten not only our physical but our economic security.

We recommended that the Government should not renegotiate. I agree entirely with the Minister: if that happened, it is likely that there would be no agreement. Sadly, I think of human rights issues and gender equality in that regard, in this period of 16 days of trying to end violence against women and girls; I do not think the Beijing agreement would have a hope in hell of being agreed today, so thank goodness it is there.

As noble Lords have made clear throughout, in order to have enforcement, you need multilateral agreements. One problem is that when China gets involved in multilateral negotiations, it likes to drive the definition. Throughout all the discussions, whether at the United Nations or elsewhere, it is clearly trying to steer the rest of the global community away from what has been a view of compliance with international law and international humanitarian law. It is trying to redesign that. That is where the UK needs to ensure that its voice, which has been loud, continues to be so and continues to be heard. There is much that the UK can do, and it can do it not only as a Government but with the assistance of experts. I point out that our inquiry drew attention to the fact that there are British experts, whether they be judges or academics, who can make a real contribution to international knowledge and agreement.

I am grateful to those who gave evidence to us because they pointed the way. We followed. We then made sure that we analysed that with the help of the inestimable ability of our secretariat, and we put the report before your Lordships today. I beg to move.

*Motion agreed.*

## Technology Rules: The Advent of New Technologies in the Justice System (Justice and Home Affairs Committee Report)

*Motion to Take Note*

*5.28 pm*

*Moved by* ***Baroness Hamwee***

That the Grand Committee takes note of the Report from the Justice and Home Affairs Committee *Technology rules? The advent of new technologies in the justice system* (1st Report, Session 2021–22, HL Paper 180).

**Baroness Hamwee (LD):** My Lords, I am delighted to move this Motion and I hope the Grand Committee will support it.

This is the first formal report of our committee, which was formed in April last year. At the start, our members knew little about new technologies—I hope I am not being unkind to any of them. After some tuition, we confessed ourselves terrified, but we should not have been terrified about not understanding technologies; in a way, that is the point. The report is about new technologies and how they affect the citizen in the justice system. We looked largely at policing because that was where the evidence led us, but our recommendations have wider application.

Quite early on I asked, rhetorically, "How would I feel if I was arrested, charged, convicted and imprisoned on the basis of evidence I did not understand and could not access?" Towards the end of our work, another member said, "Look at Horizon and the Post Office; look at what happens when you assume the computer is always right".

We heard about the software and tools used to record, store, organise, search and analyse data, and those used to predict future risk based on the analysis of past data. Predictive policing includes identifying, say, an estate where there has been a lot of crime, putting police in and detecting more crime than in an area that is not overpoliced. The data reflects this increased detection rate as an increased crime rate, and that is embedded in the next predictions. It is a vicious circle which, as a witness said, is

"really pernicious. We are looking at high-volume data that is mostly about poor people, and we are turning it into prediction tools about poor people."

The noble Lord, Lord Blunkett, who had hoped to speak this afternoon but, given the change of time, has a clash and apologises for not being here, asked me to say the following:

"It is critical that the substantial issues addressed in the report are confronted before major problems arise, rather than because of them. The wide-ranging implications for the operation and therefore the credibility of the criminal justice system, and the unanimity supporting the committee's findings, require something better than kicking the can down the road or believing that the present architecture can handle the growth and significance in the use of artificial intelligence."

I heard a murmur of support when I was reading that, but I will continue even though it pretty much says what I will say over the next few minutes.

The "something better" includes welcoming innovation and regulating it appropriately. The issues are difficult, but the point was not to put them in the "too difficult" tray. I believe that the report answers the not unexpected concerns that we must not stifle innovation, that each police force should be free to take its own decision and that police and crime commissioners must ensure compliance with human rights.

Proposing regulation often raises hackles, but it is another way of requiring standards to be met. Standards are a good thing—in themselves and because something known to meet agreed standards is more likely to be trusted. For example, standards can ensure, to the greatest possible extent, that conscious and unconscious bias—such as racial bias in stop and search tools—is not baked in. That is to the benefit of the producer as well as others. In other words, standards support innovation.

Procurements deserve a lot of attention. A police officer procuring a product can be vulnerable to an overenthusiastic sales pitch—we heard some horror stories—or a one-sided contract. I would have loved to see a form of contract, for instance, about the ownership of data, both input and output. Does the commercial producer of the programme own it? It is a big question, which makes one wonder about data inadequacy, but I will not go there this afternoon. We were not able to get hold of a form of contract: commercial confidentiality gets in the way.

National standards would include requirements in respect of reliability, accuracy and performance in the context of their use, evaluation, validity, suitability and relevance. It is very worrying if standards are regarded as a threat.

We heard a lot about the independence of police and crime commissioners, and that PCCs and chiefs ensure compliance with human rights. I heard that as overdefensive. Of course each force should pick products to suit its local needs; there are 43 forces applying the same law. By analogy, the BSI kitemark is in common use for many products in other sectors—in other words, certification. The police could have a choice among certified products. That would not preclude them picking products to suit their own local priorities. Operationally, this would not mean that the police do not have to assess both the necessity and proportionality of each deployment.

This is all part of governance. The point was made more than once, including by government: "You can always go to court to sort things out", but the courts' role is to apply the law, and nothing goes to court unless someone takes it there. That needs determination, emotional energy and money. By definition, the judgment will not be a comprehensive assessment nor a systematic evaluation.

In a similar vein, the Minister said to us that Parliament is the national ethics body—to be fair, I think that was a throwaway line—but I doubt that we are qualified for that. However, Parliament has a role in establishing a national body: independent, on a statutory basis and with a budget. We think there should be a single national body. Our report lists 30 relevant bodies and programmes. That makes for very complicated governance.

There can never be a completely one-stop shop, but that does not mean that simplification is not needed. It is not surprising that there is confusion as to where to find guidance. The committee recommends a body where all relevant legislation, regulation and guidance are collated, drawing together high-level principles and practice. Primary legislation should be for general principles, with detailed regulation setting minimum standards—not so prescriptive as to stifle innovation, but recognising the need for the safe and ethical use of technologies. We recommend the use of statutory instruments, despite the procedural drawbacks with which your Lordships are familiar, as a vehicle for regulations and a basis for guidance, with scope for non-statutory guidelines.

[Baroness Hamwee]

To assess necessity and proportionality, we need transparency. A duty of candour is associated more with the health service, but we urge the Government to consider what level of candour would be appropriate to require of police forces regarding their use of new technologies.

We also recommend mandatory participation in the Government's algorithmic transparency standard—currently, it is voluntary—and that its scope be extended to all advanced algorithms used in the application of law which has implications for individuals. This would in effect produce a register, under the aegis of the central body. I understand that the Information Commissioner's Office and Thames Valley Police, and no doubt more, are involved with the standard, and there is clear wish to link compliance with it to processes to improve technology and to enable police to exchange information about what works and what does not. There is a wish too to link it to independent oversight.

Ensuring the ethical use of any tool is fundamental. That has to be integral to the use of the tool, as we have seen with live facial recognition and the London gangs matrix, whose review apparently led to the removal of the names of some 1,000 young black men. The West Midlands Police are leaders with their ethics committee, both in having it and in how it is used—I have been very impressed by what I have heard and seen of its operation. There are similar bodies in a few, but only a few, other forces. If we get the standards right, the tools will be better trusted, by the citizen and the police themselves. That will free up police resources.

Current legislation provides that a person shall not be subject to

"a decision based solely on automated processing, including profiling, which … significantly affects him."

The then Home Secretary assured us that decisions about humans would always be taken by humans—a human in the loop—but clicking a button on a screen is not enough when one starts from the mindset that "the computer is always right". We agreed with the witness who said that the better way is that the machine is in the loop of human decision-making.

Does the human understand what it and he are doing? "Explainability" is essential; I had not come across that term before, but it seems to be used a lot in the sector. It is essential for the user, the citizen affected and everyone else. If the police officer does not understand the technology, how can he know if he—or it—has made a mistake? A critical approach in the best sense is needed.

The *Sunday Times* recently reported on new AI which will detect sex pests and thugs on trains who intend to assault rail passengers. It said:

"When a woman is sitting on her own in a carriage with empty seats, it could also assess whether she feels threatened when a man comes to sit down next to her or whether she welcomes his presence."

There is no hint there might be some fallibility in all this. With all of this, noble Lords will not be surprised that we identified a lot of training needs.

We received the Home Office response to our report in the summer. I wrote on behalf of the committee to the then Home Secretary that we were "disheartened"—the best term I felt I could use courteously—by the

"reaction to what we hoped would be understood as constructive conclusions and recommendations. These are very much in line with the recommendations of other recently published work".

Indeed, a workshop discussing the report last week at the Alan Turing Institute bore this out. The response read to us as more satisfied with the current position than was consonant with the evidence we had used. I will not quote from the Government's response as I am optimistic that the Minister today will be able to indicate an understanding of our conclusions and an enthusiasm to progress our recommendations. I beg to move.

