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PARLIAMENTARY DEBATES
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HOUSE OF LORDS
OFFICIAL REPORT

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

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

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

House of Lords

Wednesday 6 July 2022

3 pm

Prayers—read by the Lord Bishop of Manchester.

Bread and Flour Regulations: Folic Acid
Question

3.07 pm

Asked by ***Lord Rooker***

To ask Her Majesty's Government, further to the answer by Lord Kamall on 6 April (HL Deb col 2076), what progress they have made towards amending the Bread and Flour Regulations to include folic acid fortification.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord Kamall) (Con): I am grateful to the noble Lord for continuing to promote this important policy. I hope that, following our meeting in May, the noble Lord is sure that the Government share his commitment to getting folic acid fortification done as part of the Bread and Flour Regulations review. The review continues to progress, we are aiming to launch a consultation shortly and I am able to share an indicative timeline for the process.

Lord Rooker (Lab): I am grateful to the Minister for his Answer and confirmation, but just in case there is any backsliding in his department, may I suggest that he asks them a question? Can anybody name any one of the 85 countries that have made fortified folic acid mandatory, some for over 20 years, that has pulled out; and can the Minister name any one of the 85 that has found a bad side-effect? The answer to both questions is no. Then, he can go and face the 18 women last week, this week, next week and the week after who have terminations after the 20-week scan. The department is sitting on a cure to stop 80% of that distress among our fellow citizens. We are going at a glacial pace—I accept it is in the right direction, but it is glacial.

Lord Kamall (Con): I hope the noble Lord appreciates that there is debate here. He has written to me a number of times about Professor Wald's paper, which has been put before the advisers in the department. I think what we are seeing is scientific contestation: some people say that the science is settled, but others say that you have to be very aware of the unintended consequences. The NHS website advises people with certain conditions not to take folic acid, the worry being that, for people who do have levels of folic acid, we may end up solving one problem and unintentionally creating another.

Lord Patel (CB): My Lords, we have now discussed the scientific validity several times. The Minister arranged a meeting, and I thought we had resolved this issue. Which scientific evidence is confusing the departmental advisers?

Lord Kamall (Con): The advice still does not accept Professor Wald's paper. But we did say in the meeting, if the noble Lord remembers, that we should not let the scientific debate be the enemy of progress. We are progressing, and I am able to share an indicative timeframe. We can debate at appropriate levels after that, but we are progressing where there is consensus.

Lord Cunningham of Felling (Lab): My Lords, why does the Minister refuse to implement the regulations when there is abundant evidence internationally in support of this? Even worse, what does he have to say to those 18 women each week who lose a baby because of the Government's failure to act?

Lord Kamall (Con): The noble Lord has a couple of questions there, and I will try to answer them as quickly as possible. We are hoping to launch a consultation in August/early September, with a close date 12 weeks after that. There should be a government response on the final position in Q1 2023. After that we have to notify the World Trade Organization and the European Commission, because of the Northern Ireland aspect of this issue. After that, we have a notification period of between two and six months. Assuming that that is all cleared as quickly as possible, we will be ready to lay the provision by Q4 2023. It is glacial, but I assure the noble Lord that we are doing this as quickly as we can.

Lord Addington (LD): My Lords, will the Government give us an assurance that they have identified all the checks and balances? That might be a good start. Also, exactly how long did it take some of the other nations that have already done this process to get through it?

Lord Kamall (Con): The Government are clear that we are doing this, but we also have to be aware of the debate regarding high levels of folic acid. We are progressing in areas where the consensus is that there are no unintended consequences or damage. However, the NHS website plainly says that you should not take folic acid if you have had an allergic reaction to it; if you have certain forms of cancer, unless you have folic deficiency anaemia; if you have a type of kidney dialysis called haemodialysis; or if you have a stent in your heart. Let us make sure that this is based on evidence. We have to make sure that we address the worry of unintended consequences; otherwise, what do we tell the relatives of those who have died because of high levels of folic acid?

Baroness Hayman (CB): Does the Minister accept that that sort of advice is given regarding life-saving treatments across the board? In more than a quarter of a century, I have heard Ministers at that Dispatch Box prevaricate and obfuscate on this issue, while the rest of the world has moved on and given us scientific evidence, in 85 countries, that this works—that it saves lives and saves distress. There is scientific evidence, and evidence in practice as well. The Minister has the opportunity not to be one of those prevaricating and obfuscating Ministers; I hope that he will take it.

Lord Kamall (Con): I hope that the noble Baroness is not mis-stating the fact that we are looking to go through proper processes as our trying to kick this down the road.

Noble Lords: Oh!

Lord Kamall (Con): I have been advised on this issue, and I have asked if this could be done quicker. Let us put it this way: I anticipated the reaction that I might well get in this Chamber to some of these answers. Indeed, I had to go back to the department on some of the answers and ask for clarification. The point is that there has to be a consultation. Think back to where there has been improper consultation, or where certain evidence has been ignored—the dash to diesel, for example. That consultation identified that while diesel might have lower levels of CO_2, it has higher levels of other things that damage air quality. But that advice from the consultation was ignored. They pushed ahead, and the situation end up worse as an unintended consequence. We have to be careful on this one.

Lord Dodds of Duncairn (DUP): My Lords, the Government first announced that they were going out to consultation on this issue in October 2018. That was very welcome after many years of delay. Given the number of countries that have implemented this very sensible policy, what on earth are the scientific arguments for not proceeding? Surely, all these other countries have tested this in real terms, in actual practice. Can the Minister give us a target date for when all the consultations will have finished and the regulations will come into force?

Lord Kamall (Con): Perhaps I have not made it clear enough that we are proceeding with this; there is no stopping the process or review. We are clear that the scientific debate should not hold up progress, so we want to launch the consultation in August/early September. The closing date will be 12 weeks after that, and we should have a government response on the final position in Q1 2023. We would then notify the WTO and European Commission, and once that is all cleared, it should result in legislation being ready to be laid in Q4 2023, and the transition period for the industry would be discussed after that. When I spoke to the noble Lord, Lord Rooker—I hope he would acknowledge this—he believed that I was one of the few Ministers who is very intent on progressing this.

Baroness Merron (Lab): My Lords, as the noble Lord, Lord Patel, has said, the scientific evidence is readily available and evidenced across the world. Can the Minister tell us what, on this new timeline, he thinks the new consultation and process might reveal that we have not seen so far?

Lord Kamall (Con): The reason we have a consultation is so that we are aware of unforeseen circumstances and that, hopefully, we deal with unintended consequences before they occur. It is all very well saying that the science is settled; we have reached a level of consensus where both sides can agree, and that is what we are progressing from. Once it is implemented, we can start reviewing whether it should be a higher level and whether there are unintended consequences. The history of contestation in science goes back a long way; think of the heliocentrism versus geocentrism debate. People thought that the universe revolved around the earth, but Aristarchus of Samos, al-Battani, Islamic philosophers and others challenged that, and Copernicus proved that heliocentrism was right.

Lord Cormack (Con): My Lords, will it take as long for my noble friend to come to this conclusion? If there were a Nobel prize for prevarication, he would win it.

Lord Kamall (Con): I am not sure that I should thank my noble friend for that question. I really do not mind being heckled, as long as I am not being asked to resign, frankly.

Noble Lords: Oh!

Lord Kamall (Con): If I let your Lordships laugh a bit longer, maybe I will run out of time. We are absolutely clear that we will do this; I am sorry that we have to go through this process, but the advice I have been given is that we have to go through the proper consultation and notification process. I apologise if that annoys noble Lords.

Baroness Symons of Vernham Dean (Lab): My Lords, the noble Lord will have followed the argument of my noble friend Lord Rooker for a very long time. Actually, he is one of the very few Ministers that I hope will not resign, because he is always honest and clear with this House and has a level of respect which Ministers in another place perhaps do not have. But I ask him quite sincerely: does he really want the risk of another 500 or 600 babies who are much wanted being lost, on the timetable he has outlined to the House, because that is what will happen?

Lord Kamall (Con): I first express my relief that the noble Baroness does not want me to resign—but, as others say, give it time.

Noble Lords: Oh!

Lord Kamall (Con): You always have to be careful what you say at the Dispatch Box. I am afraid that I have to follow a process; I can take it back to the policy team, but they advise that this is the process we have to go through. We have to notify the WTO and others.

Thyroid Patients: Liothyronine

Question

3.18 pm

Asked by ***Lord Hunt of Kings Heath***

To ask Her Majesty's Government what steps they will take to prevent Clinical Commissioning Groups denying thyroid patients access to the drug liothyronine (T3) for the treatment of hypothyroidism.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord Kamall) (Con): My Lords, I am still here. While levothyroxine is the first-line treatment for hypothyroidism, guidance published by NHS England is already clear that prescribing liothyronine is clinically appropriate for individual patients who may not respond to levothyroxine alone. NHS England is currently reviewing its guidance. As part of the engagement exercise, patient groups and other key stakeholders have been contacted to provide feedback and will be involved in this refresh.

Lord Hunt of Kings Heath (Lab): My Lords, I am relieved that the noble Lord is still here to answer this Question. I am grateful for what he said, but he will know that, for a certain group of patients, T3 is highly effective and much more effective than the normal medication that is given. There was a huge price hike a few years ago, and as a result the NHS restricted access; the price has come down, but, unfortunately, access is still restricted. In some parts of the country, patients cannot get prescribed it. Will the noble Lord, rather than relying on advisers, intervene and tell the NHS to stop this postcode lottery?

Lord Kamall (Con): NHS England is currently consulting on this revision, for much the same reasons that the noble Lord acknowledges. At the moment, liothyronine is a second-line treatment when the other one cannot be used or is not appropriate. At a local level, doctors should be advised that they are able to prescribe it. Clearly, that is not getting through. When we went to NHS England with this, it recognised this and said that there will be a consultation.

Lord Borwick (Con): My Lords, I declare an interest as a thyroid patient and as patron of several thyroid charities. As my noble friend the Minister is aware, there are many patients suffering a misinterpretation of "routinely" in the advice that

"T3 should not be routinely prescribed".

"Routinely" could mean either "regularly" or "without thought". Can my noble friend make it clear that the meaning of "routinely" in this case is "without thought", rather than "regularly", as all thyroid medication must be prescribed regularly? If the Minister could make this clear from the Dispatch Box, I believe that the suffering of a lot of patients—notably, Christine Potts, who has written to me and to the Minister—could then be reduced.

Lord Kamall (Con): I thank my noble friend for sending me the question in advance, since it was quite complicated—I sent it to the advisers, and when it came back, I had to ask for further explanation. So here is the advice that I have been given, and I hope that noble Lords will bear with me. The term "routinely" can be defined as "regularly", as part of the usual way of doing things, rather than for any clinically accepted reason. It is actually regularly because patients should not be given liothyronine as the first-line treatment; the exception to that is when patients have tried the first-line treatment but still have symptoms. In that case, liothyronine is tried. I am assured that, although this may be confusing, the language is known to commissioners, whom the guidance is aimed at. However, they appreciate that others outside the commissioning process may not understand it as clearly.

The Lord Speaker (Lord McFall of Alcluith): The noble Baroness, Lady Brinton, will make a virtual contribution.

Baroness Brinton (LD) [V]: My Lords, what assessment has been made of the *T3 Prescribing Survey Report*, which was published on 13 May, and of the reported failure by clinical commissioning groups to follow NHS England's national guidance, *Prescribing of Liothyronine*, published in 2019, which shows that 58% of CCGs are still not complying with the national guidelines? Can the Minister intervene? This seems to be a ridiculous situation.

Lord Kamall (Con): I have had prior notice from other noble Lords about this issue and have organised meetings with my officials in the past on this—I am always happy to do so. Given the concerns about the lack of commissioning for people who have tried the first-line treatment and now want the second-line treatment, NHS England intends to revise its guidelines. It is sorry about the process, but it must consult before it can change those guidelines.

Baroness Masham of Ilton (CB): My Lords, is this not a case of discrimination against those patients who need the drug?

Lord Kamall (Con): The current advice is for them to try the first-line treatment and only if that does not work should they go for the second-line treatment which noble Lords are asking for. In some cases, there may be patients in the other direction, who could go on to the first-line treatment. NHS England clearly understands the problem and the concerns that many noble Lords have raised, and it is consulting on the guidelines.

Baroness Warsi (Con): My Lords, this question does not relate to thyroid drugs, but perhaps the Minister can answer it. If not, I would be obliged if he wrote to me. It relates to HRT drugs. My noble friend will be aware of the ongoing issue relating to supply of HRT medication, both oestrogen gel and patches. The now-departed Secretary of State for Health was due to appoint a menopause tsar. Can my noble friend update the House on the current situation regarding supply of HRT and the appointment of a tsar?

Lord Kamall (Con): I am afraid that I am not able to fully answer my noble friend's question. However, I know that my right honourable friend the former Secretary of State for Health did organise a round table with some of the relevant charities to discuss this and to discuss where they can source elsewhere, outside of the UK, and whether they could build up UK capacity. My honourable friend Maria Caulfield, the Minister, has also met with a number of organisations on this, and they are determined to get as much as they

[Lord Kamall]
can. One issue is the stock for the future as opposed to for now, and feeding that through, but I know that the department is on to this.

Baroness Wheeler (Lab): My Lords, the evidence clearly shows that many patients with hypothyroidism would benefit hugely from the declassification of T3 as a high-cost drug back to being a drug that is routinely prescribed in primary care. Can the Minister explain exactly what the Government will do to ensure that the actual NICE guidelines that enable T3 to be prescribed by clinicians according to their judgment reflect this position, are implemented consistently across new NHS structures and stop the current postcode lottery? Would this not be better than repeating the record of the majority of CCGs who ignore the guidelines?

Lord Kamall (Con): The noble Baroness raises a really important point about some of the blockages to patients getting T3. It is both the first and second-line advice from NHS England but also the NICE advice too. NICE always reminds us that it is independent, and that Ministers should not intervene, but we can call for meetings. NICE also recognises that a price change does change the equation. It has told me that it is open to new evidence with people able to consult and contact it about this.

Shortage of Workers

Question

3.25 pm

Asked by ***Lord Londesborough***

To ask Her Majesty's Government what steps they are taking to address the shortage of workers in the United Kingdom.

The Parliamentary Under-Secretary of State, Foreign, Commonwealth and Development Office and Department for Work and Pensions (Baroness Stedman-Scott) (Con): My Lords, with around 1.3 million vacancies currently available, the Government recognise the importance of filling vacancies in support of business and economic growth. Our approach focuses on how we can best support jobseekers and employers to overcome the barriers to recruitment, retention and progression in their sector. The Way to Work campaign focused on bringing employers and claimants together in our jobcentres to fill vacancies faster. As of 29 June, we estimate that at least 505,400 unemployed universal credit and jobseeker's allowance claimants moved into work between 31 January and the end of 26 June.

Lord Londesborough (CB): I thank the Minister for her detailed response, but the UK is suffering an employment crisis. Our workforce has shrunk by at least 500,000, with some estimates saying nearer 1 million —the biggest percentage drop of any G7 economy—and as the Minister says, we now have more than 1.3 million unfilled vacancies. Labour shortages do not just cause economic disruption; they fuel wage inflation and damage productivity—a classic recipe for stagflation.

Some employers are now employing underqualified or untrained staff and having to pay them 20% more. When will the Government respond to the scale of this crisis and come up with a comprehensive package of new measures to address this mass exodus of workers?

Baroness Stedman-Scott (Con): The DWP is running numerous programmes to get people back to work to try to fill those vacancies, because, as the noble Lord said, the lack of workers and skills is not helping the economy. We do have a new Chancellor.

Noble Lords: Oh!

Baroness Stedman-Scott (Con): I know that he is full of ideas, and I am sure we will hear from him very soon.

Baroness Sherlock (Lab): My Lords, there are indeed lots of vacant jobs with no applicants, but that is just for government Ministers of course.

The Government approach the problem of vacancies as though the basic problem is lots of idle, unemployed people. They pour money into restarting Kickstart and start big sanctions, but what we have is a crisis of economic inactivity. For example, we have a whole load of people aged over 50 who either lost or left their jobs in the pandemic and never came back, and we have a post-pandemic crisis of mental and physical ill-health. Is not that where the Government should direct their energies?

Baroness Stedman-Scott (Con): I am very pleased to tell the noble Baroness that that is exactly what we are doing. For older workers—those over 50—there is a £22 million fund to boost employment support. I can assure the whole House that we are not looking at people as being idle; we are looking at them as people with potential and the ability to add value to an employer. We are working very carefully with them to get them in a position to do that.

Lord Young of Cookham (Con): My Lords, I hope my noble friend will stay in post whatever happens. She will know that there are many thousands of people with a disability who are none the less capable of filling some of the vacancies now available. While the Government have an excellent record with their Access to Work scheme, could they do more to unlock the talents of disabled people by beefing up some of the other schemes, such as the Work and Health Programme and the Disability Confident employer scheme?

Baroness Stedman-Scott (Con): Again, I am pleased to respond to that question, because we set a target to have 1 million more disabled people in work between 2017 and 2027. By Q1 2022, we had 1.3 million, so we have smashed the target and are not stopping now. I assure all noble Lords that we are working to get disabled people into work, because they have great skills and employers are taking them very seriously.

Baroness Randerson (LD): My Lords, I welcome the Government's Statement on the 22 measures they intend to take to support the aviation industry. Eight

of those relate to improving recruitment of staff. It is now six years since the Brexit vote, and we have had two and a half years of the pandemic. That made it clear to the Government that they would no longer be able to rely on the pool of European labour and of previously trained labour. Why did it take the Government so long—until this week—even to start to address the inevitable staff shortage that has flowed from this?

Baroness Stedman-Scott (Con): I note the point the noble Baroness makes about shortages in the aviation sector, and there have in fact been problems in road haulage and other sectors. But the Government and the DWP have been working closely with trade bodies and employers to try to work things through. All I can say is that I am sorry we were not quick enough.

Lord Woodley (Lab): We all know—indeed, the last speaker just pointed it out—that one of the main reasons for the shortage of labour is Brexit. As the CEO of Ryanair said, that is the single biggest problem, but it is not helped either by Covid. However, there is a solution the Government unfortunately will not consider, even though it builds on their tremendous work to fast-track Ukrainians with relatives in the UK. What is stopping the Minister from doing the same for refugees from other countries, with relatives who are prepared to sponsor them? Let them work; let them live; let them contribute to British society.

Baroness Stedman-Scott (Con): Immigration policy is not in the DWP's gift. I suggest the noble Lord takes that up with the Home Office, although I am happy to help by diverting his question to the Home Office. The noble Lord is correct about Ukrainian refugees: we have done a lot to get them into the benefits system and get them national insurance numbers. I am pleased to say that a lot of them are highly skilled and qualified, and we look forward to integrating them into the workforce.

Baroness Butler-Sloss (CB): My Lords, fruit and vegetables are rotting in the fields. What on earth are the Government doing to get enough seasonal workers to pick them?

Lord Cormack (Con): Send Boris!

Baroness Stedman-Scott (Con): I will leave that to my noble friend to make the suggestion.

The SAWs visa scheme makes sure that people can have a visa if employers promise to pay them over £20,000. I am pleased about that, because then the "cheap labour" heading goes. One swallow does not make a summer, but today I spoke to one of the biggest fruit providers in Kent and it has managed quite well in getting in seasonal workers. If you pay and treat them well, and give them good accommodation, it seems they will come.

Baroness Altmann (Con): My Lords—

Lord Lilley (Con): My Lords, does the Minister accept that a general shortage of labour is a symptom of excess demand? You cannot assuage that by importing labour from abroad for the simple reason that workers not only produce but consume goods and services. The extra demand they create exactly equals the extra demand they assuage.

Noble Lords: Oh!

Lord Lilley (Con): That is why, when Tony Blair justified opening our boundaries to free labour from eastern Europe because there were 1 million vacancies, 3 million more people entered but there were still 1 million vacancies.

Baroness Stedman-Scott (Con): I wonder whether the noble Lord will allow me to read *Hansard* and respond to him in writing.

Baroness Bennett of Manor Castle (GP): My Lords—

Noble Lords: Altmann!

Baroness Altmann (Con): Thank you, my Lords. I commend the Government on protecting jobs and preserving high employment levels, but I put in a plea regarding the immigration situation. Health and care workers are put into the same bracket when we talk about special visas, but the majority of care workers—more than 90%—earn less than the £20,000 limit. Would it be possible to have a special channel for overseas care workers in the current emergency situation where so many vulnerable and elderly people are left without care and homes are having to close?

Baroness Stedman-Scott (Con): We are working with the DHSC and the DfE to promote opportunities and routeways into adult care. We are using our sector-based work academies to get people skilled, but the health and care visa is available to qualified professionals looking for work in the sector as long as they meet the minimum eligibility criteria, which includes a salary minimum of £20,000.

Defence Spending Priorities: NATO Summit

Question

3.36 pm

Asked by ***Lord West of Spithead***

To ask Her Majesty's Government what changes to defence spending priorities they will make as a result from the outcome of the NATO summit in June.

The Minister of State, Ministry of Defence (Baroness Goldie) (Con): My Lords, although the next spending review will determine the exact changes to defence spending priorities, as the Prime Minister stated at the NATO summit last week, we need to invest for the long term in vital capabilities such as future combat air, while simultaneously adapting to a more dangerous and competitive world. The logical conclusion of the

[Baroness Goldie]
investments we propose to embark on and of these decisions is 2.5% of GDP on defence by the end of the decade.

Lord West of Spithead (Lab): My Lords, I must first say that I am very impressed that the Minister is so on top of her brief; she read it just 20 seconds ago. The NATO summit clearly identified Russia as a clear and present danger. There is a danger of a world war at very short notice. The summit identified a need to spend money on defence. We need to spend that money today. Does the Minister not agree that we need to spend now? It is no good waiting for the end of this spending review. We know that we will not have a fully stocked armoured division available to fight peer-on-peer until the 2030s. We know that our number of frigates will keep falling and not come up again until the 2030s. We might well have had two wars by then. We need to spend now. Does she agree?

Baroness Goldie (Con): To reassure the noble Lord, I tell him that the pack was read, digested and tabbed, but unfortunately it was not where I was. I was very pleased to be reunited with it. What we have seen with recent events is a confirmation of what was identified in the integrated review and the defence Command Paper—that Russia is the current threat. Therefore, the assessment in these papers holds true. However, we are not complacent. We recognise that the context in which we are operating is shifting and we are watching and analysing the situation. We will make adjustments where appropriate, but we should wait in some cases to see what unfolds.

Lord Lancaster of Kimbolton (Con): But the devil is in the detail, my Lords. Although I welcome 2.5% by 2030, can my noble friend perhaps—

Noble Lords: King!

Lord King of Bridgwater (Con): In looking at the priorities for the NATO summit and the longer-term considerations for defence spending, what consideration was given to the urgent need for collaboration on further supplies of ammunition for various weapons? That could otherwise threaten to completely undermine the efforts to defend Ukraine.

Baroness Falkner of Margravine (CB): My Lords—

Noble Lords: Oh!

Baroness Goldie (Con): I thought someone was going to answer the question for me; all offers of help gratefully received. My noble friend identifies a significant issue that was the subject of extensive discussion at the recent NATO summit. The MoD continues to understand the implications of the war in Ukraine for the readiness and resilience of our Armed Forces, for the health of our industrial base and for our review of our stocks of weapons and munitions, because that forms a key element of the analysis we carry out. All parties to NATO are doing similar things, but I reassure my noble friend that this department remains fully engaged with industry, allies and partners to ensure that all equipment and munitions granted in kind are replaced as expeditiously as possible.

Lord Campbell of Pittenweem (LD): My Lords, in Madrid, NATO agreed to create a force of 300,000 troops to be kept on high alert in order to meet the Russian threat. How can the United Kingdom make a meaningful contribution to that force without increasing the British Army?

Baroness Goldie (Con): As my noble friend Lord Howe explained so eloquently last week in response to a Question specifically about this, we have explained our approach. We are very clear that the Army will be more agile. It will have a greater speed of response. It will be remodelled around brigade combat teams, which means more self-sufficient tactical units with the ability to integrate the full range of capabilities at the lowest possible level. In addition, every part of the Army Reserve will have a clear war-fighting role and will stand ready to fight as part of the whole force in time of war.

Baroness Falkner of Margravine (CB): I first apologise to the Minister for my enthusiastic earlier attempt at intervention. I assure her that the last thing I would seek to do at the moment is to expect to speak on behalf of Her Majesty's Government. Turning to the substantive question from the noble Lord, Lord West, will she accept that in a declining or stagflating economy a GDP target several years out is almost meaningless once inflation is taken account of? Will they at least attempt to set an immediate target for where they expect to get to within a reasonable—I should say "prompt"—period in terms of real funding?

Baroness Goldie (Con): The Prime Minister has made it clear that the investments we propose to embark on, such as AUKUS and FCAS, will mean that defence spending will reach 2.5% of GDP by the end of the decade. It is currently projected to reach 2.3% of GDP this year. We constantly assess the threat and our ability to respond to it, which is a responsible way to proceed.

Lord Browne of Ladyton (Lab): My Lords, on Monday in the other place, while making a Statement, the Prime Minister was on more than one occasion asked a variant of the excellent question that the noble Lord, Lord Campbell of Pittenweem, asked. He never once answered the question but twice prayed in aid what he called the "gigantic" commitment we are making to the AUKUS agreement and how it will increase defence spending very considerably, taking it over the target of 2.5%—those are not the exact words but that is what he said. On 16 December when he made the initial Statement about AUKUS he said nothing about predicted costs. On the contrary, he said that AUKUS came with lucrative defence and security opportunities. There is no information in the public domain on the predicted cost of AUKUS so where can I find the evidence of the gigantic commitment we seem to have made, that only the Prime Minister seems to be aware of?

Baroness Goldie (Con): As the noble Lord is aware, AUKUS is subject to an 18-month scoping period, so Her Majesty's Government cannot prejudge the outcome of that period. Similarly, in the advanced capabilities space, all working groups are currently in the initial phases. As that proceeds, we will have a clearer picture of what the UK contribution can be. Much the same can be said of FCAS. These are very significant projects.

Lord Trefgarne (Con): My Lords, are there plans to deploy any of our existing naval forces to the Black Sea to facilitate some of the export of the large quantities of grain which at present are unable to move?

Baroness Goldie (Con): My noble friend refers to an important issue: how we transport that grain, if possible. Discussions are taking place among the different partner countries as to what solutions there might be. There are no Royal Navy craft in the Black Sea. My noble friend will be aware that the Montreux convention governs maritime activity there, and that has been deployed by Turkey.

Lord Coaker (Lab): My Lords, was not the most welcome outcome of the Madrid summit NATO's agreement to admit Finland and Sweden? Far from weakening NATO, Putin's actions have strengthened it. Alongside that, is it not clear that we need to review the cuts to tank numbers, cuts to C130 transport planes and cuts of 10,000 troops? Is the chair of the Defence Select Committee not right when he says that 2.5% of GDP on defence spending by the end of the decade is too little, too late?

Baroness Goldie (Con): As the noble Lord is aware, people will have varying views on the appropriate percentage of GDP to spend on defence. We have laid down a clearly structured plan based on the integrated review and the defence Command Paper, and we regularly make available progress reports—for example, our annual review of the equipment plan—on where we are in the delivery of all that. We constantly assess need and identify and assess threat. We try to make sure that the two are aligned and that we meet the one with the other, and that is a sensible way to proceed.

Baroness Smith of Newnham (LD): My Lords, there is a theme on all sides of your Lordships' House that perhaps 2.5% is insufficient—or at least can be overtaken by inflation, which is looking to move to double digits, and the exchange rate, which has gone down yet again today. What work are Her Majesty's Government doing to ensure that the 2.5%, or whatever is spent on defence, will be adequate for everything the Government claim they will achieve?

Baroness Goldie (Con): As I have indicated to the Chamber, there is a regular assessment by the MoD of both the threat we have to meet and the means by which we meet it. For example, the equipment plan—a massive plan—is kept under constant review to ensure that it is delivering the capabilities required to let us deliver our strategic outcomes. Major changes are normally undertaken as part of a formal government-led review process, but the MoD conducts an annual review to ensure that capabilities are not just being delivered but are still the right ones to meet the evolving threat.

Hereditary Peers By-election

Announcement

3.47 pm

The Clerk of the Parliaments announced the result of the by-election to elect two Conservative hereditary Peers, in place of Lord Brabazon of Tara and Lord Swinfen. Forty-one Lords submitted valid ballots. A notice detailing the results is in the Printed Paper Office and online. The successful candidates were Lord Remnant and Lord Wrottesley.

Lord Grocott (Lab): My Lords, as is traditional on these occasions, I would like to say a few words. I have been in politics long enough to know that the results of these by-elections may not make it to tomorrow's front pages. I thank the returning officer and congratulate the two winning candidates; they are coming in batches now. They are two new Members of Parliament and we give them our congratulations, as we always do.

It would be churlish of me not to recognise, as well, the achievement of the Government in successfully defending a seat in a parliamentary by-election. Such is the Alice in Wonderland atmosphere at the moment, I would not be at all surprised if the Prime Minister used these by-election results as proof that he is still a vote winner.

It is a year since these by-elections were resumed. As the House knows, there was a long interregnum when they were put in abeyance during the period of the Covid difficulties. I can briefly give a review of the year and give the House one or two statistics. This year we have had 11 new Members of Parliament, which is what they are, as a result of these by-elections. Seven of them were in this constituency of Conservative hereditary Peers, so the 46 hereditary Peers in the Conservative group have provided us with seven new Members of Parliament in 12 months.