*5.42 pm*

**Lord Hunt of Wirral (Con):** My Lords, I draw attention to my entry in the register, in particular to my role as a partner in the international commercial law firm, DAC Beachcroft. I am very much aware from that separate strand of my life how law firms are increasingly under pressure from their clients to make use of automation and AI. This can lead directly to efficiencies and cost savings. It also offers up the longer-term possibility of developing and licensing self-serve law tech solutions to replicate some of the services that law firms have traditionally provided, reducing the dependency on lawyers. In a highly competitive market, technology can make all the difference. So, both as a lawyer and a legislator, I warmly welcome this debate. I congratulate the noble Baroness, Lady Hamwee, for her impressive opening speech, her leadership of the select committee and her wise guidance in helping us to produce a very persuasive report.

I dare say that all reports suffer to some extent from in-built obsolescence, especially those dealing with technology. However, I hope that by going back to first principles, the committee has given this one sustainable life and relevance. As we read our way into these questions and raised them with witnesses, I think it is fair to say that we grew more, not less, concerned about the implications for the rule of law of the burgeoning technologies that are increasingly available.

The very good report we produced by consensus with the help of our excellent support team makes our sense of concern—even alarm—very overt and apparent. Our inquiry left me in no doubt about the scale of the challenge we all face to ensure that new technologies serve the best interests of justice and the public interest more widely.

Some noble Lords may have heard or read a highly stimulating lecture earlier this year by the Master of the Rolls, Sir Geoffrey Vos, in which he mused on the significance for us all of

"the inexorable rise in blockchain technologies",

which will

"immutably record every event or transaction in our lives."

He also predicted that a

"truly integrated online digital justice system to resolve civil family and tribunals disputes"

would be in place in England and Wales by the mid-2020s at the latest. It is quite a thought.

It is very easy to be seduced by the technologies themselves, but I would like to pull focus to questions of transparency, governance and accountability. We are told that much accountability within the system now rests with police and crime commissioners. My

own dealings with such a commissioner give me no reassurance at all—quite the opposite, in fact. I do not believe that PCCs can provide adequate or even meaningful accountability, especially where fast-moving technology is concerned. They lack the necessary expertise and, looking at some of the turnouts in PCC elections, they lack the authority too.

With both the criminal and civil justice systems so overstretched and behindhand, it is all the more tempting to succumb to the allure of the glittering baubles of high tech, AI, algorithms and all the rest, with the promise they appear to offer of a faster, slicker set of outcomes. If we are also persuaded that those outcomes are also more just and fairer, with human fallibility stripped out, the Lorelei cry may prove irresistible. Yet, again and again during the course of our inquiry, we heard from experts how algorithms, however sophisticated, can be "gamed". If this is true, I wonder whether algorithms can ever truly be fit for purpose within a justice system.

It all takes us inevitably back to the old, uneasy, irreconcilable tension between the supposedly sacrosanct principle of operational independence versus the ultimate need for accountability to prevent a police force or chief going rogue, which, as I have witnessed myself, does indeed happen from time to time, although fortunately rarely. I am becoming increasingly troubled by what we call "fairness metrics". We hear much talk of using AI, not simply to deliver the status quo more effectively and efficiently, but actively to make society "fairer"—a subjective and loaded term, if ever I heard one—by rectifying perceived social, economic and other inequalities. If that initiative acquires significant momentum, we as parliamentarians must surely be profoundly concerned about what is being factored in.

I see a clear analogy here with the development of automation and AI in the automotive sector. We were told six or seven years ago that driverless cars would be on our roads by 2021. The reality is, they are still not here. Safe implementation is a vital consideration, as is the need for an appropriate legislative and regulatory framework both pre and post placement and, ideally, through testing in a sandbox environment to ensure the veracity and reliability of algorithms.

Rushing the implementation of automation and AI would be damaging enough in the context of automated vehicles, but getting it wrong risks pushing back mass-market adoption of technologies designed to improve productivity and mobility. A similar mistake is surely inconceivable and wholly unacceptable in the context of the criminal and civil justice systems. Who is keeping a close eye on all this? Is it Ministers?

I am sad that the noble Lord, Lord Blunkett, is not here. To quote from the evidence that we received from the Minister, when I asked at question 107,

> "Will you be keeping a careful eye on this?"

The Minister responded,

> "That is a very good question which I will have to think about … We have some brakes and levers that we can pull".

At that point, the noble Lord, Lord Blunkett, said,

> "There are ways and means, I promise you."

At the end of the day, that is what this debate is all about. Who is keeping a careful eye? Is it officials? If it is, from which of the plethora of departments and public bodies that are active in this field will they emerge?

We come back to accountability. Who has practical, day-to-day responsibility for the legal, ethical and active use of advanced technologies of this kind? Who has day-to-day decision-making powers, and where is the practical transparency and ultimate accountability? The reality is always that ultimate responsibility must rest with Ministers and Parliament. The Executive takes the decisions and faces the scrutiny of the legislature in either or both of our Houses of Parliament. The question then is how to make that work quickly, effectively and reliably.

It is perhaps inevitable that a report of this kind raises more profound questions than it would ever be capable of answering, especially when addressing so complex and controversial a topic. I was worried at the time of publication that we would not succeed in our aim of moving Ministers to share our concerns. The trials and tribulations within the Government in recent months have not served to calm my fears. Now we appear—I stress, appear—to be in a period of much-needed stability again. I hope we catch the eyes and ears of Ministers and make a difference, for in the field of radical innovation, just as in the field of criminal and civil justice, prevention of an undesirable outcome is invariably preferable to cure.

*5.52 pm*

**Baroness Primarolo (Lab):** My Lords, I will make a small contribution to this debate as a member of the committee but, first, I pay tribute to the noble Baroness, Lady Hamwee. She steered our committee through complex and, at times, contradictory evidence to try to make sense of what, as the noble Lord, Lord Hunt, said, is a rapidly changing and developing area. Her opening remarks in this debate said, with great eloquence, exactly which problems the committee identified and our fears for the implications for the justice system if those problems are not addressed. The noble Lord, Lord Hunt, referred to the prediction of driverless cars. The issues addressed within our justice system are cumulative and the problem will be too large to address if we do not take these very small steps at the beginning.

I welcome the Minister to this debate. I recognise that this is a complex area of policy and that the Government are trying to catch up, balancing all sorts of priorities, while the technologies continue to develop and change.

Your Lordships and the Minister will see from the committee's report that we raised concerns, particularly about the risks to human rights and civil liberties as a result of the increasing use of these advanced technologies, and particularly in the police forces, which was our focus. We stopped there because the subject was so enormous, if we had not, we would still be deliberating on the evidence. Clear questions continually emerged which remained unanswered—questions of accountability, efficacy, transparency and the potential to undermine inadvertently the basic principles of our criminal justice system.

[Baroness Primarolo]

The question that our committee kept finding itself confronted with was: what are the principles which should underpin the safe and ethical use of these new technologies in the justice system? Currently, a lack of national minimum standards, transparency, rigorous evaluation and training in the use of these technologies means that human rights and civil liberties could be compromised. Are we to wait until they are compromised before we decide to address these principles?

In endorsing this report, the committee unanimously decided that now is the time to start acting. It cannot be right that 43 constabularies are doing their own thing, most in isolation from each other, evaluating as they go along, at best—if they do it at all. However, that evaluation is not open to public scrutiny—it does not provide a route through to the point that the noble Lord, Lord Hunt, made: who is accountable? Parliament has to be accountable, and how do we discharge those responsibilities without the information in the first place? Each constabulary develops the use of the technologies to its local policing objectives and does different tasks to different levels of complexity. I am not making a case for a national police force, and neither was the committee, but it would be helpful to those constabularies to be provided with clarity from government on the basic principles that they should be observing, as this fits within the wider justice system.

Some are in no doubt—it may be the case; I do not have a crystal ball—that advanced technologies have a huge potential in assisting the police in delivering priorities and a policing system that commands confidence, trust and respect, improving efficiency, productivity and problem-solving. That is the sales pitch to the constabularies. But—and it is a very big but—these technologies have challenging and significant downsides with regard to civil liberties and human rights, as the noble Baroness, Lady Hamwee, pointed out. If not addressed, they will undermine the same confidence, trust and respect, and, if inadvertently and wrongly used, they will undermine the concept of fairness in our justice system. We should be under no illusion that if these technologies are allowed to mushroom in the police service without clear, consistent, understandable standards and protections, we will build up significant problems.

We urgently need consideration at national level of the trade-offs in using these new technologies: human rights versus interference with those rights, while ensuring that the interventions are necessary and proportionate. When we asked where the balance was, who was accountable and who was watching, answer came there none. On their effectiveness, we asked: are the public safer with these enhanced technologies and do these technologies make a difference? Again, in the absence of evaluation, answer came there none.

Transparency is a crucial principle because, increasingly, citizens want transparency about how their personal information is used and shared. Many benefits flow from transparency, including identifying problems early on and, crucially, improving the public's trust in data-driven technologies. With that trust comes a pathway to developing appropriate technologies in supporting priorities. It happens elsewhere, so the committee suggested a central organisation or regulating body. NICE does it for the health service with regard to the efficacy of drugs. Why can it not be done in the justice system? The embryology authority balances what is possible medically with what is acceptable ethically. Why can we not use similar models?

Does the Minister think that police forces should satisfy themselves in advance of using new technologies, through independent verification, that the software program does not have an unacceptable level of bias? How can we be confident that historic cultural bias is not built into the system? Does the technology actually work and do what we want?