While I commiserate with those who lost, the good news is that plenty more opportunities will be coming along. These by-elections are coming with increasing regularity. I can tell the House that, of the 12 candidates this time round, one of the losers—I will not mention the name because that would be mildly embarrassing—has already had 18 attempts at winning a by-election. That is persistence, but even that is not the record: the record holder, according to my statistics, is the candidate who has had a go on 22 occasions. I have lost a few elections over the years, but that really is Guinness book of records stuff.

The House will not be surprised to learn that of the 77 people who contested the 11 by-elections over the last 12 months, all were men, so there is a bit of a work to be done on gender equality in the House.

The last stat that I shall give, and I do not know whether this is good or bad news for the House, is that, of the original 90 who were the result of the House of Lords Act 1999, 44—of the lucky 70 on that occasion—are still in the House, but I am afraid that Father Time takes his toll and inevitably those 44 people are 23 years older, so we can be certain that, although the 11 new Members this year are a record, since that is the highest

[Lord Grocott]
number in one year since the 1999 Act, I would not be at all surprised if that record was broken quite soon. I am told that more people are expected to resign before long.

All I can really say to the House is that these elections look as though they are going on and on, but if they do not go away then neither will I.

Lord Hamilton of Epsom (Con): My Lords, I add my congratulations to those from the noble Lord, Lord Grocott, on the election of these two hereditary Peers. At least they have been elected to your Lordships' House, which is more than one can say for either the noble Lord or myself.

Seafarers' Wages Bill [HL]
First Reading

3.52 pm

A Bill to make provision in relation to the remuneration of seafarers who do not qualify for the national minimum wage.

The Bill was introduced by Viscount Younger of Leckie (on behalf of Baroness Vere of Norbiton), read a first time and ordered to be printed.

Energy Bill [HL]
First Reading

3.53 pm

A Bill to make provision about energy production and security and the regulation of the energy market, including provision about the licensing of carbon dioxide transport and storage; about commercial arrangements for industrial carbon capture and storage and for hydrogen production; about new technology, including low-carbon heat schemes and hydrogen grid trials; about the Independent System Operator and Planner; about gas and electricity industry codes; about heat networks; about energy smart appliances and load control; about the energy performance of premises; about the resilience of the core fuel sector; about offshore energy production, including environmental protection, licensing and decommissioning; about the civil nuclear sector, including the Civil Nuclear Constabulary; and for connected purposes.

The Bill was introduced by Baroness Bloomfield of Hinton Waldrist (on behalf of Lord Callanan), read a first time and ordered to be printed.

Marriage (Same Sex Couples) (Overseas Territories) Bill [HL]
First Reading

3.54 pm

A Bill to make provision for the marriage of same sex couples in certain Overseas Territories, and for connected purposes.

The Bill was introduced by Lord Cashman, read a first time and ordered to be printed.

High Speed Rail (Crewe–Manchester) Bill
Motion to Agree

3.54 pm

Moved by ***Baroness Vere of Norbiton***

1. That if—

(a) a High Speed Rail (Crewe–Manchester) Bill is first brought to this House from the House of Commons in this Session of Parliament ("the current session"), and

(b) the proceedings on the Bill in this House are not completed in the current session, further proceedings on the Bill shall be suspended from the day on which the current session ends until the next Session of Parliament ("Session 2023–24").

2. That if, where paragraph 1 applies, a bill in the same terms as those in which the High Speed Rail (Crewe–Manchester) Bill stood when it was brought to this House in the current session is brought from the House of Commons in Session 2023–24—

(a) the proceedings on the bill in Session 2023–24 shall be pro forma in regard to every stage through which the bill has passed in the current session;

(b) the Standing Orders of the House applicable to the bill, so far as complied with or dispensed with in the current Session or in the previous Session of Parliament ("Session 2021–22"), shall be deemed to have been complied with or (as the case may be) dispensed with in Session 2023–24;

(c) any resolution relating to the Habitats Regulations that is passed by the House in the current session in relation to the Bill shall be deemed to have been passed by the House in Session 2023–24; and

(d) if there is outstanding any petition deposited against the bill in accordance with an order of the House—

(i) any such petition shall be taken to be deposited against the bill in Session 2023–24 and shall stand referred to any select committee on the bill in that Session; and

(ii) any minutes of evidence taken before a select committee on the bill in the current session shall stand referred to any select committee on the bill in Session 2023–24.

3. That if proceedings on the Bill are resumed in accordance with paragraph 2 but are not completed before the end of Session 2023–24, further proceedings on the Bill shall be suspended from the day on which that Session ends until the first Session of the next Parliament ("Session 2024–25").

4. That if, where paragraph 3 applies, a bill in the same terms as those in which the High Speed Rail (Crewe–Manchester) Bill stood when it was brought to this House in the session 2023–24 is brought from the House of Commons in Session 2024–25—

(a) the proceedings on the bill in Session 2024–25 shall be pro forma in regard to every stage through which the bill has passed in Session 2023–24 or in the current session;

(b) the Standing Orders of the House applicable to the bill, so far as complied with or dispensed with in Session 2023–24 or in the current Session or

in Session 2021–22, shall be deemed to have been complied with or (as the case may be) dispensed with in Session 2024–25;

(c) any resolution relating to the Habitats Regulations that is passed by the House in Session 2023–24 or in the current session in relation to the Bill shall be deemed to have been passed by the House in Session 2024–25; and

(d) if there is outstanding any petition deposited against the bill in accordance with an order of the House—

(i) any such petition shall be taken to be deposited against the bill in Session 2024–25 and shall stand referred to any select committee on the bill in that Session; and

(ii) any minutes of evidence taken before a select committee on the bill in Session 2023–24 or in the current session shall stand referred to any select committee on the bill in Session 2024–25.

5. That if a High Speed Rail (Crewe–Manchester) Bill is first brought to this House from the House of Commons in Session 2023–24 the Standing Orders of the House applicable to the bill, so far as complied with or dispensed with in the current session or in Session 2021–22, shall be deemed to have been complied with or (as the case may be) dispensed with in Session 2023–24.

6. That if—

(a) a High Speed Rail (Crewe–Manchester) Bill is first brought to this House from the House of Commons in Session 2023–24, and

(b) the proceedings on the Bill in this House are not completed in Session 2023–24, further proceedings on the Bill shall be suspended from the day on which Session 2023–24 ends until Session 2024–25.

7. That if, where paragraph 6 applies, a bill in the same terms as those in which the High Speed Rail (Crewe–Manchester) Bill stood when it was brought to this House in Session 2023–24 is brought from the House of Commons in Session 2024–25—

(a) the proceedings on the bill in Session 2024–25 shall be pro forma in regard to every stage through which the bill has passed in Session 2023–24;

(b) the Standing Orders of the House applicable to the bill, so far as complied with or dispensed with in Session 2023–24 or in the current session or in Session 2021–22, shall be deemed to have been complied with or (as the case may be) dispensed with in Session 2024–25;

(c) any resolution relating to the Habitats Regulations that is passed by the House in Session 2023–24 in relation to the Bill shall be deemed to have been passed by the House in Session 2024–25; and

(d) if there is outstanding any petition deposited against the bill in accordance with an order of the House—

(i) any such petition shall be taken to be deposited against the bill in Session 2024–25 and shall stand referred to any select committee on the bill in that Session; and

(ii) any minutes of evidence taken before a select committee on the bill in Session 2023–24 shall stand referred to any select committee on the bill in Session 2024–25.

8. In paragraphs 1, 3 and 6 above, references to further proceedings do not include proceedings under Standing Order 83A(8) (deposit of supplementary environmental information).

9. In paragraphs 2, 4 and 7 above, references to the Habitats Regulations are to the Conservation of Habitats and Species Regulations 2017.

Lord Berkeley (Lab): The House will know that this is a standard carry-over Motion, and it is welcome, but I question the timing. This Bill has only recently had its Second Reading in the House of Commons and will probably take another year or so in Select Committee there, so why today? I ask the Minister: is it something that is normal at this stage in a Bill process, or are the Government preparing for an early election and making sure that everything is ready in case there is one?

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Vere of Norbiton) (Con): I reassure the noble Lord that this a very standard process. The date is today because it is convenient for it to be today. It is a very regular procedure, as he has stated. So, if I were him, I would not read too much into it.

Motion agreed.

Identity and Language (Northern Ireland) Bill [HL]

Report

Relevant documents: 3rd Report of the Delegated Powers Committee, 2nd Report of the Constitution Committee

3.56 pm

Clause 1: National and cultural identity

Amendment 1

Moved by ***Lord Murphy of Torfaen***

1: Clause 1, page 2, line 5, after "means" insert "the Northern Ireland Office, the Northern Ireland Human Rights Commission and"

Lord Murphy of Torfaen (Lab): My Lords, I cannot say that the Report stage in front of us will excite people in the same way that other events might today, but it is still very important for the future stability of Northern Ireland.

Before I go into some small details, I will mention one or two general things about Report stage, and I hope that at the appropriate time, the Minister will be able to comment on them. The first thing is his own letter that he sent to Members of the House of Lords, on the various issues that arose in Committee. He very

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kindly agreed to reflect on the points that were made in Committee and has come up with a number of ideas and suggestions that I entirely agree with and thank him for. They deal, of course, with the Ulster Scots commissioner, with the Castlereagh Foundation, and with the step-in powers of the Secretary of State. On all three issues, Members of the Committee who spoke some weeks ago will be very pleased with the Minister's response.

The other general point is to ask what we can do on Report with a Bill that was essentially formed from an agreement made some years ago in Belfast. As your Lordships will know, the *New Decade, New Approach* deal was struck between the then Secretary of State, the political parties in Northern Ireland and the Irish Government. One reason that they decided to look at this issue of identity and language is, of course, that that issue brought down the Assembly for some three years. So it is hugely significant. However, it means that this Bill really reflects the agreement; I am sure it mostly does. The agreement made in Belfast is incorporated in the Bill and any amendments that we might make should really be in the light of the principle that it should stick as closely as possible to the agreement made. There may be some examples where the wording and other issues can be improved upon in the Bill, but that is the principle.

Another issue that is important, and likely to come up in our debates over the next couple of hours, is the equality of the commissioners: the Irish language commissioner and, of course, the Ulster Scots and Ulster-British tradition commissioner. This is, again, reflecting what was in the agreement made in Belfast.

The amendment that I am moving, signed by my noble friends, is really very simple. When the agreement touched on which public bodies should be put into the Bill—with regard to the Irish language commissioner, for example—some specific government bodies and agencies in Northern Ireland were not included when it seemed logical that they should have been. One was the Northern Ireland Human Rights Commission; the other was, of course, the Minister's own department, the Northern Ireland Office—my former department. What is significant is that that body is wholly about Northern Ireland. It is about no other part of the United Kingdom; its duty is to deal with Northern Ireland. The Secretary of State and his or her Ministers' duties concern Northern Ireland.

Although there is of course a London office for the NIO, there is a more substantial base in Belfast. That is why it seems logical that those bodies should be under the same umbrella of public bodies mentioned in the Bill. I shall be very interested in what the Minister has to say in response to this amendment and I beg to move.

4 pm

Baroness Suttie (LD): My Lords, I echo many of the points just made by the noble Lord, Lord Murphy. I also repeat the comment that many of us made in Committee: it is with regret that we are debating this Bill at all. It should be debated in Northern Ireland by the Northern Ireland Assembly. Having said that, we broadly support the Bill, but we tabled these amendments in Committee and have tabled them again here to probe the Minister further. Having reread the debate from when we discussed similar amendments in Committee on the definition of public authorities, I do not believe that the Minister gave a substantial explanation of why the Northern Ireland Office and the Northern Ireland Human Rights Commission were not explicitly included under the Bill. It seems, to me at least, that both bodies would have a substantial role to play in these matters. Like the noble Lord, Lord Murphy, I ask the Minister to give an explanation in his concluding remarks for why they were not covered in this legislation.

Baroness Ritchie of Downpatrick (Lab): My Lords, first, I apologise for my non-participation at Second Reading, due to the fact that I was at Queen's University on that day receiving an honorary professorship, and in Committee because I had Covid. However, I watched that stage from the comfort of my bedroom and found that some very interesting points were made on that day. I support and endorse the comments made by my noble friend Lord Murphy and those of the noble Baroness, Lady Suttie.

The Bill would have been much better dealt with in the Northern Ireland Assembly by its Members. Obviously, however, there is a necessity for the UK Government, via the Northern Ireland Office, to bring forward this legislation in Parliament because it could not seem, regrettably, to be progressed through the Northern Ireland Assembly. I support the clauses and central purpose of the Bill: to deliver on large aspects of the *New Decade, New Approach* agreement, which was the basis of an agreement between the five main parties in Northern Ireland, resulting in the formation of the Executive, the Assembly and other institutions in early January 2020. I support the Bill and want to see it implemented, subject, obviously, to the amendments in my name and that of my noble friend Lord Murphy, and the noble Baroness, Lady Suttie, along with others that I have tabled in respect of powers to do with the Secretary of State.

I believe in and support the Irish language. I did Irish at school up to GCSE/O-level and then attended, on two separate occasions, the Gaeltacht in north-west Donegal. You were expected to speak Irish in the house you were allocated there and in the school—the Irish College. I am also a firm believer that place names in Ireland, both north and south, and many words in Irish inform and teach us about her heritage, our unique geographical landscape and our environment. In fact, many of our towns on the island, north and south, have Anglicised versions of the old Irish names. That is not by way of a political point; it is simply a historical fact of heritage.

I also support the provisions for Ulster Scots as a linguistic grouping that transcends traditions in Northern Ireland. In many ways, perhaps it should not be conflated with identity, but I understand the pressing amendments in that respect. My name is from the lowland Scots, so I represent the Gael and the Planter, which I do not see as an offensive personal identification mechanism. Like the Ulster poet John Hewitt, I see that as a means of identification because it represents the richness and beauty of diversity and challenges us all on that necessary path to reconciliation.

To revert to the amendments on public authorities, I am very much in agreement with my colleagues who have just spoken. I suppose part of the reasoning behind the original drafting was that the Bill was meant to be dealt with by the Northern Ireland Assembly and Executive, hence there was no reference to the Northern Ireland Office and the Human Rights Commission, which has direct responsibility and derives that authority from the Northern Ireland Office.

I make a special plea to the Minister, because we are dealing with this in the UK Parliament, to give due consideration to and accept these amendments. I also suggest, if that is not possible today, that he goes back to his ministerial colleagues in the NIO to see what may be possible and considered acceptable through the passage from this House to the other place, and in so doing that have a period of reflection. I know that these issues were also discussed in Committee because other areas are not included, such as the UK Passport Office, vehicle tax and registration, the Parades Commission, Covid testing and money and tax services.

I believe that for the provisions of the Bill to have meaning in government circles, the two mentioned here—the NIO and Human Rights Commission—need to be immediately included and the Government should give consideration to those and others in the fullness of time. I fully support this amendment.

The Parliamentary Under-Secretary of State, Northern Ireland Office (Lord Caine) (Con): My Lords, I am very grateful to the noble Lords who have spoken to these amendments. I say at the outset how grateful I am to the noble Lord, Lord Murphy. As I made clear in my first speech from this Dispatch Box as a Minister, while we might not agree on everything all the time, when it comes to Northern Ireland I will always try to adopt as consensual, bipartisan and open an approach as possible. I am very grateful to the noble Lord.

He mentioned the Bill being a faithful implementation of the *New Decade, New Approach* agreement from January 2020 and that is what the Government have sought to do. However, I agree with other noble Lords that this really should have been dealt with in the Northern Ireland Assembly and not within this Parliament. It is a matter of regret that this is the case. I remember first-hand the period from 2017 to 2020 when these issues paralysed politics in Northern Ireland and led to a prolonged lack of functioning devolved government. It was a particularly frustrating period and I am very sorry that we are going through a similar period now, which I hope will be much shorter lived than last time.

Turning to the amendments, I am grateful to noble Lords for the spirit in which they were moved and spoken to. As noble Lords made clear, they seek to widen the definition of "public authorities" in the Bill beyond those captured in the Public Services Ombudsman Act (Northern Ireland) 2016. As noble Lords have mentioned, we had a very wide-ranging discussion in Committee. I am very sorry that the noble Baroness, Lady Ritchie of Downpatrick, was unable to be present. I hope that watching proceedings from her bedroom helped mitigate some of the Covid symptoms she might have experienced and aided her recovery, which we all very much welcome.

I do not intend to cover the same ground today as I covered extensively in Committee. However, the definition of public authorities for the purposes of the Bill, as with other parts of the legislation—this goes back to the comments of the noble Lord, Lord Murphy, about being faithful to *New Decade, New Approach*—is consistent with the legislation that was drafted by the Office of the Legislative Counsel in Stormont and published alongside *New Decade, New Approach*. As a result, the Bill does not seek to innovate in respect of that definition by removing or adding public authorities. It seeks to make provision comparable to a situation in which the Assembly, rather than this Westminster Parliament, had taken forward these commitments. The Northern Ireland Office and the Northern Ireland Human Rights Commission, and indeed any of the bodies to which the noble Baroness referred, such as the Passport Office, were not intended to be captured by these commitments. That was never agreed and, as I said in Committee, the range of public authorities listed under the Public Services Ombudsman Act (Northern Ireland) and in this Bill is substantial and comprehensively covers devolved areas.

The Government consider that it would be inconsistent to expand the definition of public authorities beyond that set out in the draft legislation to which I have referred. Further, adding two or indeed more organisations with functions outside the devolved competence, such as the Northern Ireland Office and the Northern Ireland Human Rights Commission, would undermine the overarching approach, which is that the First and Deputy First Ministers should be the sole arbiters when designating public authorities. There are of course provisions in this Bill that would allow the First and Deputy First Ministers to add or subtract from the public authorities that this legislation covers within Northern Ireland. To introduce organisations for which the First and Deputy First Ministers do not have direct responsibility would, I gently suggest, muddy the waters and detract from their role.

I would also suggest that the public in Northern Ireland do not routinely interact with the Northern Ireland Office, which for the most part does not deliver or provide day-to-day front-line services to the public that would seem to trigger the relevant provisions on Irish language and Ulster Scots. Of course, given the close interest of the Northern Ireland Office in the *New Decade, New Approach* commitments on which the Bill delivers, I would still expect consideration to be given to the national and cultural identity principles set out in the first part of the Bill, and the guidance issued by the respective commissioners. I would expect much the same with the Northern Ireland Human Rights Commission.

However, the extension of the legal duty as proposed in these amendments would, in our view, be inconsistent with *New Decade, New Approach* and seem impractical for the reasons I have given. I therefore hope that noble Lords will not press their amendments.

Lord Murphy of Torfaen (Lab): My Lords, I understand the points the Minister makes. He also makes the point that, eventually, as this Bill is embedded in Northern Ireland law over the years ahead, the Assembly itself might decide to make changes and that, in the

[Lord Murphy of Torfaen]
meantime, the bodies to which I have referred—the NIO and Northern Ireland Human Rights Commission—must still stand by the principles that underlie this legislation. So in that regard, I am happy to withdraw the amendment.

Amendment 1 withdrawn.

Amendment 2

Moved by ***Lord Caine***

2: Clause 1, page 3, line 22, leave out from "Commissioner" to "Ulster" in line 24 and insert "for the Ulster Scots and the"

Lord Caine (Con): My Lords, these amendments in my name all concern proposed changes to the differentiation in the Bill between Ulster Scots as a recognised national minority and the Ulster British tradition. Following the extensive debate on these matters in Committee, I undertook to consider proposals put forward by noble Lords and, in tabling these amendments, I hope I have fulfilled that commitment.

4.15 pm

Since the original drafting of the Bill, the Government recognised Ulster Scots as a national minority under the framework convention in May. I therefore agree with noble Lords that the Bill as drafted would not seem to draw a clear and adequate distinction between Ulster Scots as a distinct national minority and the Ulster British tradition. This lack of clarity is particularly acute in the title of the relevant commissioner—as drafted,

"the Commissioner for the enhancement and development of the language, arts and literature associated with the Ulster Scots and Ulster British tradition."

I defy anybody to come up with an acronym for that. Subject to the agreement of noble Lords, the amendments in this group will change the title of the relevant commissioner to "the Commissioner for the Ulster Scots and the Ulster British Tradition", the inclusion of a new instance of the definite article—the word "the"—to differentiate between the two, being crucial here.

Noble Lords may wonder why the Government have not simply changed the references in the Bill to "the Ulster Scots and Ulster British traditions", plural, as was suggested by some in Committee. We have taken this approach to reflect the fact that the Ulster Scots are a distinct people and now a recognised national minority. To pluralise "tradition" would be to disregard this new status, which delivers on paragraph 24 of Annexe A to *New Decade, New Approach*. It would overlook the work of the relevant commissioner advising on the Framework Convention for the Protection of National Minorities, as set out in paragraph 5.16.2 of Annexe E. I should add that in looking into this issue, my officials consulted both the Ulster-Scots Agency and the Northern Ireland Human Rights Commission, which share our understanding. Indeed, the Ulster-Scots Agency confirmed that it would be content with the approach set out in these amendments. I beg to move.

Lord Morrow (DUP): My Lords, the Minister has proved that he has been listening. I know the Bill in its entirety is a wee bit like the curate's egg—good in parts—but on behalf of my party, I welcome what he has committed himself to here today.

Amendment 2 agreed.

Amendment 2A

Moved by ***Lord Morrow***

2A: Clause 1, page 3, line 33, at end insert—

"(5) The First Minister and deputy First Minister acting jointly must annually assess and report on the costs arising from the operation of the Office in line with the duties prescribed in section (*Assessment of expenditure*) of the Identity and Language (Northern Ireland) Act 2022."

Lord Morrow (DUP): My Lords, I am pleased to speak to Amendments 2A, 4, 16, 35A and 37, and I point out at the commencement that the noble Lord, Lord Empey, is a signatory to them but regrettably is unable to be with us today due to domestic circumstances. We wish him well and I thank him for attaching his name to them. My noble friend Lord Browne, to my left, will speak on some of these amendments in place of the noble Lord, Lord Empey.

I want to be very clear from the outset that the view of the DUP is that the two commissioners are different and their functions do not need to be made identical; indeed, we do not believe that making them identical would be appropriate. However, it is vital, not least in order to respect the principle of parity of esteem, that both commissioners be respected by all parts of government and society as equally important. One key way in which this respect needs to be manifest is in ensuring that the amounts of public money devoted to both are comparable. In making this point, I observe that the Explanatory Notes suggest that the funding for both commissioners will be similar, but it is my contention that this assertion is made on a problematic basis. The costing is assessed narrowly, in terms of the direct costs of running the offices of two commissioners, but that is surely just a fraction of the impact—certainly of the Irish language commissioner—on the public purse.

One can only have any hope of assessing the impact of the provision of the commissioners if, in addition to assessing the relevantly limited cost of running their offices, one has regard also for the budgetary impact they will have in placing additional demands on public authorities. It is in relation to their impact on public authorities that the real cost of the commissioners will be felt, and it is important, especially in the context of the current cost of living crisis, that we are open and honest about this fact.

The relevant public authorities are defined by the Public Services Ombudsman Act (Northern Ireland) 2016, which lists well over 70 public authorities in Northern Ireland. If we consider the principal aim of the Irish language commissioner, described in new Section 78K(1) as,

"enhance … the use of the Irish language",

it is possible that every single public authority in that long list will be in receipt of significant new obligations and costs, relating to the provision of the services of the public authority in question in Irish. They will,

however, also benefit from a duty to have regard to obligation being placed on public authorities in relation to them and the complaints procedure with respect to the entirety of their obligations as defined by the Irish language commissioner.

By contrast, the role of the Ulster Scots commissioner is also defined in terms of the same list of public authorities, the principal aim of the commissioner, to

"enhance … the language, arts and literature",

of Ulster Scots, rather than enhancing the use of the language, as described in new Section 78Q(1), is such that while it is clear that some public authorities concerned with culture and the arts will be engaged, it is also likely that the demands placed on the long list of others, including, for example, the Northern Ireland Fishery Harbour Authority, the Health and Safety Executive, the Agri-Food and Biosciences Institute, et cetera, will be very limited indeed.

Put another way, while every public authority is equally and extensively open to engagement by the Irish language commissioner, because all public authority services must be provided in the context of the use of language, it seems to me that every public authority is not as equally and as extensively engaged by the Ulster Scots/Ulster-British commissioner.

At this point, I should perhaps anticipate the response that the Bill makes reference to the role of the Ulster Scots/Ulster-British commissioner in terms of,

"facilitating the use of Ulster Scots in the provision of services to the public or a section of the public in Northern Ireland".

However, while the principal role of the Irish language commissioner, as described in new Section 78K(1), is focused on enhancing the use of the language in public service provision, the parallel principal role of the Ulster Scots commissioner is defined in terms of enhancing the language, literature and arts of Ulster Scots. Although facilitating the use of Ulster Scots by public authorities in service provision is by no means off limits, the fact that it is not front and centre, as in the case of the Irish language commissioner, is underlined by the fact that reference to it does not occur in the principal role definition when it is mentioned lower down, as in new Section 78R(2)(b) where it is only in brackets.

In response to the debate on costs in Committee, the Minister referred simply to the Explanatory Note, which focuses narrowly on the costs of running the three organisations, not on the cost to the public purse with respect to public authorities. In responding to that debate, the Minister stated also that it was not the business of Westminster to get involved in monitoring the costs of the new bodies. I accept that point, after the bodies are established.

My Amendment 37, however, pertains to the period before the Bill comes into force and so is directed at Westminster and Whitehall. While it is not our job to run offices, it is our job to make this legislation very clear about the costs for which Northern Ireland must prepare. Amendment 37 requires that, before this Act can come into force, the Secretary of State must lay before Parliament a report assessing both the operational costs of setting up and running the three offices, and the costs to public authorities of engaging with the new commissioners and their requirements. Critically, it requires also that this assessment demonstrates how the resulting spending allocation, including that from the public authorities, will give effect to the principle of the parity of esteem between the unionist and nationalist communities.

Amendments 4, 16 and 35A would place a similar obligation on the First and Deputy First Ministers for once the two commissioners are up and running in order to ensure that the spending allocations to each community are broadly comparable. Amendment 2A applies the same obligation in relation to their assessment of the spending of the office of identity and cultural expression.

I hope that the Minister is in a position to give the following assurances that I am looking for in speaking to these amendments today: first, that the role of both commissioners should be accorded equal importance; and, secondly, as a function of this, that the budgetary footprint left by each commissioner in terms of their impact on public authorities should be broadly the same. In responding to the debate today, I ask that the Minister directly addresses these two points. I beg to move.

Lord Dodds of Duncairn (DUP): My Lords, I will very briefly add a word or two. By way of general introduction, I agree with noble Lords who have already said that this is a matter that should be decided and debated in the Northern Ireland Assembly rather than in this place. Of course, had the Government wished that to be the case, they could have left it to the Northern Ireland Assembly. However, it was a decision taken by Her Majesty's Government to bring it here, and we are therefore debating it today. Nevertheless, we are now examining these matters in detail, and the other place will deal with this in due course.

Since I had spoken on this issue of accountability and financial responsibility in Committee, I wanted to agree with the noble Lord, Lord Morrow, in the amendments that he has set out, and to stress the point that the Minister in Committee said that these were matters for the Northern Ireland Assembly and therefore that it would be inappropriate to have Whitehall, the Northern Ireland Office or this Parliament have reports presented to them on expenditure in relation to these commissioners, bodies and so on. But the amendment to which the noble Lord, Lord Morrow, has referred on the costs to public authorities, which would require that a report be laid before the commencement of the Bill, is right and proper for this Parliament to consider. It is entirely right that the Comptroller and Auditor-General will examine the accounts of the commissioners' offices, and I urge that that should also look at the parity issue in relation to the fairness of expenditure across the board between the two offices and the office of identity and cultural expression.

However, the impact on public authorities has not been adequately investigated or probed thus far. While the Minister referred to cost, which the noble Lord has alluded to, in the Explanatory Notes, as I understand it, the estimated cost to public authorities of fulfilling the requirements in terms of guidance and so on has never been set out. I would be grateful if the Minister could deal with that point in his response and indicate whether any study or work has been done with those public authorities which will be engaged and affected

[Lord Dodds of Duncairn]
by this legislation and by the guidance that emerges from the commissioners' offices. Has any work been done with them about the impact on them in terms of costs, where any budgetary pressures may emerge and how those will be met? This matter deserves a little more scrutiny. We have had representations on it, and I hope that the Minister can address it when he sums up.

Lord Caine (Con): My Lords, I am very grateful to the noble Lords, Lord Morrow and Lord Dodds of Duncairn, and to my noble friend Lord Empey. I too regret that he cannot be here this afternoon; I understand that family commitments in Belfast detain him, and we all wish him well.

4.30 pm

The amendments in the names of the noble Lord, Lord Morrow, and my noble friend Lord Empey all seek to require the publication of various pieces of information on the three bodies and commissioners established by the Bill, largely on their running costs and the cost of the associated duties.

I again refer noble Lords to what I said on this in Committee, some of which was raised by the noble Lord, Lord Morrow. I do not intend again to go over in detail what I said but, consistent with the responsibilities of the Executive that were agreed by parties in the *New Decade, New Approach* agreement and the associated draft legislation, all provisions of the Bill are a matter for the Executive to administer, support and fund. It follows, therefore, that expenditure from the Northern Ireland Consolidated Fund, including expenditure on the three public authorities established by the Bill, is for the Northern Ireland Assembly to scrutinise and not this Parliament.

That is why the financial accounts of all three authorities must be laid before the Assembly alongside the statement of the Comptroller and Auditor-General for Northern Ireland, as mentioned by the noble Lord, Lord Dodds of Duncairn. I am in no doubt whatever that a restored Assembly will provide appropriate and robust scrutiny of the annual accounts of the three authorities, including where these raise any questions of parity of esteem.