There are steps forward that could be taken—I know it is going to be very difficult—to deliver two central propositions recommended in this report. First, will the Minister agree to bring together the 43 constabularies, either by requiring or facilitating them, to share their knowledge and experience in this area so that we can begin the painful process of getting on the right side of this development? Secondly, will he consider appointing an expert panel of academics and practitioners to advise him on how to make progress on having the correct balance for a regulatory authority that protects us and our civil liberties, but enables the police and the justice system to do their job effectively?

*6.03 pm*

**Lord Clement-Jones (LD):** My Lords, it is a pleasure to follow three such excellent opening speeches. I draw attention to my interests in the register, particularly my interest in artificial intelligence technologies as a former chair of the AI Select Committee of this House. As a non-member of her committee, I congratulate my noble friend Lady Hamwee and the committee on such a comprehensive and well-argued report.

I entirely understand and welcome the width of the report but today I shall focus on live facial recognition technology, a subject that I have raised many times in this House and elsewhere in Questions and debates, and even in a Private Member's Bill, over the last five years. The previous debate involving a Home Office Minister—the predecessor of the noble Lord, Lord Sharpe, the noble Baroness, Lady Williams—was in April, on the new College of Policing guidance on live facial recognition.

On each occasion, I drew attention to why guidance or codes are regarded as insufficient by myself and many other organisations such as Liberty, Big Brother Watch, the Ada Lovelace Institute, the former Information Commissioner, current and former Biometrics and Surveillance Camera Commissioners and the Home Office's own Biometrics and Forensics Ethics Group, not to mention the Commons Science and Technology Committee. On each occasion, I have raised the lack of a legal basis for the use of this technology—and on each occasion, government Ministers have denied that new explicit legislation or regulation is needed, as they have in the wholly inadequate response to this report.

In the successful appeal of Liberal Democrat Councillor Ed Bridges, the Court of Appeal case on the police use of live facial recognition issued in August 2020, the court ruled that South Wales Police's use of such technology had not been in accordance with the

law on several grounds, including in relation to certain human rights convention rights, data protection legislation and the public sector equality duty. So it was with considerable pleasure that I read the Justice and Home Affairs Committee report, which noted the complicated institutional landscape around the adoption of this kind of technology, emphasised the need for public trust and recommended a stronger legal framework with primary legislation embodying general principles supported by detailed regulation, a single national regulatory body, minimum scientific standards, and local or regional ethics committees put on a statutory basis.

Despite what paragraph 4 of the response says, neither House of Parliament has ever adequately considered or rigorously scrutinised automated facial recognition technology. We remain in the precarious position of police forces dictating the debate, taking it firmly out of the hands of elected parliamentarians and instead—as with the recent College of Policing guidance—marking their own homework. A range of studies have shown that facial recognition technology disproportionately misidentifies women and BAME people, meaning that people from those groups are more likely to be wrongly stopped and questioned by police, and to have their images retained as the result of a false match.

The response urges us to be more positive about the use of new technology, but the UK is now the most camera-surveilled country in the Western world. London remains the third most surveilled city in the world, with 73 surveillance cameras for every 1,000 people. The last Surveillance Camera Commissioner did a survey, shortly before stepping down, and found that there are over 6,000 systems and 80,000 cameras in operation in England and Wales across 183 local authorities. The ubiquity of surveillance cameras, which can be retrofitted with facial recognition software and fed into police databases, means that there is already an apparatus in place for large-scale intrusive surveillance, which could easily be augmented by the widespread adoption of facial recognition technology. Indeed, many surveillance cameras in the UK already have advanced capabilities such as biometric identification, behavioural analysis, anomaly detection, item/clothing recognition, vehicle recognition and profiling.

The breadth of public concern around this issue is growing clearer by the day. Many cities in the US have banned the use of facial recognition, while the European Parliament has called for a ban on the police use of facial recognition technology in public places and predictive policing. In 2020 Microsoft, IBM and Amazon announced that they would cease selling facial recognition technology to US law enforcement bodies.

Public trust is crucial. Sadly, the new Data Protection and Digital Information Bill does not help. As the Surveillance Camera Commissioner said last year, in a blog about the consultation leading up to it:

> "This consultation ought to have provided a rare opportunity to pause and consider the real issues that we talk about when we talk about accountable police use of biometrics and surveillance, a chance to design a legal framework that is a planned response to identified requirements rather than a retrospective reaction to highlighted shortcomings, but it is an opportunity missed."

Now we see that the role of Surveillance Camera Commissioner is to be abolished in the new data protection Bill—talk about shooting the messenger. The much-respected Ada Lovelace Institute has called, in its report *Countermeasures* and the associated Ryder review in June this year, for new primary legislation to govern the use of biometric technologies by both public and private actors, for a new oversight body and for a moratorium until comprehensive legislation is passed.

The Justice and Home Affairs Committee stopped short of recommending a moratorium on the use of LFR, but I agree with the institute that a moratorium is a vital first step. We need to put a stop to this unregulated invasion of our privacy and have a careful review, so that its use can be paused while a proper regulatory framework is put in place. Rather than update and use toothless codes of practice, as we are urged to do by the Government, to legitimise the use of new technologies such as live facial recognition, the UK should have a root-and-branch surveillance camera and biometrics review, which seeks to increase accountability and protect fundamental rights. The committee's report is extremely authoritative in this respect. I hope today that the Government will listen but, so far, I am not filled with optimism about their approach to AI governance.

*6.11 pm*

**Lord Hope of Craighead (CB):** My Lords, I congratulate the noble Baroness, Lady Hamwee, on securing this debate. As another non-member of the committee, I join the previous speaker in congratulating her and all members of the committee on such an excellent and informative report. I hope that when the Minister replies, he will be able to remove at least some of the evident disappointment which the noble Baroness felt on reading the Government's response.

Before I go into any detail, I should explain that my interest in this subject is directed to the use of AI in the courts and the challenges that it faces. However, I confess that I have no technical expertise and have had very little contact with the courts' use of AI at first hand; nor I did not have the advantage the committee members had of listening to the evidence, so I start with a definite disadvantage. I come from a generation which is unable to use its thumbs to operate the mobile phone. We did not have these things when we were at school so I have to jab it, as others of my generation do, with my forefingers. Things have been moving so fast that even the eight years since I retired from my judicial career have seen changes that were barely in prospect when I was still sitting as a judge.

I have struggled with the word "algorithm", for example—not a word that I was ever accustomed to using. When I looked it up in my copy of the third edition of the shorter English dictionary, which was published in 1964 and which I purchased one year later when I was embarking on my legal career, I was told that "algorithm" is an erroneous version of "algorism", which is an Arabic system of numbering. No other definition was offered, so I am grateful to the committee for telling me in box 1 of the report what in today's language it really means. That definition

[Lord Hope of Craighead]
should perhaps have made it clear that the instructions are given by means of numbers, which I believe is the way that AI operates. We owe all this to the Arabic system, which is why the word derives from the previous one.

Even so, I struggle to understand how the system works. Where do the instructions come from, and are they the right people? How do we know that the answers it produces are the right ones? Is the system open to cross-examination to test these issues? If so, how can this be done? I share the committee's concern about where all this is leading. So far as the courts are concerned, AI comes especially into play in two ways. The first is in the provision of evidence in a criminal trial. The other is in its use in dispute resolution in the civil courts. Each of them presents very real challenges.

The report, for the most part, is directed at the use of advanced technologies by police forces. The courts become involved when evidence that has been gathered by this means is led at a criminal trial to secure a conviction. Some years ago—in fact, quite a number of years ago—I presided in a case before the criminal appeal court in which the appellant had been convicted on the basis of a primitive system of facial recognition technology. He insisted that it was a mistake and that its use was unfair because, due to problems with legal aid, he had no access to expert evidence to challenge it. It seemed to us that that amounted to a miscarriage of justice, so we set aside the conviction so that he could face trial again with expert assistance.

In the retrial, the jury—unfortunately, from his point of view—reached the same conclusion as the first jury on the recognition evidence and once again he was convicted. My point is that fairness and transparency, which the noble Baroness, Lady Primarolo, emphasised in her impressive speech, should be at the heart of any criminal trial. That requires that evidence of this kind should be open to challenge. As it happens, there was no suggestion that the evidence in that case had been manipulated; it was just said to be a mistake. The reference to the possibility of manipulation must give rise to real concerns, as shown by the very important selection of paragraphs 23 to 26 in the report, under the heading,

"The right to a fair trial".

I support the recommendations that are referred to as numbers 1, 2 and 4 in the Government's response. They are all designed to ensure the safe and ethical use of AI. The Government say they are confident that existing structures and organisations create a sufficient network of checks and balances, but the evidence that is narrated in this report suggests that that confidence may be misplaced. More safeguards than those that are available may be needed in this fast-moving area. I endorse the point made by the noble Lord, Lord Blunkett, which the noble Baroness mentioned: it is far better to do this now than later, when it would be too late and things would have moved on beyond recall.

As for AI's use in dispute resolution in the civil courts, I pay tribute to the work of the Library and its very helpful briefing on the report. It contains a link to an article referred to by the noble Lord, Lord Hunt of Wirral, headed,

"Technology to become embedded in UK justice system by 2040, senior judge suggests".

That contained a link to a speech that was given online in March this year by the Master of the Rolls, Sir Geoffrey Vos, about the future for dispute resolution in what he referred to as a "brave new world".

If one wants to be enlightened of the huge advantages that AI can offer, they can be seen in Sir Geoffrey's speech. He is an enthusiastic supporter, promoting AI's use in the civil courts as fast as possible. He focuses particularly on the advantage of speed and simplicity, which gathering evidence in this way can produce. I am certainly not one of those who decries the use of AI; it is all a question of how it can be best operated.

According to Sir Geoffrey, factual disputes will themselves become a thing of the past, as so much of what we do will be indelibly recorded by AI. He referred, among other things, to number plate recognition. You cannot really dispute where your car has appeared, because AI no longer leaves any room for dispute about that. He says that we are more and more likely to find this a feature of dispute resolution in the civil courts.

He went on to say that some decisions, admittedly minor decisions, such as those about time limits and other procedural aspects, could be made by this system with no human intervention. Proposals for dispute resolution themselves would be "driven by AI", as he puts it.

He acknowledged that public confidence is important, and that the public would need to understand what had been decided by a machine and what had not. He also said that, ultimately, there must be the ability to question an AI-driven decision before a human judge. That begs the question whether and how that can be done, and how far we can trust algorithms that are not open to being tested in that way.

I was encouraged by the statement in paragraph 32 of the Government's response that they will work with the justice system with a view to

"better long term research and evaluation of the different circumstances in which predictive algorithms"

are described and used to support future decision-making. Of course, there is much that the courts themselves can do to control and regulate their use, but the extent of the ability of litigants to question and interrogate the algorithms is not open to control or guidance by the courts. That is why the recommendation in paragraph 155 of the report, which is dealt with in paragraph 18 of the Government's response, is so important. It is about the need for a requirement on producers to embed explainability within the tools. If that requirement is there, one may be able open up a system of cross-examination to find out what is going on and see whether what has been produced can be relied on. I fear that the Government's response in paragraph 35 hardly does justice to this crucial issue.

I hope that when he comes to reply the Minister will be able to reassure the noble Baroness that the Government will look again at the evidence and recommendations in the committee's report, to see whether more can be done to regulate and control the way that AI is imposing itself on our lives. I suggest

that if the Minister and his team have not already done so, they might like to read Sir Geoffrey's speech, because it will show the advantages and concerns which surround this whole issue.

*6.22 pm*

**Baroness Sanderson of Welton (Con):** My Lords, it is an honour to follow the noble and learned Lord. As others have before me, I compliment the chair of the committee, the noble Baroness, Lady Hamwee, on her comprehensive opening remarks—no easy feat with this report—and her very fair and decent approach throughout the committee's inquiry. I also compliment our secretariat on its hard work and guidance.

There are many topics we could cover—and have covered—in this debate today: the technology itself, the dangers of inherent bias and predictive policing and the implications for civil liberties. However, for the purposes of today, I will concentrate on the pace at which new technologies are developing, particularly within the police—which I, and perhaps the Minister, notice seems to be an emerging theme—and pick up on some of the Home Office's responses to our concerns.

As my noble friend the Minister will know from the report, when we began this investigation, we did it on the understanding that, despite the concerns I have just mentioned, AI is a fact of modern life. We acknowledged that it can have a positive impact in improving efficiency and finding solutions in an ever more complex world.

However, in terms of the justice system, and more specifically the police, we became alarmed at the relatively unchecked proliferation of new technology across all 43 forces. As has been mentioned, we made a number of recommendations to combat this: a central register, kitemark certification, mandatory training and better oversight.

I know that these are significant steps and that they have costs attached, but they were carefully thought through and, to be honest, we were not expecting to be quite so roundly dismissed by the Government in their response. They seemed to imply that we had failed to appreciate the value and necessity of AI tools in today's policing environment. In particular, the response highlighted the use of CAID—the Child Abuse Image Database—which brings together all the images found by police and the NCA, helping them to co-ordinate investigations.

In one sense, the Government are right to make much of CAID because it was game-changing. For instance, a case with 10,000 images that would typically have taken up to three days to review could be done in an hour, thanks to CAID. Perpetrators could be apprehended more quickly, officers protected from the effects of viewing these images and more focus placed on identifying the victims. As someone who worked on child sexual abuse and exploitation at the Home Office when CAID was introduced, I assure the Minister that I completely understood—and understand—the value of new technologies in certain instances.

However, in the context of the report, I just do not think that it is a very helpful example. The Home Office itself helped to develop CAID in collaboration with the police and industry partners. Once piloted, it went live across all police forces and the NCA. To suggest that that is the norm would be misleading, and it should not be used as a reason not to address the clear problems that we identified in a system where all 43 forces, as has been mentioned, are free to individually commission whatever tools they like in a market that is, as we said, opaque at best and the Wild West at worst, in which the oversight mechanisms are, frankly, inadequate. The Home Office may think that we are overreacting, but the truth is that it would be hard-pushed to make that case because without a central register, as we suggested, it is impossible to know who is using what, how and to whom.

If we dig a little deeper, the Minister may see why we are concerned. Some of this has already been mentioned. On procurement, we heard from a police representative who said that procurement is not the comfort zone of all police forces. When the tools they are procuring may have consequences for human rights and the fairness of the justice system, as we have been talking about, never mind taking into account the complexities of the technologies market, where providers are reluctant to share information on the basis of commercial confidentiality, as the noble Baroness, Lady Hamwee, said, that is truly worrying.

Then there is the problem that, as the NCC Group told us,

"many claims made by [Machine Learning] product vendors, predominantly about products' effectiveness in detecting threats, are often unproven, or not verified by independent third parties."

There are the salespeople who—in an understandably overzealous way in a burgeoning market—according to one developer,

"take something they do not understand and shout a number that they do not understand".

I would add that in many cases they then make it available to officers who do not understand it either. Incredibly, the police are not required to be trained to use different AI technologies—this is one of the things I found most shocking in our report—including facial recognition, because they are procured at a local level.

All this does not feel like a solid foundation on which to deploy such highly sensitive tools and, as the noble Baroness, Lady Hamwee, has already alluded to, there are some in the police and in the market who agree with us. At the excellent conference at the Alan Turing Institute last week, one speaker representing the police pointed out that in order to become a detective you have to pass an exam, and that the same should be true for technology. Another from a different force said: "Artificial intelligence is not on the tip of the tongue of the public yet, but we don't want it to be another frontier of failure."

One way in which we could help to build confidence is statutory specialist ethics committees, which would not only increase community involvement and understanding but help to create an institutional culture of accountability, something that we already know needs to be improved. I am afraid to say that that was another recommendation dismissed by the Home Office.

I am not blaming the police here. There are some brilliant forces, such as West Midlands, which have spotted the benefits but also the pitfalls, and which are working hard to get ahead of them. Without more commitment from the Government, though, I fail to

[Baroness Sanderson of Welton]
see how the current system leads to anything but another frontier of failure. As people have said throughout the debate, at some point under the current free-for-all, when a police force that has not put in the protections that, say, West Midlands has, it feels inevitable that something is going to go very wrong.

It is not as though the Government are not doing anything. The Centre for Data Ethics and Innovation, which is based in DCMS, is piloting the public sector algorithmic transparency standard. We on the committee would all agree with that, and, genuinely, people around the world are looking at it. Can the Minister tell me, if you compare the work that is going on in DCMS with the response to our report, how closely do officials in the Home Office work with their counterparts in DCMS on this? This pilot includes some police forces, and it does not feel as if the two marry up.

Again, as others have said, I know that probably quite a few people may wish to put this report on the shelf and watch it gather dust. However, I think we all know that in practice, that is unlikely to happen because the concerns raised within it will surely become more apparent down the line.

Finally, we heard a great analogy at the conference last week with regard to training for those using AI. The speaker said: "For a car to be allowed on the road, it's got to have an MOT, but the driver also has to have a licence." I am afraid that at the moment, with regard to these technologies, we do not have either.

*6.31 pm*

**Baroness Chakrabarti (Lab):** My Lords, what an absolute honour to follow that contribution from the noble Baroness, Lady Sanderson of Welton. Your Lordships can imagine what the contribution her fabulous communication skills and powers of analysis made to the work that we did on this report. I now have the daunting privilege of being the last member of the recently constituted Justice and Home Affairs Committee to contribute. We have also had two expert contributions from a technology expert in the noble Lord, Lord Clement-Jones, and of course the noble and learned Lord, Lord Hope. I will try not to repeat too much but will add just a little framing and a few points of emphasis.

First—this is relevant beyond even the vital business of this report—I had never sat on one of the House of Lords' select committees before, and it was and continues to be a wonderful experience. This was a perfect subject to examine with the rigour of a Lords Select Committee in a totally cross-party way. It feels almost odd now to be a few swords away from the noble Baroness, Lady Sanderson of Welton, and the noble Lord, Lord Hunt, because on the journey that we went on together on this committee, there was no significant partisanship at all. Rights and freedoms and the rule of law should not be a partisan issue. That was definitely my experience of being on the committee of the noble Baroness, Lady Hamwee—she chaired it with the elegance of a society host, the creativity of a film director and the rigour of a judge.