I am also in no doubt that the reporting and governance mechanisms for public authorities to which the duties will apply will provide sufficient transparency if there are any significant or notable costs in their work to meet these duties. Indeed, the Bill expressly provides for public authorities to publish a plan saying how they will comply with any best practice standards. I expect this mechanism will support the scrutiny of the work and any cost impacts, to which the noble Lord referred, on public authorities seeking to meet their legal duty in this regard.

I will respond more directly to a couple of the points made. The functions of the respective commissioners in the Bill reflect *New Decade, New Approach* almost word for word. Although the budget for each commissioner will be a matter for the Executive, we envisage that they will be comparable. We estimate that the cost for all three authorities will be in the region of £9 million per annum.

The Government therefore feel that the amendments proposed by noble Lords are not required, although I completely understand and recognise the intent behind them. I urge the noble Lord, Lord Morrow, to withdraw his amendment.

Lord Morrow (DUP): My Lords, I have listened carefully to what the Minister said. As I said earlier, and on another occasion, he demonstrates that he listens to what is being said. I will watch with great care as the Bill proceeds and goes elsewhere, but I will withdraw my amendment.

Amendment 2A withdrawn.

Amendment 3

Moved by ***Lord Caine***

3: Clause 1, page 3, line 33, at end insert—

"78I

Further functions: establishing the Castlereagh Foundation

(1) The Office may—

(a) establish a body corporate or other organisation to be known as the Castlereagh Foundation, or

(b) provide grants for the establishment of such a body or organisation by another person.

(2) A body or other organisation established or funded under subsection (1) must—

(a) have as its principal objective the funding and support of academic research into identity, including national and cultural identity and shifting patterns of identity, in Northern Ireland, and

(b) be operationally and financially independent from the Office (though this does not affect the Office's functions under section 78H).

(3) The Office may dispose of any interest in the Castlereagh Foundation."

Lord Caine (Con): My Lords, I have great pleasure in speaking to Amendments 3 and 30 in my name, on the establishment of the Castlereagh Foundation. We had an excellent discussion on the merits of establishing the Castlereagh Foundation in Committee following amendments tabled by my noble friend Lord Lexden and the noble Lords, Lord Morrow, Lord McCrea and Lord Dodds. I do not wish to cover the same ground here, but we also had an excellent debate about the merits of Lord Castlereagh as Foreign Secretary and Chief Secretary for Ireland in taking through the Acts of Union in 1800. I do not wish to embarrass the noble Lord, Lord Bew, but we also raised on a number of occasions the brilliant biography of Castlereagh by his son John.

Following the amendments in Committee, I promised to look at this issue further. The Government committed to fund the establishment of the Castlereagh Foundation in annexe A of *New Decade, New Approach*, at paragraph 25. It was envisaged that the foundation would explore the shifting patterns of social identity in Northern Ireland. The amendments that I have tabled will enable the establishment of that foundation and therefore meet a key commitment of *New Decade, New Approach*. I am delighted to bring them forward. I beg to move.

Lord Lexden (Con): My Lords, I thank my noble friend. His amendment represents a very satisfactory response to the probing amendment that I moved in Committee alongside a similar amendment in the name of unionist noble friends. He reminded the House of the historical background, which we went over quite thoroughly in Committee, so I will not repeat it, following his example. I hope that the new foundation will conduct its work in ways that enrich and enlarge understanding, of the unionist tradition in particular, and help to increase support for unionism in all parts of the community in Northern Ireland. That is something that Viscount Castlereagh himself would have wanted.

Lord Morrow (DUP): In Committee, in deference to the excellent speech on the amendment tabled by the noble Lord, Lord Lexden, I withdrew my amendment. However, I welcome what the Minister has said here today.

Lord Caine (Con): My Lords, I am very grateful for the support of my noble friend Lord Lexden, and that of the noble Lord, Lord Morrow.

Amendment 3 agreed.

Clause 2: Irish language

Amendment 4 not moved.

Amendment 4A

Moved by ***Lord Morrow***

4A: Clause 2, page 6, leave out lines 10 to 23

Member's explanatory statement

The NDNA does not commit to assisting the Irish Language Commissioner or the Ulster Scots Commissioner with the provision of a duty on public authorities to have regard to them. This amendment would mean that neither of the Commissioners benefit from public authorities being subject to having a duty to have regard to them.

Lord Morrow (DUP): My Lords, I am pleased to speak to Amendments 4A and 17, in my name and that of the noble Lord, Lord Empey. I have given some indication as to why he is not in his place today. By way of introduction, I say that I am very grateful to the Ulster-Scots Agency for drawing my attention to the highly significant problem that these amendments seek to address.

In his response to Amendment 17, which I moved in Committee, the Minister pointed out that the two commissioners approach their different remits in different ways, and that we should not try to change that. I completely agree—100%. One commissioner is very focused on language, the other is less concerned with language and much more concerned with public culture, broadly conceived. This reflects the relative priorities of the different communities, as acknowledged by the NDNA process. However, appreciating this point does not provide any reason to oppose our amendments. While it is vital that we make space for the differences of focus, both communities require commissioners with similarly robust powers to pursue their different purposes. If one commissioner is given one role and provided with the requisite authority to discharge that role, while the other commissioner is given another role but not the same level of authority to discharge it, we are left with the image of two commissioners but the reality of only one that is worth while.

In his response to the debate in Committee, the Minister seemed to suggest that the lack of a duty to have regard in relation to the Ulster Scots/Ulster-British commissioner was compensated for by another difference between the two commissioners, namely that the Ulster Scots commissioner would have a broader brief. There are two difficulties with this assertion. In the first instance, the extension beyond language to cover arts and literature does not give the Ulster Scots commissioner a broader brief in public affairs. While the expectation is that the Irish language commissioner would make language demands on all 70-plus public authorities, the Ulster-Scots commissioner would not, and the compensating provision of arts and literature would engage only a small number of them.

In the second instance, no self-respecting community could accept a proposition that something being unenforceable in relation to a large number of issues was compensation for it being enforceable in relation to a smaller group of issues. That, of course, would be absurd.

The other argument deployed by the Minister in defence of the proposal that public authorities should not be required to have a duty to have regard to the Ulster Scots commissioner while they should be so obliged in relation to the Irish language commissioner relates to the wording of the NDNA, which does not explicitly state that a statutory duty should be imposed on public authorities to have regard to what the Ulster Scots commissioner says. Crucially, however, the NDNA does not state that no duty to have regard should be placed on public authorities in relation to the commissioner. Rather, it is silent on that matter.

There is a big difference between advocating something that the NDNA affirms or rejects on the one hand, and advancing something it is silent on, on the other. More importantly, however, an enforcement mechanism along the lines of a duty to have regard to is logically implicit in the NDNA, in that if there was no duty to have regard to what the commissioner says, the provision of the commissioner would be pointless.

Put another way, one can test the silence of the NDNA by imagining whether it would have stood up if it stated there should be a commissioner but that there should be not even a statutory duty for those engaged by it to have regard for what it says, since they would no longer be engaged in any meaningful way. That would make the provision absurd. Furthermore, the act of actually calling on legislators not to pass an amendment to make explicit a duty to have regard makes it explicit that there should be no duty to have regard, and thereby makes the provision of the commissioner explicitly pointless. In agreeing that there should not even be something as minimal as a duty to have regard, Parliament would be telling public authorities they can effectively ignore the commissioner. This is not defensible in my book.

There is a further, and in some ways even more profound, difficulty with the Government's position. The truth is that in the same way the NDNA is silent on placing the duty to have regard on public authorities

[Lord Morrow]
in relation to the Ulster Scots commissioner so too is it silent on that point as it relates to the Irish language commissioner, yet the Government have provided the Irish language commissioner with this crucial right, even as they have denied it to the Ulster Scots commissioner. This is indefensible.

The only relevant provision of the NDNA in relation to a duty to have regard is one that assumes a duty rather than a provision that proposes creating such a duty. Paragraph 5.8.4 in Annex E of the NDNA states that the commissioner should

"investigate complaints where a public authority has failed to have regard to those standards."

On the basis of simple logic, it makes sense that the Bill before us today does place a duty to have regard on public authorities in relation to the Irish language commissioner, because if there are no obligations the provision of the commissioner would be a waste of public money. The difficulty, however, with concluding that this justifies the provision of a duty to have regard to in relation to the Irish language commissioner but not the Ulster Scots commissioner arises from the fact that paragraph 5.16.3 makes an identical commitment in relation to the Ulster Scots commissioner, stating that they should

"investigate complaints where a public authority fails to have due regard to such advice provided by the Commissioner in respect of facilitating the use of Ulster Scots."

In this context, on the basis of both simple logic and what the NDNA says, we face a simple choice if we are to uphold the parity of esteem and do what is right by Northern Ireland.

The two amendments that I have tabled set before us the options that define that choice. Either we can say that the Ulster Scots commissioner must be endowed with the same authority to command respect as the Irish language commissioner, so that the two communities are equally respected by placing a duty on public authorities to have regard to the Ulster Scots commissioner, as set out in Amendment 17, or we can secure this end by removing that existing duty in relation to public authorities with respect to the Irish language commissioner, as set out in Amendment 4A.

In my view, the answer is obvious: since it would be absurd for this House to state that the public authority should not be subject to at least the lowest level of obligation to have regard to the commissioners we are creating, we have to make one change or the other. We cannot leave the Bill as it is, without actively undermining the principle of the parity of esteem and treating one community with contempt. I beg to move.

4.45 pm

Lord Murphy of Torfaen (Lab): My Lords, I can understand much of what the noble Lord, Lord Morrow, is saying. I entirely agree with the Bill where it says that the Irish language commissioner should have powers of due regard if public authorities do not come up to the standards that the commissioner expects. I entirely agree with and in no way denigrate that.

However, I am slightly puzzled, especially in light of what the Minister said earlier about the sensible change that there has been in the title of the commissioner. There is a difference between the way in which the commissioners operate, because they have different functions. Clearly, the Irish language commissioner is concerned about the Irish language, but the Ulster Scots commissioner goes beyond that. The noble Lord, Lord Morrow, referred to paragraphs 5 and 6 of the NDNA agreement. Paragraph 5.14 in Annex E says that the commissioner will deal with

"the language, arts and literature associated with the Ulster Scots/Ulster British tradition in Northern Ireland."

This is followed by another sentence:

"The Commissioner's remit will include the areas of education, research, media, cultural activities and facilities and tourism initiatives."

In paragraph 5.16, it goes on to say:

"The functions of the Commissioner will be to … provide advice and guidance to public authorities, including where relevant on the effect and implementation, so far as affecting Ulster Scots, of commitments under"

various charters. So it is quite clear that the agreement meant that the two commissioners, in their different ways, would oversee the work of public authorities in Northern Ireland on the issues that were debated and agreed before that agreement was signed.

There is a case based on getting confidence across the community because, as the Minister knows, nothing can happen properly in Northern Ireland unless there is confidence and trust across all communities in Northern Ireland. Not just the nationalist and unionist communities but everybody has to see that there is fairness, and that people are being treated equally.

There is an opportunity before this Bill goes to the other place for the Government and the Minister—provided there is still a Government in situ over the next few weeks; I rather fancy that, by the time this session has finished, the Minister might be the last Minister of this Government still in office, but we will have to wait and see—to reflect on the points that the noble Lord, Lord Morrow, and others have made and to listen to other people in Northern Ireland on what the answers to these things might be. It also seems an ideal opportunity, and the noble Lord, Lord Morrow, might have mentioned this, to talk to the Ulster-Scots Agency and to the bodies dealing with the Irish language in Northern Ireland to get their views on the progress of the Bill. There is an opportunity to have another look at this to ensure that there is full confidence, across the board, in what is an essential piece of legislation.

Baroness Suttie (LD): My Lords, on Monday I had an extremely useful meeting with Ian Crozier of the Ulster-Scots Agency. Although I cannot support these amendments, they do raise some very important points, as the noble Lord, Lord Murphy, just said.

The Bill as drafted places a duty on public authorities to have "due regard" to the Irish language commissioner, as has been discussed, but creates no such duty in respect of the commissioner responsible for Ulster Scots and the Ulster-British tradition. This is therefore causing some lack of trust and some concern. This difference of approach was not specifically set out in *New Decade, New Approach*, which suggested that both commissioners should be treated the same way on this point.

Will the Minister respond to the fears that have been expressed in the debate and, indeed, by the Ulster-Scots Agency that treating the two commissioners differently through this legislation risks undermining the credibility of one of the commissioners? Like the noble Lord, Lord Murphy, did, I ask whether the Minister has already met the Ulster-Scots Agency. If not, will he do so and listen directly first-hand to its very real concerns?

Lord Lexden (Con): My Lords, like other speakers, I have very considerable sympathy for the views that the noble Lord, Lord Morrow, expressed. I urge my noble friend the Minister to keep the key words "parity of esteem" constantly in mind. That is the heart of the matter. I hope he will indeed reflect further, as he has been encouraged to do. It really would be a tragedy not to do all that is possible to allay the considerable misgivings with which this legislation is currently viewed by many unionists in Northern Ireland.

Lord Dodds of Duncairn (DUP): My Lords, following on from the noble Lord, Lord Murphy, I hope the Minister will remain in his place, because he brings a large degree of experience and knowledge to the situation. I certainly hope he can continue in his post for as long as possible.

I welcome what the noble Lord, Lord Murphy, and the noble Baroness, Lady Suttie, said about these amendments. There are two issues. The first is parity of esteem, as the noble Lord, Lord Lexden, said. This legislation has been very controversial and it no doubt will be. It must be implemented with people feeling that they are being treated equally. I was involved in some of the negotiations and if anyone had suggested at the time that the *New Decade, New Approach* agreement meant that there would be this difference in duty, it would never have been agreed on that basis. It is clear that the two should be treated equally, with the same duties on public authorities regarding each of them. I echo the calls for this to be considered further before it gets to the other place.

Secondly, if we are talking about reflecting accurately the NDNA agreement—we will come on to this with more significant clauses later in the Bill—it is important that there is not a piecemeal approach. If NDNA is to be faithfully replicated and the duty is placed on public authorities with regard to the Irish language commissioner, then we either have Amendment 4A, which would take it away from the Irish language commissioner, which I do not wish to see happen, or we have Amendment 17, which would make it an equal approach. That is something the Government should think about very seriously, in the interests of boosting confidence and giving reassurance.

Lord Caine (Con): Again, I am grateful to noble Lords for their contributions, in particular the noble Lord, Lord Murphy, for elevating me to the position once occupied by the first Duke of Wellington in the 1830s, when, in his caretaker Administration, I think he occupied every position in the Government bar Lord Chancellor and Chancellor of the Exchequer—my noble friend Lord Lexden will correct me if I am wrong. Let us hope that it does not come to that.