I was reading in the press just today some comments from the American computer science genius and polymath Jaron Lanier. He was talking about the rise of these technologies in general, not about the criminal justice system in particular, and he told the *Guardian*:

> "People survive by passing information between themselves. We're putting that fundamental quality of humanness through a process with an inherent incentive for corruption and degradation. The fundamental drama of this period is whether we can figure out how to survive properly with those elements or not."

That is a comment on the rise of these very exciting new technologies in general but I suggest that, of all the spheres in which artificial intelligence and these new technologies are being employed, the criminal justice sphere is special. There are great potential benefits, as we have heard, but real dangers as well. Why are the criminal justice system and the ambit of the home department so special? It is because we are talking about people's rights and freedoms. We are thinking about the right to life and to protect people, our communities and victims and potential victims, but we are also talking about the gravest rights, freedoms and liberties of the subject. That came through very clearly in both the evidence to and the private deliberations of our committee.

I remind noble Lords that it was just over 40 years ago that, in response to the Brixton riots in this city, Lord Scarman produced his report because there was a crisis of trust and confidence in policing in so many of our communities. Not long after that legendary Scarman report, a Conservative Thatcher Government produced the Police and Criminal Evidence Act 1984. There was inevitably some controversy attached to it but, none the less, I would consider it a piece of human rights legislation, because it attempted to set a framework of principles and law for governing police power.

We would not dream today of rescinding or repealing that Act. It has been amended, but it is still on the statute book. The idea is that police power, while essential, needs to be regulated and consolidated in one place. Of course, new and intrusive technologies have emerged. The PACE codes have had to be updated and the legislation itself has been amended, but some basic principles and ideas of accessibility and transparency in the use of intrusive police power hold still, over 40 years later.

I do not believe that noble Lords and Ministers would dream of rescinding that, and nor should the Government think that such a framework is not needed today in relation to these new powers—these powers which we cannot even see being used, or understand, because they are effectively in a black box, or in a jar in the form of the pill but I cannot say what is in the pill that I am taking. That is why regulation and framework legislation is required.

It is simply not enough to rely on the current arrangement of broad police discretion and the occasional police witness to our committee or some other forum to say, "Oh, but you know: proportionality". We are compliant with human rights proportionality as it if is a mantra. That is not detailed enough for regulation. It would not be detailed enough for powers of arrest and it certainly would not be detailed enough for the use of drugs. We need to get into the black box: we need to prescribe it and to decide what is legitimate

and proportionate in the use of this technology and its design. Legislation is absolutely essential to avoid what the noble Baroness, Lady Sanderson of Welton, called the Wild West—because that is exactly where we are now in the use of this technology in the criminal justice system and, to some extent, at the border in relation to its intrusive use.

In addition to this framework legislation—the Police and Criminal Evidence Act and an AI Act for the 21st century—we need a national body that will do the prescription and kitemarking. There is no doubt that we need this because of the black box. Lay citizens and even parliamentarians cannot understand the technologies, read and decipher the algorithms, and understand whether coded bias is being baked in—which is happening.

I commend the Netflix documentary on facial technology that features the noble Baroness, Lady Jones of Moulsecoomb, from this House. It is a wonderful documentary. I hope that noble Lords, Ministers and their officials—who are passing them notes, probably saying "Yes, it's a great documentary"—will watch it.

Kitemarking is essential before any procurement of these technologies and algorithms within the criminal justice system. It should not be left to local police officers, or even PCCs, to have lunch with some people who are selling their wares and decide what is a good deal or not.

In addition to the kitemarking of the product, there is a great opportunity for His Majesty's Government and the United Kingdom in going down the road being advocated in our report. We could be world leaders in the kitemarking and regulation of this technology. In years to come, if we take up the recommendations from this committee, there could be countries all over the world that say, "We go for the UK AI in criminal justice model". It is the equivalent of saying they want to contract in English law or in Delaware law, or whatever it is. This technology is being developed and used all over the world, and if we get ahead of the kitemarking and regulation game, others may contract into our arrangements and adopt our technologies and systems over time.

It is completely without justification, it seems to me, for private companies to be experimenting on our populations, including with their intimate data and with policing and intelligence and so on, and then claiming that they will not engage with transparency or legality because of commercial sensitivities. That is a swindle and a scandal, and it needs to end. We would not allow arms companies or drugs companies to behave this way; we certainly should not be allowing it in these deals that are being done in the 43 forces with these people in the Wild West—I will not say who it is that rides around on horses in the Wild West, but the point is made.

To conclude, we are just asking for this technology to be governed by the rule of law, for Parliament to step up and, crucially, for Ministers to step up, as their predecessors did in the Thatcher Government in the 1980s in response to the Brixton riots and the Scarman report. Only this time, we are asking that this be done before a scandal and before a crisis of confidence that reaches the kind of levels where it will be harder to use the technology in a positive way in the future.

*6.42 pm*

**Baroness Ludford (LD):** My Lords, this report produced by the committee chaired by my much-praised noble friend Lady Hamwee is both powerful and shocking. It does not mince its words. I will be quoting from it, as I cannot improve on its wording. The report is not before time—indeed, it is overdue. One can only wonder that successive Governments have neglected to introduce the reforms and protections that this report so convincingly explains are essential to protect us from breaches of equality, human rights and data protection safeguards.

The committee is a remarkably strong one, including as it does a former Home Secretary, the noble Lord, Lord Blunkett; a former National Security Adviser, the noble Lord, Lord Ricketts; a former director of Liberty, the noble Baroness, Lady Chakrabarti; and several very senior lawyers. The report says that the committee was

"taken aback by the proliferation of Artificial Intelligence tools potentially being used without proper oversight, particularly by police forces across the country."

It warns that,

"without sufficient safeguards, supervision, and caution, advanced technologies may have a chilling effect on a range of human rights, undermine the fairness of trials, weaken the rule of law, further exacerbate existing inequalities, and fail to produce the promised effectiveness and efficiency gains."

That is a stunning catalogue of dangers.

The report explains how public bodies and all 43 police forces are free to individually commission whatever tools they like or buy them from companies

"eager to get in on the burgeoning AI market".

The committee found this

"particularly concerning in light of evidence we heard of dubious selling practices and claims made by vendors as to their products' effectiveness which are often untested and unproven."

No wonder that the committee reports that it

"uncovered a landscape, a new Wild West, in which new technologies are developing at a pace that public awareness, government and legislation have not kept up with."

It refers to the phenomenon of "digital excitement"—one could say the delight in boys' toys, if that were not sexist—felt by some who get their hands on a new technology product. That is of course not a good rationale for purchase. It is hardly surprising that my noble friend Lady Hamwee, in her letter to the Home Secretary, said that the committee was "disheartened" by the Home Office's response to its "constructive conclusions and recommendations", saying it found the Home Secretary—I think my noble friend Lady Hamwee quoted this—

"more satisfied with the current position than is consonant with the evidence"

that the committee had received. That is quite a strong message.

My noble friend Lady Hamwee said with considerable feeling that the committee

"hoped that when the House debates the report, the Minister will be able to explore with us in more depth the points that we raised, and not simply be briefed to repeat the formal response".

[Baroness Ludford]

We very much look forward to that more realistic response today. The Government's response was disappointing and complacent, and failed to do justice to the quality of the evidence, the report and the committee. The Government

"was not persuaded that a new independent national body and certification system should be created. It said whilst certification worked in some contexts, it could also create false confidence and be costly. It disagreed with the idea of making transparency a statutory principle. It said … making transparency a legal duty could limit the police's current transparency efforts to whatever would be set out in statute."

Also, the Government said that

"it could not make the police and the judiciary undertake training on 'meaningful interaction with technologies'. This was because training was the responsibility of the College of Policing and Judicial College, rather than the government."

However, as the noble Baroness, Lady Sanderson of Welton, said, we oblige drivers to have a licence as well as for the car to have an MOT. The Government

"disagreed that there should be statutory ethics groups created to scrutinise the use of technologies and veto deployment … because they would not be democratically elected."

These all seem remarkably weak points. An alternative term would be "scraping the barrel".

The committee said that:

"While we found much enthusiasm about the potential of advanced technologies… we did not detect a corresponding commitment to any thorough evaluation of their efficacy … there are no minimum scientific or ethical standards that an AI tool must meet before it can be used in the criminal justice sphere. Most public bodies lack the expertise and resources to carry out evaluations … we risk deploying technologies which could be unreliable, disproportionate, or simply unsuitable for the task in hand."

Are the Government happy with that situation?

The committee found the institutional landscape confused and duplicative—no wonder, with at least 30 organisations, initiatives and programmes having some input or other—and found governance arrangements complex and disconnected, while the Government are appointing still more bodies which make the picture even more crowded. The committee said:

"We have heard no evidence that the Government has taken a cross-departmental strategic approach to the use of new technologies in the application of the law … Thorough review across Departments is urgently required."

Can the Minister tell us that that at least will happen? The report mentions that a government White Paper is supposedly in the pipeline. Can the Minister tell us the envisaged date for that?