This was another a matter of great interest and extensive and lengthy debate in Grand Committee and I will try to respond without necessarily repeating all the same arguments that we examined in detail there. The Government's view is that it is very clearly set out in Annexe E of *New Decade, New Approach*, a document that I gently remind some noble Lords was hailed at the time by the Democratic Unionist Party as "fair and balanced". The roles and functions of the two commissioners are different, reflecting the respective needs of Irish as a language, Ulster Scots as a national minority, and the Ulster-British tradition. That is why the provision for those respective groups is set out differently in *New Decade, New Approach*, including in respect of the legal duties set out in this Bill. The Government believe that that was for good reason.

I hope this goes some way to answering concerns from a number of noble Lords, including the noble Baroness, Lady Suttie: to answer her question directly, I had a very constructive meeting with Ian Crozier from the Ulster-Scots Agency and am very happy to continue to engage with the Ulster-Scots Agency and with Irish language groups that I have already met. I have absolutely no issue with doing that at all.

To go back to the point, the role of the Irish language commissioner pertains to matters of language alone. Its work focuses on best practice standards on the Irish language for public authorities to follow in providing their services. Accordingly, there is a specific legal duty in this regard. In comparison, the commissioner associated with the Ulster Scots and the Ulster-British traditions will cover arts and literature in addition to language. The legal duty proposed here by Amendment 17 from the noble Lord, Lord Morrow, would therefore have the effect of being far broader than that on the Irish language, covering public authorities' work on arts and literature.

I will just come back on one point made by the noble Lord, Lord Morrow, when I think he stated that the Irish commissioner would cover 70-plus authorities but the Ulster Scots commissioner would not. The Government's position is very clear that the Ulster Scots and Ulster-British commissioner will cover exactly the same public authorities as the Irish language counterpart and will still be able to receive complaints where its advice and guidance are not followed. I want to be clear on that.

Therefore, the amendments proposed by noble Lords this afternoon, in the Government's view, seem to go far beyond the fair and balanced package reached in *New Decade, New Approach*, and as such the Government cannot accept them.

I understand that we will return to this matter later, but I highlight also that there is a specific new legal duty for Ulster Scots in relation to the education system provided by the Bill. This will address the current lack of statutory provision for Ulster Scots in the education system. I also highlight that the commissioners will be able to administer complaints in relation to the compliance with public authorities on their guidance and standards issued and lay reports before the Assembly.

Amendment 4A would remove the legal duty in relation to the Irish Language best practice standards. Those standards were a key function of the Irish language commissioner, as set out in paragraph 27(d)

[Lord Caine]
of *New Decade, New Approach*. The standards provided for in the Bill are, therefore, consistent with *New Decade, New Approach* and the legal duty set out in the proposed draft legislation accompanying it, in new Section 78I(1) of the Northern Ireland Act 1998.

Annexe E of *New Decade, New Approach*, in paragraph 5.9, accordingly speaks of public authorities fulfilling their "requirement" under the standards and it would seem clear from a reading of both that document and the draft legislation together that the legal duty provided for in this Bill is consistent with the position reached by the parties in the talks. Reflecting the fact that the standards are associated with a legal duty, these will require the approval of the First and Deputy First Ministers, acting jointly, to be given effect. This is intended to provide a level of assurance and oversight over the requirements set by the commissioner.

I highlight that no such approval from the First Minister and Deputy First Minister is required for the guidance and advice of the commissioner for the Ulster Scots and the Ulster-British tradition; nor is approval required for guidance so that complaints can be made in relation to the failure of public authorities to comply with it. With this context in mind, I hope noble Lords will appreciate that the provision for the commissioners and the associated legal duties reflects the delicate and fair balance and the particular needs of the groups that they will serve. The Government cannot accept propositions that would deviate from *New Decade, New Approach* or the legal duties set out in the original draft legislation that accompanied that document. I would therefore be grateful if the noble Lords did not press their amendments.

5 pm

Lord Morrow (DUP): My Lords, I again listened intently to what the Minister said. He remarked that it was said that NDNA was a fair and equitable package. We still stand by that, but we are not convinced that the Bill reflects that; that is what we are looking to be addressed.

I thank everyone who has spoken here. If my hearing is right, in the main those who have spoken agree with what I said. It is just unfortunate that the Minister did not go a step or two further here today, but maybe there will be another opportunity.

It is very clear that there is a discriminatory element in all this and it has to be addressed. It is better that we get it right from day one than wonder, when we are in the middle of it all, "How did we get into this?". We just have to stop and think for a while, look at it and see where the deficiencies are.

I know the Minister has been sent here today by the Government to say these things, so I do not blame him personally—it is no reflection at all on his duty here at the Dispatch Box—but any objective person who reads this debate will conclude that the arguments for Amendment 17 are overwhelming and that no good reason has been provided today to justify not putting that right. We have heard from the Labour and Lib Dem Front Benches, the noble Lord, Lord Lexden, and my noble friend Lord Dodds. We have heard what everybody has said, yet we seem to just want to go on. Well, we know where going on sometimes takes us—into the wrong place altogether.

What should we do? In this context, while I feel disappointed, I will not divide the House on this issue today, because this will go to another place and I hope it will come back from there different from how it is today.

Amendment 4A withdrawn.

Amendment 5 not moved.

Amendment 6

Moved by ***Lord Caine***

6: Clause 2, page 7, line 24, leave out from "Commissioner" to "Ulster" in line 26 and insert "for the Ulster Scots and the"

Amendment 6 agreed.

Clause 3: The Ulster Scots and Ulster British Tradition

Amendments 7 to 9

Moved by ***Lord Caine***

7: Clause 3, page 8, line 11, leave out from "Commissioner" to second "Ulster" in line 12 and insert "for the Ulster Scots and the"

8: Clause 3, page 8, line 14, leave out from "Commissioner" to second "Ulster" in line 16 and insert "for the Ulster Scots and the"

9: Clause 3, page 8, line 18, leave out from second "Commissioner" to second "Ulster" in line 20 and insert "for the Ulster Scots and the"

Amendments 7 to 9 agreed.

Amendment 10

Moved by ***Lord Morrow***

10: Clause 3, page 8, line 24, leave out "arts and literature" and insert "heritage and culture"

Member's explanatory statement

This amendment would revise and expand the functions of the Commissioner for the Ulster Scots and Ulster British traditions provided in the Bill. The Commissioner would be responsible for developing the language, culture and heritage associated with these traditions, reflecting the body of established work and existing human rights law.

Lord Morrow (DUP): My Lords, in moving Amendment 10, I am pleased to speak also to Amendments 12, 13, 14, 15 and 30A. Amendment 10 proposes replacing "arts and literature" with "heritage and culture" so that the remit of the Ulster Scots commissioner relates to language, heritage and culture rather than language, arts and literature.

In Committee the Minister stated that it was not possible to accept a similar amendment because it was contrary to NDNA, but I do not accept that. In the first instance, while I accept that NDNA refers to arts and literature, nothing in it states that the role of the Ulster Scots and Ulster-British commissioner should be limited to this. When read in the context of the wider Ulster Scots commissioner commitment in NDNA, seeking to constrain the role of the Ulster Scots commissioner in this way makes no sense at all.

The critical provisions in NDNA in this regard are the Council of Europe's Charter for Regional or Minority Languages, to which the UK is a signatory, and the Council of Europe's Framework Convention for the Protection of National Minorities, under which Ulster Scots has now been registered as a minority language, as a result of the NDNA commitment. To quote just one relevant provision of the framework, although there are many, Article 5 states:

"The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage."

Aligning itself with these international instruments and defining the role of the Ulster Scots commissioner in relation to them, NDNA plainly commits itself to an understanding of the Ulster Scots and Ulster-British tradition, the best interests of which are not caught by the narrow, arbitrary and exclusive focus on language, arts and literature.

The failure of the Bill to align the role of the commissioner with the established human rights framework has been highlighted by the Northern Ireland Human Rights Commission. In advice to the Government in 2020, the commission spoke of the need to move beyond language, art and literature, stating:

"The NIHRC recommends that other aspects of Ulster-Scots culture including heritage, religion, history, music, dance are also effectively protected by including them within the Commissioner's mandate."

The problem with the language, arts and literature constraint has been highlighted by the expert panel appointed by the current Northern Ireland Communities Minister, Deirdre Hargey MLA, to advise on a new strategy for Ulster Scots language, heritage and culture, which is required by NDNA.

In the second instance, when one appreciates the lack of the Ulster Scots commissioner's statutory focus on the use of the Ulster Scots language by public authorities, it is plain that the arbitrary and exclusive addition of just arts and literature cannot provide the Ulster Scots/Ulster-British tradition with something as meaningful as the provision made for the Irish-language tradition. While the Irish language commissioner will engage all public authorities, since there is not a public authority that does not make its service available through language, there are few public authorities with a focus on arts and literature.

To provide the Ulster Scots/Ulster-British tradition with a commissioner with as meaningful a role for them as the Irish language commissioner would be for the Irish-language community, one would need to make up for the very limited statutory focus on the use of the Ulster Scots language by public authorities by providing a significantly wider additional focus on arts and literature. This is precisely what is afforded by NDNA in its deliberate alignment with the obligations set out in the Council of Europe Charter for Regional or Minority Languages and the Council of Europe Framework Convention for the Protection of National Minorities.

The departure from NDNA, with a negative effect on the interests of unionism, is also evident in the extraordinary failure of the legislation to recognise the breadth of the focus of the Ulster Scots commissioner, recognised by NDNA in paragraph 5.15, which states:

"The Commissioner's remit will include the areas of education, research, media, cultural activities and facilities and tourism initiatives."

There is no comparable commitment to the Irish language commissioner in NDNA. It is randomly left out of the Bill, and it is the purpose of Amendment 12 to put that right. Moreover, the Bill also seeks to limit the remit of the commissioners in relation to the international instrument compared with the NDNA agreement. NDNA commits to

"provide advice and guidance to public authorities, including where relevant on the effect and implementation, so far as affecting Ulster Scots, of commitments under the European Charter for Regional and Minority Languages, the European Framework Convention for the Protection of National Minorities, and the United Nations Convention on the Rights of the Child".

The Bill before us today, however, inexplicably narrows that to

"provide or publish such advice, support and guidance as the Commissioner considers appropriate to public authorities in relation to … the effect and implementation of the international instruments specified in subsection (3) in relation to the relevant language, arts and literature".

The plain meaning of "Ulster Scots" when the language is not specified is that it pertains to Ulster Scots culture in the round. Moreover, this interpretation makes much more sense, given the breadth of focus of the international instruments. Mindful of this, the purpose of my Amendment 13 is to restore the clear breadth of meaning, communicated by NDNA, which the current drafting of the Bill seeks to truncate. It is deeply concerning to unionists that those who drafted the Bill have departed from the plain commitments of NDNA repeatedly, in a way that damages the best interests of unionism.

This grouping also includes Amendments 14 and 30A. If one is to engage with the reality of Ulster Scots and honour our international commitments, with which NDNA seeks to align itself, it is vital to understand that Ulster Scots is what it says on the tin: a cultural phenomenon that extends between Ulster and Scotland. It is not possible to engage with the reality of Ulster Scots by putting it in a framework that engages only with Ulster. That would constitute a very basic category error. Moreover, for those of us in the UK who support our union, the opportunity to strengthen the relationship between parts of the union—Scotland and Northern Ireland—should not be set aside, especially in this year, when Nicola Sturgeon has announced another independence referendum and when, in October, we mark the 100th anniversary of the Conservative Party gaining its Ulster Scots Prime Minister, Andrew Bonar Law.

It should not be forgotten that the Ulster Scots community is to be found in not only Scotland and Northern Ireland but other parts of the United Kingdom. Mindful of this, Amendment 14 recognises the reality of the nature of Ulster Scots in the Ulster Scots commissioner, by giving him the role of promoting cultural connections between the Ulster Scots community in Northern Ireland and the Ulster Scots community in the rest of the kingdom. This is an elementary provision without which it is very difficult to honour the basic reality of Ulster Scots.

[LORD MORROW]

Amendment 30A furthers this step by requiring the Secretary of State to

"establish and maintain a fund to support the provision of projects and programmes which connect Ulster Scots in Northern Ireland with Ulster Scots in the rest of the United Kingdom".

Again, this is a vital provision if we are to take the reality of Ulster Scots seriously.

Finally, I come to my probing Amendment 15, tabled in response to comments made by the Minister in Committee when he said,

"By comparison, the commissioner associated with the Ulster Scots/Ulster British tradition will have a far more wide-ranging role than their Irish language counterpart, going beyond language, as we will probably discuss later, into arts and literature. The proposed legal duty on this wider range of activities would go far beyond the matter of services provided to the public, unlike those on the Irish language best practice standards."—[*Official Report*, 22/6/22; col. GC 76.]

From this statement, I rather get the impression that the commissioners might have official responsibilities in relation to bodies other than public authorities. Is that what the Minister was saying? To my mind, that seems rather unlikely, and perhaps rather improper, given that the Bill before us seems to engage public authorities only in relation to the commissioner. If other bodies are engaged, surely the nature of that engagement should be set out by the Bill. I beg to move.

Baroness Ritchie of Downpatrick (Lab): My Lords, I thank the noble Lord, Lord Morrow, for his exposition and the detail behind these amendments. I have a little query. I understand the point about parity of esteem and think that is the central theme running through those amendments. I note that Amendment 14, in particular, refers to communities rather than language speakers. Perhaps, in his summing up, he could indicate his specific intention. Is it to link speakers of the Ulster variant of Scots to other speakers of Scots in Scotland or other parts of the UK, or is it a means of identification in terms of an ethnic group? How do you define that issue? Maybe in summing up he could provide a little more detail in relation to this. I recognise that there is a difference in the legislation and can understand where he is coming from, but we just have to be a little careful.

5.15 pm

Lord Browne of Belmont (DUP): My Lords, I support Amendment 10 in this grouping but, first, having taken part at Second Reading I apologise for not having been able to contribute in Committee. Like the noble Baroness, Lady Ritchie, I had succumbed to the dreaded Covid—although I do not think there was any connection between us.

I am very grateful to the Ulster-Scots Agency for helping me to appreciate the importance of securing the change that Amendment 10 addresses. It proposes to replace "arts and literature" with "heritage and culture" to make the Bill reflect the provisions of NDNA, and to bring it into line with the established policy and human rights framework, in particular as it applies to the Ulster Scots community. The Minister told the House in Committee that the Government are

"sticking faithfully to what was"

agreed in NDNA. He also said:

"It was very clear in that package that the remit of the commissioner in respect of the Ulster Scots and Ulster British tradition would be matters of 'language, arts and literature' and not culture and heritage".—[*Official Report*, 22/6/22; col. GC 86.]

I contend that this is wrong. I quote verbatim from pages 34 and 35 of NDNA:

"A further such commissioner will be appointed by the First Minister and deputy First Minister to enhance and develop the language, arts and literature associated with the Ulster Scots/Ulster British tradition in Northern Ireland … The Commissioner's remit will include the areas of education, research, media, cultural activities and facilities and tourism initiatives … The functions of the Commissioner will be to … increase awareness and visibility of relevant services which are provided by public authorities in Northern Ireland … provide advice and guidance to public authorities, including where relevant on the effect and implementation, so far as affecting Ulster Scots, of commitments under the European Charter for Regional and Minority Languages, the European Framework Convention for the Protection of National Minorities, and the United Nations Convention on the Rights of the Child".