The report has a number of important proposals on governance, oversight and evaluation to address these various deficits. One very sensible proposal is a new national body to set scientific and quality standards and certify new products against those standards. The committee recommends "evaluate centrally, procure locally".

The committee says its

"evidence reflected organisational confusion about what guidance, regulation and legislation applied"

and argues persuasively for a strong legal framework to remedy the fact that

"users are in effect making it up as they go along."

No wonder it uses the term "Wild West".

The report refers to the EU artificial intelligence regulation, or "AI Act", that is in preparation—I am not sure where it has got to—and notes that it would ban systems that pose an "unacceptable risk"", such as social scoring and many deployments of facial recognition. I hope the Government are still willing to learn from the EU.

The committee suggests legislation to set principles, supplemented by regulations to govern the use of specific technologies. If the Government object that there is a lack of parliamentary time, I suggest at least three Bills that could and should be dropped to make space: the Northern Ireland Protocol Bill, the revocation of EU law Bill and the Bill of Rights Bill, otherwise known as the Human Rights Act destruction Bill.

The committee found the market "worryingly opaque", with buyers often pretty ignorant about the systems that they were buying due to companies' insistence on commercial confidentiality. It found some "dubious selling practices" and untested, unproven claims about effectiveness of the products.

The committee therefore makes a number of important proposals for increased transparency and explainability, including consultations and published impact assessments. The committee reports that there is no central register, making it virtually impossible to find out where and how these systems are being used such that parliamentarians, the media, academics and those subject to them could scrutinise and challenge them. The committee rightly called for a mandatory register.

The Government published their consultation paper *Data: A New Direction* just over a year ago, promising

"a bold new data regime",

a phrase that makes me wary. I am concerned about prejudice to our data adequacy decision from the European Commission but also worried if it makes the Government less vigilant about data protection and privacy issues.

The committee said it sees

"serious risks that an individual's right to a fair trial could be undermined by algorithmically manipulated evidence",

with defendants and indeed courts ignorant of what technologies might have been used in their case. That is a pretty dire state of affairs.

The report raises serious concerns that bias in data collection could lead to discriminatory policing, especially in predictive policing. It is well-known, as my noble friend Lord Clement-Jones pointed out, that facial recognition technology is not sound when used on female and ethnic minority subjects because the learning algorithms have leaned more on data from white men than from other groups. The committee also warned of the danger of overpolicing through the use of predictive tools, which could become a vicious circle of concentration on poorer people in more disadvantaged areas.

The committee is highly concerned at the lack of accountability for the misuse or failure of these AI technologies and hence the lack of recourse for people who might suffer from their use. It suggests that the Government appoint a taskforce to produce guidance on consistent lines of accountability.

This is a first-class and hugely valuable report. The Government's complacency—I could say blinkered complacency—is profoundly unwise when defects and unfairness in the deployment of AI systems could create a backlash through a loss of trust or become, in the words quoted by the noble Baroness, Lady Sanderson of Welton, "another frontier of failure."

The glittering prize for the UK is, in the words of the report, to be

"a frontrunner in the global race for AI while respecting human rights and the rule of law."

I hope we hear a better response than we had in June and concrete plans now from the Minister.

*6.53 pm*

**Lord Paddick (LD):** My Lords, that was an extremely powerful contribution from my noble friend Lady Ludford, with which I wholeheartedly agree. I thank my noble friend Lady Hamwee, her eminent committee members and their officials for this impressive report, the importance of which cannot be overestimated. There have been equally impressive contributions from members of the committee, although not exclusively from them.

I am no Luddite. I am impressed by new technology and could be described in my own way as an early adopter of it, even if it is the new iPhone or the latest laptop—boys' toys, as my noble friend just commented. Perhaps I get too excited by technology in the way that she mentioned. However, there are inherent dangers in the way that technology is being used in the criminal justice space that are a real cause for concern, as the report clearly points out and as noble Lords have described.

I do not know whether I am correct in thinking that, like direct and indirect racism, there are perhaps first and second-degree dangers in the use of advanced technology. As in the hackneyed phrase, when it comes to computers, of "Rubbish in, rubbish out", there is a clear potential danger that artificial intelligence built on the results of biased policing and biased decision-making by the courts will be hard-wired into AI systems, as the noble Baroness, Lady Primarolo, said. Whether it is about the likelihood that a convicted person will reoffend or when used in connection with vetting inquiries, where racial bias in human decision-making is copied and pasted into AI systems, artificial intelligence also has the danger, for example, of being racially biased.

As my noble friend Lady Hamwee said, the report points out what I might call second-degree prejudice and discrimination, such as where AI is used to predict where volume crime might occur but not used to focus police resources on what used to be called white-collar crime, such as high-value fraud. This application bias has the danger of focusing police resources on poor neighbourhoods, where black and other minority ethnic people live, while majority white crime is seen to be even less solvable as the opportunities provided by AI to solve crime are focused elsewhere. The first-degree racism dangers in Durham's predictor of how likely someone is to commit a crime in the future, or the Home Office sham marriage detector, should not overshadow the second-degree racism that might result from focusing advances in technology on the poor and disadvantaged.

It is not just having the mantra of "If you've done nothing wrong, you have nothing to fear" to downplay the harm caused by disproportionality in stop and search that we must be alert to, but that facial recognition technology is likely to give false positive results with women and black people. Operators that are not effectively regulated could load databases of political activists—or even images from Facebook groups that the system could be asked to trigger alerts for—allowing the police to track the individual movements of innocent citizens. That the city council of Santa Cruz in the United States placed a moratorium on the same live facial recognition software used by Kent Police between 2013 and 2018, because that council believed it endangered civil rights and civil liberties, and exacerbated racial injustice, perhaps indicates the dangers and how the UK is lagging behind other jurisdictions in addressing these dangers, as my noble friend Lord Clement-Jones said this evening.

I found the Information Commissioner's remarks, quoted in the report, that every technology can create benefits or risks, depending on the context, governance and oversight measures, a little like the Chinese phrase "We live in interesting times". It was fairly obvious but not particularly helpful, unlike the report, which not only shows how and where the governance and oversight measures are inadequate but, helpfully, recommends how and where they can be improved, as my noble friend Lady Hamwee described.

The report also points out that the courts are filling gaps in the legislation, something judges are reluctant to do. They want clear laws to interpret, not an absence of law that they then have to invent. I am reminded of going, as part of my Master of Business Administration degree, into the bank where my twin brother was a senior executive so we could act as quasi-management consultants and carry out a project on the system that the bank used to regulate salaries. The view of the operational arm of the bank was that the human resources department was holding back the business from moving forward, and that senior executives should be able to reward high performers outside the salary and grading structure.

Similarly, I appreciate how difficult it is for legislation to keep up with technological advances. However, given the erosion of civil liberties and, for example, the overpolicing of certain communities, that should not mean sacrifices just because, to quote Bill Heslop from the film "Muriel's Wedding", "You can't stop progress!" That was his campaign slogan when he was running for political office and he did not win—not that I am suggesting that there are similarities between that character and my twin brother, or Kit Malthouse, the former Minister quoted in the report.

The report's conclusions, that there is no clear line of accountability for the misuse or failure of technological solutions used in the application of the law and, as a result, no satisfactory recourse mechanisms, are worrying, together with the fact that there is a lack of transparency in the use of advanced technological solutions. Mandatory impact assessments are a safeguard, provided they are objective and independent.

Committee reports such as this one are a fundamental aspect of the work of the House, and we overlook them at our peril—this report perhaps more than many.

[Lord Paddick]
As my noble friend Lady Hamwee said, the credibility of the criminal justice system could be at stake. As my noble friend Lady Ludford pointed out, the Government's response could be described as complacent. I look forward to the Minister's response saving the day by reassuring this Committee that he has taken on board the recommendations of this important report.

*7.01 pm*

**Lord Ponsonby of Shulbrede (Lab):** My Lords, I will start by outbidding the noble Lord, Lord Paddick: I too am an early adopter of technologies. In fact, I used to write algorithms and buy black boxes to use in various business contexts in my previous life as an engineer.

I have been reflecting on my various experiences, from my working life and my life as a magistrate, of what we have been talking about today. It is interesting that, as an engineer, I spent probably 15 years of my life doing this sort of technology but, when I eventually became a business owner and a chief executive, I did not use that technology in the business I ran; I was too sceptical of it. I occasionally commissioned work to be done, but it was absolutely not part of the business processes and decisions that I was making when I was the boss of a company.

To go back a bit further, to when I was working as a councillor in south-west London about 30 years ago, we were upgrading CCTV on the council estate where I represented people. It was an interesting exercise, because the councillors and the shopkeepers were in favour of it, but my friends who came from ethnic minorities were against it. There was a huge increase in CCTV technology on the estates I represented. Interestingly, that was also when the use of the hoodie became absolutely ubiquitous. All young people wore hoodies, partly because of the introduction of CCTV.

I have sat as a magistrate for 15 years and been through the whole experience of doing remote hearings in criminal, family and youth jurisdictions. We also use technology in various bits of the process we are considering, such as DNA and drug and alcohol testing. Interestingly, the Probation Service has its own predictive tools—which I do not think are AI based but are nevertheless predictive tools—on the likelihood of offenders to reoffend, and we read about those predictions in its reports and have to take them into account in our sentencing decisions. That has been a routine part of the sentencing exercise, if I can put it like that.