Here we have a series of paragraphs, with each expanding on the last, to build an overall picture of the commissioner's role. NDNA does not stop in the middle of the first sentence after "language, arts and literature", as the Government would have us believe. Oddly, the vital linking sentence from NDNA, which lists five key areas in the commissioner's remit—and, through the use of the words "will include", makes it clear that this is not an exhaustive list—is not reflected in the Bill.

The Minister says it is "very clear" that the remit of the commissioner does not include culture, but that assertion is flatly contradicted by the NDNA document, which says that it includes "cultural activities and facilities". The commissioner's remit could not include cultural activities and facilities if it did not include culture. Clearly, the Government have got it wrong.

The Government have sought to use these three words, "language, arts and literature", to limit the human rights provisions in relation to the commissioner for the Ulster Scots and Ulster-British tradition. That limitation, however, is not to be found in NDNA. There is one clear, explicit limitation on the commissioner's power to issue guidance and it is

"so far as affecting Ulster Scots".

As far as NDNA was concerned, anything covered by international instruments affecting the Ulster Scots community is within scope of the commissioner. The misreading of NDNA needs to be corrected and what was agreed needs to be properly reflected in the legislation. Failure to address this misunderstanding will lead to a situation where the Bill is at odds with 20 years of law and policy, not to mention the human rights framework which the Minister says this legislation is built on.

The applicable human rights framework—the scope of the Framework Convention for the Protection of National Minorities—under which the Government have just recognised the Ulster Scots community as a national minority of the United Kingdom, goes far beyond language, arts and literature. This can be seen in examples in Articles 5, 6, 15, 29 and 30.

The position of the Northern Ireland Human Rights Commission and the Minister's expert panel, appointed by the current Northern Ireland Communities Minister, is also supported by the Ulster-Scots Agency. They all agree that the role of the commissioner needs to reflect

established law and policy. To do otherwise risks excluding the commissioner from addressing issues that they should be addressing and undermines both the effectiveness of the commissioner and their standing in the eyes of the community.

The Government have stated that the function of the commissioner in respect of the human rights instruments reflects the Government's recent recognition of Ulster Scots under the framework convention. In truth, that objective is much better reflected in the text of NDNA than it is in the text of the Bill. The text of NDNA provides space for the commissioner's work to reflect the true breadth of the human rights instruments instead of applying a groundless, arbitrary restriction that will seriously impair the realisation of human rights. I support Amendment 10.

Lord Caine (Con): My Lords, once again, I am very grateful to noble Lords for moving and speaking to their amendments, and for the spirit in which they have done so. Amendments 10 and 13 return to the question of the functions of the commissioner. At the risk of repeating myself, I respectfully disagree with noble Lords who have spoken. The Government are quite clear that the Bill is faithful to *New Decade, New Approach* and the relevant legislative commitments it set out.

That document was very clear that the commissioner's functions would encompass matters of language, arts and literature. Indeed, both *New Decade, New Approach* and the draft legislation published alongside it, to which I referred earlier, used that precise formulation no fewer than 15 times. Paragraph 27E of *New Decade, New Approach* sets out that the main function of the commissioner would pertain to "language, arts and literature". The Bill replicates this in its principal aim essentially word for word.

The reference to heritage and culture in *New Decade, New Approach*, on which I believe noble Lords are drawing, specifically in Amendment 10, appears in paragraph 5.12.3 of Annexe E and relates to a separate commitment for the Executive to agree to an Irish language and Ulster Scots strategy. This is already provided for in Section 28D of the Northern Ireland Act 1998, which is a clear legal duty. I hope that the Executive continue to meet their legal duty to adopt these two important strategies; however, the operation of this duty is clearly separate from the legislative commitments on which the Bill delivers. I shall speak to the amendments on this matter more fully later.

On Amendment 13, specifically, the commissioner's role of providing advice and guidance on three international instruments was also always intended to be in relation to matters of language, arts and literature. Comparable provision was made in the draft legislation published alongside *New Decade, New Approach*, to which I refer again. The widening of the provision in the Bill beyond language, arts and literature, as proposed in Amendments 10 and 13 would, in the Government's view, be inconsistent with the conclusion reached. The Government therefore cannot accept them.

I turn to Amendment 12, which seeks to make provision for the commissioner's remit as set out in paragraph 5.15 of Annexe E to *New Decade, New Approach*. I understand the thrust of the noble Lord's argument, as that paragraph specifies that the commissioner's remit includes

"the areas of education, research, media, cultural activities and facilities and tourism initiatives."

However, this amendment would have the effect of altering the commissioner's functions. Those functions are separately set out in the same annexe to NDNA, in paragraph 5.16, and were also provided for in the draft Assembly legislation. I hope, however, to reassure noble Lords on this point. The Government consider that the commissioner's functions, particularly in relation to Ulster Scots services, would also cover the remit envisaged by *New Decade, New Approach*. Separate provision on the commissioner's remit therefore would not be necessary and the widening of its functions was not agreed.

Reference was made by the noble Lords, Lord Morrow and Lord Browne of Belmont, to the recommendations of the Northern Ireland Human Rights Commission in respect of these matters. The Government have consulted a wide range of bodies on the Bill, which included conversations with the Human Rights Commission. This has helped us reach a conclusion on the commissioner's name, for example. However, we have to stay within the bounds of NDNA and it would be wrong to innovate on these commitments unilaterally. I should point out that the Assembly would be able to amend this legislation were it functioning once again, which we all hope it will be very shortly.

Amendment 14 seeks to introduce a new function for the commissioner for Ulster Scots and Ulster-British tradition to promote cultural connections between Ulster Scots in communities in Northern Ireland and those in Scotland. The noble Lord, Lord Morrow, referred to the centenary of the coming to office as Prime Minister of the Ulster Scots leader of the Conservative and Unionist Party, Andrew Bonar Law. I assure the noble Lord that, as a committed and staunch unionist myself, I am very much in sympathy with the intention behind his amendment, which highlights the importance of the connections between Northern Ireland and Scotland.

I hope to reassure the noble Lord on this point: the commissioner will be able to co-operate with other bodies, such as those elsewhere in the United Kingdom, if this were conducive to its functions within Northern Ireland. The commissioner doing so may have the effect of promoting those cultural connections between the Ulster Scots diaspora elsewhere in the United Kingdom, which is what noble Lords aspire to with this amendment. However, the functions agreed in *New Decade, New Approach* did not specify that a strand of the commissioner's work would include promoting cultural connections outside Northern Ireland. Indeed, it would be outside the competence of the Northern Ireland Assembly to legislate for functions exercisable other than in regard to Northern Ireland itself, which is why such provisions were never planned in the draft Assembly legislation published alongside NDNA. I cannot accept an amendment that would broaden the work of the commissioner in the Bill beyond what was intended, although I can understand the noble Lord's intention. I am, as I say, personally very sympathetic to what he is trying to do.

[Lord Caine]

In the same vein, Amendment 30A seeks to place the Secretary of State under a legal duty to establish a dedicated fund to support projects connecting the Ulster Scots in Northern Ireland with those elsewhere in the UK. Again, such a fund was not envisaged in *New Decade, New Approach* and the Government cannot accept this amendment. I should add that this Government have demonstrated, on a number of occasions, their commitment to Ulster Scots through—to take one example—changing the BBC charter and framework to include support for Ulster Scots output.

Amendment 15 would also seem to be a further innovation on the position reached in *New Decade, New Approach*, as it seeks to widen the functions of the commissioner beyond public authorities and more broadly to "Northern Ireland society", which again would greatly extend the scope of the commissioner beyond what was envisaged. There would be no comparable change to the functions of the Irish language commissioner, which are concerned solely with the provision of services by public authorities in Northern Ireland. The Government cannot accept amendments that would broaden the scope of the commissioner's work in this way—in our view, it would be contrary to the position set out in *New Decade, New Approach*. On that basis, I urge the noble Lord to withdraw his amendment.

5.30 pm

Lord Morrow (DUP): My Lords, I thank all noble Lords who have spoken on these amendments. I begin by welcoming the positive comments the Minister has made about the importance of recognising the Ulster Scots and the Ulster-British tradition as something that cannot, by definition, be confined to Ulster alone. If I heard him correctly, he seemed to suggest that Amendment 12 was not necessary because the Bill should be read as meaning that the Ulster Scots commissioner already has responsibilities in relation to

"the areas of education, research, media, cultural activities and facilities and tourism initiatives."

Will he confirm that my interpretation is correct?

Lord Caine (Con): The noble Lord is correct to say that NDNA sets out the functions of the commissioner and then expands to set out the remit, which includes the areas to which he just referred. In our view, the Bill as drafted, in replicating the functions of the commissioner as set out in NDNA, means it is not necessary also to include the remit within the functions—the functions will cover the remit.

Lord Morrow (DUP: I am very grateful to the Minister for that.

Turning to his response to Amendment 10, I have to say that I do not believe that his defence of the exclusive focus on language, arts and literature is faithful to the NDNA, given what the international instruments with which it identifies say about the importance of heritage and culture, broadly considered. I urge him to go back and reread the international instruments, and then the NDNA in light of them, to study the important speech given today by my noble friend Lord Browne and to talk to the Ulster Scots Agency. I know that others have asked him to do that, and I hope that he takes that on board. If he does, I think he will be forced to conclude that it is wholly wrong to seek to justify limiting our focus on language, arts and literature.

Finally, I note that the Minister argues that the Bill gives the Ulster Scots commissioner powers in relation to bodies beyond the public authorities mentioned in the Bill. I believe, however, that if that is the Government's intention, the other bodies should be referenced in some way in the Bill. I urge the Minister to give matters very careful consideration over the summer and I beg leave to withdraw the amendment.

Amendment 10 withdrawn.

Amendment 11

Moved by ***Lord Caine***

11: Clause 3, page 8, line 25, after "and" insert "the"

Amendment 11 agreed.

Amendments 12 to 17 not moved.

Amendment 18

Moved by ***Lord Browne of Belmont***

18: Clause 3, page 9, line 30, leave out "facilitation"

Member's explanatory statement

This amendment would extend the grounds on which an individual can submit a complaint to the Commissioner for the Ulster Scots and Ulster British traditions to cover the conduct of public authorities in relation to all the guidance issued by the Ulster Scots and Ulster British Commissioner, as is already the case with respect to all the guidance issued by the Irish Language Commissioner. It would thus help restore/achieve the parity of esteem.

Lord Browne of Belmont (DUP): My Lords, in the absence of the noble Lord, Lord Empey, and with the permission of my noble friend Lord Morrow, I shall speak to Amendments 18 to 21. When these amendments were dealt with in Committee, the Minister objected that if they were accepted, they would make a change to one commissioner but not the other, as if they must be treated in exactly the same way. He stated:

"My first concern is that it would not be appropriate to amend one of the commissioner's complaints procedures but not the other."—[*Official Report*, 22/6/22; col. GC 99.]

This, however, is wholly inconsistent with what the Minister has rightly been insistent on, and in relation to which he has my full agreement; namely, that this legislation does not provide commissioners with identical functions and responsibilities but with different and equally meaningful and valuable roles for their respective communities.

The limitation of the complaints procedure to the use of the Ulster Scots language by public authorities is the consequence of the drafters losing sight of the fact that the two commissioners have different functions in order to provide something of equal value to each community. In this regard, it is useful to compare and contrast the provisions in the Bill that define the principal role of the Irish language commissioner and

then that of the Ulster Scots/Ulster-British tradition commissioner. Of the former, new Section 78K(1) states:

"The principal aim of the Commissioner in exercising functions under this Part is to enhance and protect the use of the Irish language by public authorities in the provision of services to the public or a section of the public in Northern Ireland."

Thus, it is about the use of the Irish language by public authorities.

The parallel clause defining the role of the Ulster Scots commissioner, meanwhile, does not mention the use of the language by public authorities. New Section 78R(1) states:

"The principal aim of the Commissioner in exercising functions under this Part is to enhance and develop the language, arts and literature associated with the Ulster Scots and Ulster British tradition in Northern Ireland."

Indeed, this is underlined by the very name of the Ulster Scots/Ulster-British commissioner.

Given that Ulster British is not a language in any sense, restricting the complaints facility to the use of the Ulster Scots language transparently limits it to less than half the commissioner's title, even while the Irish language commissioner's function is such that the right to complain applies to the entire scope of their engagement with public authorities. As if to underline the point, not only is the use of the Ulster Scots language by public authorities not mentioned in the principal role clause but when it is mentioned later on such is its secondary importance it is only in brackets so that it is not forgotten entirely. Thus, if anyone should respond by saying that the nationalist community is subject to exactly the same constraints as the unionist community, then let us be clear: no, it is not.

The roles of the two commissioners are, as the Minister pointed out, different, and while the Irish language commissioner will make extensive demands of all public authorities in relation to the use of the Irish language, the Ulster Scots commissioner will not in relation to the use of the Ulster Scots language—hence the compensating broader cultural remit. However, to make a comparable, meaningful provision for unionists through the Ulster Scots commissioner to that afforded to nationalists through the Irish language commissioner, it is necessary to endow the former with a different set of functions to the latter. This must come with a complaints facility across the spectrum of functions required, in order for unionists to be afforded something of equal value to that which is afforded to nationalists. Not to do so is to live in denial about the fact that the two commissioners are different, servicing the needs of two different communities, with different concerns and priorities. Far from giving effect to parity of esteem, this would be to snub one community in a context when they have already been snubbed by the inexplicable decision also to weaken the Ulster Scots commissioner compared to the Irish language commissioner by denying the former the protection of the "duty to have regard" obligation dealt with in a previous grouping.

The only thing the Government could possibly do to seek to justify this arrangement would be to say that the NDNA agreement does not specify that a complaints procedure should be applied in relation to the other areas of the Ulster Scots commissioner's responsibility, but that does not provide a justification for inaction.

In the first instance, it is important to appreciate that the NDNA agreement does not say that the unionist community should not be given the right to complain about the conduct of public authorities through the Ulster Scots commissioner beyond the use of language. It is silent on the matter. In this context, we must test the silence and ask whether it makes sense that the commissioner should be provided with areas of responsibility in relation to the conduct of public authorities but no ability to respond to complaints from his or her community about the failures of public authorities in those areas, while the nationalist community is afforded the right to complain in relation to the principal functions of the Irish language commissioner. No, it does not.

In the second instance, and importantly, we have to interpret NDNA through the lens of the imperative for the parity of esteem principle. This means that if we conclude that one community cannot receive meaningful support through a narrow focus on language because of its different priorities—such that the commissioner needs to be given a different function—it would be perverse for that community to be denied the right to complain about failures of public authorities across the remit of the commissioner while making provision for such a complaints mechanism in relation to the other community.