The one bit of technology which has made the biggest difference to my role as a magistrate has been body-worn video cameras. I think the Met Police invested well over £100 million in giving all operational police officers body-worn video cameras, and that has made a specific difference to the way in which we deal with domestic abuse cases. When police officers walk in through that front door and they are filming what they see in front of them, which of course you can then see in court, it makes a huge difference to the likelihood of getting a conviction. As we all know, very often the woman, who is usually the victim, does not want to go ahead and press charges. However, literally, when that front door is opened and a police officer walks in, you get a very different impression—a very realistic one—of the state of play in that house, if I may put it like that. That is one area where I have seen a huge improvement—I believe it is one—in the likelihood of getting convictions in domestic abuse cases.

To return to the debate and the report, I too congratulate the noble Baroness, Lady Hamwee, and all the members of the committee. This has been an extremely interesting debate. The officials are clearly very expert, and that is reflected in the debate itself. I was reading the recommendations of the report—I am not sure whether, in my role, I am supposed to say that I agree with them all wholeheartedly, but I do. The challenge put to the Minister to give a more sympathetic response than the official response that we have all read is fair, because the recommendations are born out of a great deal of work. The analogy with the health service and NICE, as my noble friend Lady Primarolo said, is a good one, and one could make other analogies with defence and other things like that, so why not in this context as well? I will be interested to hear the Minister's answer to that question.

All the contributions to today's debate have been exceptional. Again, my noble friend Lady Primarolo asked two questions of the Minister, on bringing together all 43 police forces to exchange information and look at the issues which they are facing, and on appointing an expert panel to look at the overall situation.

The noble Baroness, Lady Sanderson, also made a very good intervention. Her point about CAID—the identification of child abuse images—was interesting. As she said, that was a Home Office-developed and implemented technology that was done on a national scale, which of course is very different from what we are talking about in the context of this report.

As usual, my noble friend Lady Chakrabarti made an informed and provocative speech, if I may put it like that. As she said, we need to get into the black box—I thought that was the right way of putting it. That is what prompted me to talk about my previous business experience of the scepticism of sometimes buying pieces of kit when you know it is a black box; but when I was in a different position, I chose not to go down that route. As she said, we need a national body to look into those black boxes, because, ultimately, the fairness of the system is the most important thing.

As the noble and learned Lord, Lord Hope, said, ultimately, people need to believe that they are treated fairly, whether it is in a court, when they are charged or when they are in prison. They might not like what is happening to them, but they need to understand it and understand the process by which decisions are made about them. If they cannot do that, they will be far less likely to accept the results of a conviction, a prison sentence or whatever it is. So it is very much in all our interests that the technology is understood, and that people feel that the criminal justice system is treating them fairly.

I will conclude on this point: I have an insider's look into the way that court hearings are conducted. In the vast majority of cases in one of the jurisdictions I am involved in, it is not legal or technology failures

but administrative failures that lead to cases failing. That is a far more human element which has been underinvested in and which leads to a lack of faith in the criminal justice system. While we are talking about technology, we should not take our eye off the much bigger, more practical problem of administering our courts and criminal justice system in a reasonable way.

*7.11 pm*

**The Parliamentary Under-Secretary of State, Home Office (Lord Sharpe of Epsom) (Con):** My Lords, I thank all noble Lords who have spoken in the debate today and particularly the noble Baroness, Lady Hamwee, for securing the debate. I also thank those who contributed to the Justice and Home Affairs Committee's thoughtful and insightful report, which has paved the way for today's discussion.

As the noble Baroness has made clear, the Government responded to that report in June, but it is nevertheless welcome that we have found time to discuss these important matters more fully. I hope this is not the last time we cover the topic; I suspect it will not be. I will remark briefly on the broad thrust of the committee's report and the Government's position, as well as on points made during this debate, while also—I am afraid—having to join the noble and learned Lord, Lord Hope, by admitting that I am not much good with my thumbs either.

I am not sure that this line is going to qualify as "riding to the rescue", but there is significant agreement between the Government and the committee on the challenges posed by advanced technology and how it is rolled out into the justice system. I am sorry if noble Lords feel that the government response was in some way a brush-off, but I am sure all your Lordships would agree that the technology is very complicated. The policing and justice sector and the ethics around balancing competing human rights are also very complicated. The public expect us to have a world-class justice system, and I think all noble Lords acknowledged this. Utilising technology is a cornerstone of this. The police must use technologies to free up officer time to fight crime, by making administration more efficient, and as a tool to hold those responsible for crime to account.

The Government are committed to empowering the police to use the latest technologies because the public support their use. However, there are no easy answers and the risk of acting without fully understanding the implications of these technologies and getting it wrong is very real. We are not presently persuaded by the overall recommendations put forward in the report, but the Government are committed to the spirit of improving consistency, maintaining public trust, ensuring sufficient oversight and empowering the police which sit behind those recommendations.

The subject of transparency was raised by my noble friend Lord Hunt and others. In their evidence, the Government were clear that transparency is not optional. The police themselves see and understand that being transparent is in their interests. We do not agree that we should mandate specific rules on transparency across such a wide range of current and potential future technologies and uses, but that does not mean we take it any less seriously.

Transparency is an important part of data protection laws. Our policing model works only if there is public consent. For the public to consent, as the noble Lord, Lord Ponsonby, has just pointed out, they must be engaged. It is in the police's interest to hold conversations and be open about what they are doing and why. Several police forces are working with the Centre for Data Ethics and Innovation to explore how the algorithm transparency standard may work for them. We welcome it as one tool that could promote the sharing of best practice, but transparency can come in many forms. Our position is that mandating a set of rules could restrict what information is ultimately provided to the public and risks turning transparency into a tick-box exercise.

Instead, we will continue to help the police to collaborate with experts and identify how they can be transparent in a way that allows scrutiny, both at a technical level by those with expert knowledge and at an ethical level by the wider public. There is no point being transparent if what is said cannot be understood. We are in agreement that the question of ethics is of fundamental importance, and the ethics of acting or using technology is not something to be considered lightly.

We have heard how important the roles of accountability and oversight are at each stage of the system. I would caution that a statutory ethics panel, as proposed in the report, may decrease democratic oversight because such powers could override local decision-making, local accountability and locally elected officials, but I note the particular reference to the West Midlands Police example. We are not persuaded that the creation of a national statutory ethics committee is the best way to bring expert insight into police practice, but we will continue to work with colleagues in policing to develop and support non-statutory models.

Our democratic system, and ultimately Parliament, is here to provide scrutiny and oversight. The committee's report is proof of that, as is today's debate. It is right that our institutions are held to account, especially in relation to the complex and important issues we have discussed today. The committee's report noted that, below this, there are a range of oversight bodies tasked with providing oversight on various aspects of how the police use technology. We recognise the risk of overlap and confusion, which is why we have proposed in the Data Protection and Digital Information Bill to simplify the arrangements for biometric and surveillance cameras, because, ultimately, it is individuals, not technology, who take the key decisions within the justice system. Technology may be used to generate insights, but the decision to arrest will always remain with the officer, while the courts will decide what material can be given in evidence in determining guilt and any sentence. The Government will continue to support work to equip and educate the individuals working within the justice system so that they understand the technologies they use and how to use them correctly.

My noble friend Lord Hunt and others raised governance and accountability. On accountability, I think the question was who is responsible when things go wrong—who has the day-to-day responsibility for governance? There are existing regulations covering

[Lord Sharpe of Epsom]
the responsibilities of parties when undertaking a procurement and when working together to provide a service. Depending on the issue, it may be addressed in different ways: illegal activity may be a criminal offence; other unlawful activities, such as a data protection breach, would be an issue for regulators; and poor performance should be mitigated against at the contractual level.

The public expect the police to innovate. They have to be allowed to do so within the law, so decisions on what technologies to use are highly operational ones for the police, independent of government. However, the police need to act within the legal framework set out by Parliament, and bans are in place where they are proportionate to the risk, such as in cases where the technology poses a risk of lethal or less than lethal force. This is not the same level of risk as that associated with the types of technologies raised in the report.

Chief constables ultimately decide when and how to use new technologies. However, they and their PCC are advised, regulated and overseen by a range of technical and regulatory bodies. The police chief scientific adviser, who I will come back to, advises chief constables on important matters such as good education. The ICO can and will take action where there is a lack of compliance with data protection laws. His Majesty's Inspectorate of Constabulary and Fire & Rescue Services has a duty to consider how forces are meeting the Peelian principles, of which the use of technology is of course a part. HMICFRS undertakes thematic reviews based on its local inspections, and the use of technology is an area which could merit specific analysis.

The noble Baroness, Lady Primarolo, asked about individual complaints challenging the use of technology. Challenging the use of technology in the courts is certainly a resource-intensive process, and it is best reserved as a solution when the circumstances are exceptional. However, individuals can report concerns through other avenues, and we encourage them to do so. Where there are concerns over necessity, proportionality or a policing justification, they could be raised with HMICFRS, which has a mandate to consider how professional standards are applied in its reports and investigations. If the matter relates to how individuals within policing are using technology and their behaviour, this may be something to take forward with the independent police complaints authority. Concerns related to fairness, equality or rights can be raised with the Equality and Human Rights Commission, while the Information Commissioner's Office is well placed to investigate questions of data protection and privacy.

Noble Lords have acknowledged that the police are operationally independent, which is an essential principle of our system. Nevertheless, we are also alive to the need to ensure that law enforcement is given appropriate support in adapting to technological change and advancements. The role of the police chief scientific adviser, to which I have referred, was created to give policing a scientific capability, establishing a dedicated place for advice on how to innovate, test technologies and ensure that tools do what they claim. Since being appointed, the chief scientific adviser has led reform of how the sector works with the scientific community and is developing a strategy for science and technology. The NPCC's science and technology strategy will strengthen how the police approach using validated and cutting-edge science in their mission to protect the public. The Government support this strategy and encourage its successful adoption. Those using the technology and impacted by it must be confident that it works as it should.

The Home Office is investing in policing to strengthen the technical evidence available on the most promising future technologies, as well as helping in the commission of research by the Defence Science and Technology Laboratory, which tests functional performance. Confidence in the scientific basis and validity of the technology being used is only part of the picture: there must also be confidence in the operational practice.

The wider question of technology in the justice system is clearly an area in which it is important constantly to develop best practice and future guidance. We agree that clear and consistent advice is essential to allow innovation. To this end, the sector is developing its repository of guidance and information. For example, the College of Policing published national guidance on live facial recognition earlier this year. The Government will support the sector to stay on the front foot in addressing specific technologies, as needed.

An approach centred on the "Move fast and break things" mantra may work for innovation in the Silicon Valley, but it would not be appropriate in the context of UK law enforcement. So we have no wish to break the system establishing the rule of law, which of course dates back a very long time. That is not to say that the Government intend to sit back and be solely reactive, but proactively regulating brings its own risks. Mandating standards without consensus in the sector on what it needs may turn certification into something that is easily gamed by bad actors, opening up public authorities to harm.

So, although I happily acknowledge that there will be an opportunity for someone to set global standards, at the moment the Government are of the opinion that certification, or kitemarking, can create false confidence in the validity of a technology. We want to ensure that responsibility for using lawful technologies is not delegated to a certification process that may be gamed. Within our existing regulatory model, the police have a responsibility to use products that are safe and meet the high ethical tests set out in the data protection, human rights and equalities legal framework.

Assessing proportionality and necessity, even if the technology works, depends on the unique factors of each use case. Organisations should not hide behind regulations or certification when it comes to deploying new technologies responsibly. The police must make justifiable decisions during procurement, development and deployment, reviewing them regularly. The current legal framework places responsibility for how to do that firmly on the organisation. However, in addition to the Centre for Data Ethics and Innovation, the Government have established an AI standards hub to help to promote good practice. But the responsibility and accountability that organisations face are theirs alone.

Although we did not generally share the committee's overall approach of more and more legislation, we will act when the need is clear. We are confident that the regulatory model is proportionate and mature. We have

established a statutory code for digital forensics and placed the forensic services regulator on a statutory footing. As practice consolidates around specific standards, we will continue to learn from the relevant experiences and engage with wider learning from sectors such as healthcare.

Someone, but I am afraid I have forgotten who, asked: does it actually work? The answer is yes. I have a large number of examples but in the time available I will provide one: all forces use facial recognition retrospectively. South Wales Police produces around 100 identifications a month, which, as a noble Lord—I forget who—noted, reduces certification time from 14 days to a matter of hours. South Wales Police and the Met have also used live facial recognition technology and successfully disrupted things like mobile phone theft gangs, with no reported thefts at rock concerts, for example, and there were 70 arrests overall during various trials, including for offences as severe as rape, robbery and other forms of violence.

The noble Lord, Lord Clement-Jones, raised the Bridges case. That was a compliance failure by South Wales Police. The court confirmed that there was a legal basis in common law and a legal framework including human rights, data protection and equalities law, in which live facial recognition and, by extension, other technologies could be usefully carried out. Since the judgment, the College of Policing has published an authorised professional practice clarifying the "who" and "where" questions.

On the question of potential bias, noble Lords will be interested to know that the US National Institute of Standards and Technology, which is generally recognised as the world's premier outfit of this type, found that the algorithm that South Wales Police and the Met use shows almost indetectable bias.

The Committee may have noticed that I am slightly between focus ranges with or without glasses, which is making life rather complicated. I wish I were relying on technology at this point.

I was asked about live facial recognition as an example. I have just mentioned that the College of Policing authorised professional practice guidance on live facial recognition. That requires chief officers to ensure training within the force on the following: how to respond to an alert; the technical capabilities of live facial recognition; the potential effects on those subject to the processing; the core principles of human rights; and the potential impact and level of intrusion on each subject.

The adoption of live facial recognition standards serves as an example of where practice has moved quickly over the last few years following legal scrutiny and greater public discourse. The sector learned from the early pilots to test, improve and evolve policies following feedback. The pilots of this tool were just that—early tests. Now that more evidence is available and the maturity of the capability is advanced, we can analyse how the legal framework is working. This process points to the strength of our legal framework as it has driven the improvement of standards without suffocating innovation.

My noble friend Lady Sanderson and the noble Baroness, Lady Ludford, asked about DCMS and cross-departmental working. The answer is that we work very closely. The Home Office is also part of a pilot looking at how the algorithm transparency standard works for the department's own activities. As for the White Paper, it will come some time next year but I am afraid I do not have a specified date.

I thank all noble Lords who have contributed to this fascinating debate. I extend my thanks again to the committee for all the work and insight that went into producing a thorough and engaging report on these very complex issues. We do not fully agree on the way forward in terms of specific steps, but I am confident in suggesting that there is a broad consensus about the need for a long-term approach. Whether that stops noble Lords being disheartened, I do not know.

For the Government's part, we will continue to look at the entirety of the system and seek to encourage improvements at each stage, with a focus on developing policy to ensure that the benefits of new technology are realised throughout the justice system. As the report laid out so clearly, there is no option to pause or stand still. The issues discussed today are of fundamental importance to the safety and security of our citizens and our values, and I look forward to continuing our engagement on these matters.

*7.29 pm*

**Baroness Hamwee (LD):** My Lords, there are more recommendations and conclusions in our report which any of us could have spoken to today, but noble Lords have covered a great deal of ground and I thank them all.

Our thanks go to the staff who supported this inquiry: Sam Kenny, our then clerk, and Achille Versaevel, our policy analyst, who, in truth were the authors; Amanda McGrath, who kept everything in order including the members; Aneela Mahmood, who got us coverage in an astonishing number of media outlets; David Shiels, our present clerk; and Marion Oswald, our enormously knowledgeable specialist adviser, who seems to know everyone. Of course, thanks also go to the people who gave us such powerful evidence. I thank the Alan Turing Institute, which hosted last week's workshop, attracting contributors with such expertise, who I wish were sitting behind me, passing me notes of critique of what we have just heard. That workshop felt like an important validation of our work. My thanks go to all members of the committee, with whom I thoroughly enjoy working. None of their contributions is small.

We were drawn to the topic because of the lack of a legal framework, the rule of law and the potential for injustice—principles which must continue to apply. The speeches today have confirmed these and that the committee appreciates the use of AI. We have not been dismissive of it.

I thought that the noble Lord, Lord Hunt, might refer to the thalidomide case. It was mentioned at the workshop, where the point was made that it is essential to get the tests of a product right, otherwise compliance with the test is used as the defence to a claim.

I have been subjected to a type of AI at the border, where I could get through only when I took off my earrings, because I had not been wearing the same earrings when the passport photo was taken. That is such a minor example, but I felt quite rejected.

[Baroness Hamwee]

I have to say that I thought my noble friend Lord Paddick was going to say that the technology let him range freely through his twin brother's bank because he thought he was his twin brother.

I do not think that the noble and learned Lord, Lord Hope, should begin to be apologetic about having no technical expertise. In a way, that is the point of our report. The judiciary was very much among those we regarded as affected by the use of AI.

The pace of development was referred to; it is enormous. The issues will not go away, which makes it all the more important that we should not be thinking about shutting the stable door after the horse has bolted or letting the horse bolt.

I thank the Minister for his response. It is not easy to come to this when many of us have lived with it for a long time. To sum up his response, I think the Government agree with our diagnosis, but not what we propose as the cure. We have to make transparency happen. He says it is not optional, but how do we do that, for instance?

There was a good deal of reference in his response to the public's consenting, policing needing consent and the Peelian principles, but he then listed a number of institutions, which, frankly, confirmed our point about institutional confusion. On ethics and his point that a statutory body could override a democracy, that is not how any of the ethics organisations approach it. It is about closing the stable too late if one addresses specific technology as it is needed.

A commitment to the spirit of the report gets us only so far; it does not leave the Wild West way behind in our rear-view mirror. We will indeed come back to this, maybe when we get the new data protection Bill. This is not an academic issue to be left in a pigeonhole unconnected with issues current in Parliament—I need only say: the Public Order Bill.

*Motion agreed.*

*Committee adjourned at 7.35 pm.*