It is one thing to snub a community by not placing a duty to have regard on public authorities with respect to its commissioner—even as such a duty is applied to the other community and its commissioner—but to also deny the former community the right to complain about the conduct of public authorities in relation to the definition of its commissioner's principal role, even as this right is afforded the other community, is extraordinary. Moreover, when this is seen in the light of how the unionist community has been dealt with in relation to the protocol since 2019, one can perhaps begin to understand why Northern Ireland unionists feel they have become the subject of contempt.

Stepping back from this point, however—and finally coming to a conclusion—forgetting for a moment that I am a Northern Ireland unionist, I am also at a loss to understand why the Government, who surely want to make the unionist-nationalist relationship easier, should bring forward a Bill containing such a transparently antagonising provision. I most sincerely hope that the Government will reconsider and accept these amendments, which bring a modest extension of the right of unionists to complain so that it includes practices contrary to the international instrument mentioned in Clause 3. I beg to move.

Lord Caine (Con): My Lords, I am grateful to the noble Lord, Lord Browne of Belmont, and I will be very brief in my remarks. As I said in Committee, *New Decade, New Approach* is very clear in paragraph 5.16.3 that the commissioner should be able to investigate relevant complaints about a public authority's lack of due regard to advice provided in respect of

"facilitating the use of Ulster Scots."

For that reason, the Bill makes provision so that complaints may be made to the commissioner concerned only in relation to "published facilitation guidance". Neither *New Decade, New Approach*, nor the draft

[Lord Caine]
legislation accompanying it, proposed that this complaints power be made broader, as the noble Lord proposes through these amendments.

I am content that the provision in the Bill as it stands reflects the position reached in *New Decade, New Approach*—the agreement described by the noble Lord's former leader Arlene Foster as a "fair and balanced" package—and the legislation prepared by the Office of the Legislative Counsel of the Northern Ireland Assembly alongside it. The noble Lord, Lord Browne, referred to himself as a Northern Ireland unionist; as a British unionist, I do not accept that we are snubbing a community in Northern Ireland. We are simply implementing *New Decade, New Approach* faithfully. On that basis, I urge the noble Lord to withdraw the amendment.

Lord Browne of Belmont (DUP): My Lords, I thank the Minister for his reply. I believe that NDNA is a fair package, but I am not convinced that the Bill is totally fair. It is important for the Government to engage with this problem, and nothing that the Minister has said provides a compelling reason for concluding that NDNA stipulates that while the Irish-speaking community should have access to a right to complain in relation to all matters within the mandate of its commissioner, the Ulster Scots and Ulster-British tradition should be denied this right in relation to all that commissioner's work, apart from something whose secondary importance is acknowledged by virtue of the fact that it is mentioned only in brackets. I hope that this will be debated further in the other place, and, therefore, I wish to withdraw my amendment.

Amendment 18 withdrawn.

5.45 pm

Amendments 19 to 22 not moved.

Amendment 23

Moved by ***Lord Caine***

23: Clause 3, page 11, line 7, leave out from "Commissioner" to second "Ulster" in line 9 and insert "for the Ulster Scots and the"

Amendment 23 agreed.

Clause 5: Use of Ulster Scots in education

Amendment 24

Moved by ***Lord Browne of Belmont***

24: Clause 5, page 11, line 17, at end insert—

"89B The Department may, subject to such conditions as it thinks fit, pay grants to any body appearing to the Department to have as an objective the encouragement or promotion of Ulster Scots in education."

Member's explanatory statement

This amendment would give effect to the proposed duty to promote the use and understanding of Ulster Scots in education by providing an explicit power for the Department of Education to pay grants in pursuance of its obligations as is the case already in relation to the Irish Language. The wording of this amendment mirrors the existing provision in relation to the Irish Language, maintaining the parity of esteem.

Lord Browne of Belmont (DUP): My Lords, again, in the absence of the noble Lord, Lord Empey, who unfortunately has matters to deal with back home—we wish him well—and with the kind permission of my noble friend Lord Morrow, I am pleased to move Amendment 24 in their names. I intend to be brief.

Paragraph 27c of the NDNA agreement commits to legislation placing

"a legal duty on the Department of Education to encourage and facilitate the use of Ulster Scots in the education system."

This is vital, given that we are a signatory to the European Charter for Regional or Minority Languages, Article 8 of which requires the state to make available pre-school, primary school, secondary school and university education

"in the relevant regional or minority languages; or … to make available a substantial part … in the relevant regional or minority languages",

or at least to provide it for those families who request it.

It is also vital because Ulster Scots has now been registered with the framework convention on minority languages, Article 14 of which states that

"the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language."

Critically, the understanding of language and the national minority language commitment are located very much in terms of a history and a commitment to history in education. The framework agreement asks parties to

"take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority."

Clause 5 of this Bill seeks to rise to aspects of this challenge. Its language reflects exactly, so far as it goes, an existing provision in the Education (Northern Ireland) Order 1998 with respect to Irish-medium education, which states:

"It shall be the duty of the Department to encourage and facilitate the development of Irish-medium education."

Crucially, however, this intervention to assist the Ulster Scots language not only testifies to an inequality of treatment, in that it comes much later than the provision for the Irish language, but transparently does not seek to end this inequality of treatment. It fails to honour parity of esteem; the Irish language provision also gives effect to the obligation to encourage and facilitate through the possibility of the allocation of grants, whereas Clause 5 does no such thing. Specifically, the order states:

"The Department may, subject to such conditions as it thinks fit, pay grants to any body appearing to the Department to have as an objective the encouragement or promotion of Irish-medium education."

Moreover, it is notable that this duty, in respect of Irish, followed the form of a statutory duty in respect of integrated education set out in the Education Reform (Northern Ireland) Order 1989. Again, that duty was supported by a power to make grant payments. Article 64(1) states that:

"It shall be the duty of the Department to encourage and facilitate the development of integrated education, that is to say the education together at school of Protestant and Roman Catholic pupils."

Article 64(2) adds that the department

"may, subject to such conditions as it thinks fit, pay grants to any body appearing to the Department to have as an objective the encouragement or promotion of integrated education."

Once again, this inequality of treatment is inexplicable and sends out the clear message that it is sufficient to generate an image of concern regarding Ulster Scots and the Ulster Scots language without providing a credible delivery mechanism comparable with that afforded the Irish language or other concerns, such as integrated education. This is of real concern to the Ulster-Scots Agency and constitutes a completely indefensible form of difference of treatment. Amendment 24 puts this right by ensuring the equal treatment for the Ulster Scots language that is vital if the principle of the parity of esteem is to be upheld.

I very much hope that the Minister can support this modest, permissive but very important amendment. I beg to move.

Lord Murphy of Torfaen (Lab): My Lords, I have some sympathy with the amendment, or at least with what lies behind it. I do not see any point in pushing such an amendment to a vote, but it raises the issue. I fully support the statutory duty on the Executive in Belfast to fund Irish language education through the various means. However, bearing in mind that this Bill is new, introducing three new public offices—the office and the two commissioners—the Minister might make inquiries with the Department of Education there over the next few weeks regarding this difference of approach in terms of funding. Perhaps the meeting that he intends to have with the Ulster-Scots Agency can clear this up, but it appears to be a dichotomy.

Lord Caine (Con): My Lords, I am very grateful again to the noble Lord, Lord Browne of Belmont, for his comments in moving Amendment 24. As I pointed out earlier, *New Decade, New Approac*h and this Bill provide a new specific legal duty for Ulster Scots in relation to the education system in Northern Ireland. This will address the current lack of statutory provision for Ulster Scots within that system.

However, a specific new grant-making power, which would be the effect of Amendment 24, was, of course, not committed to in *New Decade, New Approach*. It would be inappropriate in this context for the UK Government to impose financial commitments beyond those set out in that document. I also recall that noble Lords in Committee raised what the duty that is already set out in the Bill, on encouraging and facilitating the use and understanding of Ulster Scots in the education system, would mean in practice. I am therefore pleased to provide a clearer view to noble Lords on what this new and important legal duty might entail. I hope that this will speak to their concerns on this matter.

The new education duty in the Bill will enable the use and understanding of Ulster Scots to become part of the framework of the education system in Northern Ireland and the Northern Ireland Department of Education will be able to do anything necessary to meet that duty. In that context, I note that the Education (Northern Ireland) Order 1998 provides for the encouragement and facilitation of Irish-medium education and the mechanism of supporting this specific type of schooling, with the grant-making powers provided to specifically support Irish-medium schools.

Noble Lords will understand that, as a UK Minister, I cannot speak on behalf of the Northern Ireland Department of Education. The department has a Minister, a member of the DUP, who will need to consider this matter too, but it would seem to me that meeting this new duty in respect of Ulster Scots would perhaps entail the commissioning of educational materials for use in schools. Steps to meet the duty could also include seeking appropriate consultancy on the facilitation of Ulster Scots in schools, or encouraging relevant organisations in providing tuition in schools. I would stress, however, that this remains a matter for the Northern Ireland Department of Education to consider.

In respect of the comments of the noble Lord, Lord Murphy, I am very happy to reflect on what he said. In that spirit, I would encourage the noble Lords to withdraw the amendment.

Lord Browne of Belmont (DUP): My Lords, first I would like to thank the noble Lord, Lord Murphy, for his very useful contribution, and I hope the Minister will take up the offer to meet with the Ulster-Scots Agency, which I am sure can put its case very forcefully. I know this Bill will be going to the other House, where I am sure it will receive serious consideration, so under those circumstances I wish to withdraw the amendment.

Amendment 24 withdrawn.

Clause 6: Concurrent powers and powers of direction

Amendment 25

Moved by ***Baroness Ritchie of Downpatrick***

25: Clause 6, page 12, line 1, at end insert—

"(4A) Where a Northern Ireland Minister or Northern Ireland department does not perform their identity and language functions, the Secretary of State must act if no progress has made in regard to those functions.

(4B) Where the First Minister and deputy First Minister do not act jointly to appoint an Irish Language Commissioner in accordance with section 78J(1) of the Northern Ireland Act 1998 within the period of 30 days of that section coming into force or a vacancy arising, the Secretary of State must act to appoint an Irish Language Commissioner within a further period of 30 days.

(4C) Where the First Minister and deputy First Minister do not act jointly to approve best practice standards in accordance with section 78L(2) of the Northern Ireland Act 1998 within the period of 30 days of best practice standards being submitted to them, the Secretary of State must within a further period of 30 days approve the best practice standards with or without modifications."

Member's explanatory statement

This amendment would provide a timescale for the Secretary of State to step in if there is no Northern Ireland Executive in place in order to execute the functions of the legislation.

Baroness Ritchie of Downpatrick (Lab): My Lords, Amendments 25 and 27 in this group are in my name, and they address the powers of the Secretary of State.

[Baroness Ritchie of Downpatrick]

It is a matter of regret that this legislation is not being dealt with by the Northern Ireland Assembly and Executive, and that it has to be dealt by this House, because all of the issues are a matter of devolution. They impinge on those issues within the devolution settlement in relation to Irish language and Ulster Scots and the culture and heritage thereof. Political circumstances mean that we do not have a Northern Ireland Assembly and Executive, and so therefore, of necessity, the UK Parliament has to deal with this particular legislation, bringing it forward in both Houses and ensuring its implementation.

Amendment 25 will provide a timescale for the Secretary of State to step in if there is no Northern Ireland Executive in place to execute the functions of the legislation. History dictates that this has been—and is currently—the case, and noble Lords addressed this particular issue at Committee. The legislation contains new powers under Clause 6 for the Secretary of State to step in where there is no Executive or Executive Office to exercise the functions of the legislation, or if one member of the Executive decides to block progress on any aspects of the legislation that requires their approval.

Given that we do not have an Executive at present, and in a situation where even if we did we may not have political agreement from within the Executive Office on the legislation—and I can say that having previously been a Minister, there is precedent for the First and Deputy First Ministers not finding agreement, even though both officers are joint officers—the appointment of a commissioner, or an approval of best practice standards, is a problem.

6 pm

These step-in powers for the Secretary of State include a timescale in which a decision must be taken by him or her. As per the amendment, the Secretary of State must act within 30 days of progress being restrained, and that 30-day period will commence only after an initial 30-day window for the First and Deputy First Minister to agree progress. This leaves the Executive Office with an opportunity to act, albeit that window will now be time-bound to ensure focused action and attention. This will ensure that the functions of the legislation are implemented within that limited timeframe.

This Amendment 25 is in keeping with the fundamental principles of NDNA. The amendment also faces political reality, rather sadly, and seeks to avoid further political stalemate on this long-overdue legislation. I cast my mind back to 2006. I recall that the noble Lord, Lord Dodds, was at St Andrews then and, from memory, I think there was a deal on the Irish language. It was one of the side deals that was included in the announcement given by Prime Minister Blair and Taoiseach Bertie Ahern at the conclusion of discussions on the Friday afternoon.

In respect of that, I ask the Minister to reflect further on Amendments 25 and 27, which make provision in the legislation to include an Irish language strategy as a function of complying with the requirements of NDNA. Paragraph 5.21.3 of that document states that

"under Section 28D of the Northern Ireland Act 1998 the re-established Executive will produce a draft Irish Language Strategy and a draft Ulster Scots Language, Heritage and Culture Strategy for consultations within 6 months. This will include programmes and schemes which will assist in the development of the Irish language and the Ulster Scots language, culture and heritage."

In that vein, I would very much like it if the Minister could indicate his acceptance of these amendments today or, following a period of reflection, ensure that those amendments are brought forward by his ministerial colleague in Committee in the Commons, with an indication that this would be done on Second Reading. Therefore, adherence to NDNA commitments and protection of the Irish language and Ulster Scots would be provided. I beg to move Amendment 25.

Baroness Goudie (Lab): My Lords, I support my noble friend Lady Ritchie's amendments. Furthermore, I ask the Minister to consider that committees and other organisations around the strategy should have equal numbers of men and women, and of various religions and others, so that this truly bears out the Good Friday agreement and the Bill. This would be a great move, and I know the Minister could see to this. Perhaps it could also be debated fully in the other House. I raised this on Second Reading.

Lord Dodds of Duncairn (DUP): My Lords, I speak in support of Amendments 28, 29 and 36 in the names of the noble Lords, Lord Morrow and Lord Empey, but I will first deal with Amendment 25 in the name of the noble Baroness, Lady Ritchie.

I understand where the noble Baroness is coming from with this amendment, which we also discussed in Committee. Part of the reason for it is to allow decisions to be made if there is no Northern Ireland Executive in place, but from my reading of it—I stand to be corrected—if it were to be agreed, these powers to act after 30 days would apply whether there were a Northern Ireland Executive or not. In other words, even if the Assembly and the Executive are in place but a period of 30 days elapses between the trigger point and a decision being made, it is open to the Secretary of State to intervene. That seems a quite draconian suggestion. I have been in the Northern Ireland Executive, like the noble Baroness and others, and many decisions take longer than 30 days, for all sorts of good reasons and considerations of all sorts of circumstances. It seems an amazing proposition that the Secretary of State would be compelled to act if the Office of the First Minister and Deputy First Minister could not agree something within 30 days. I can think of nothing more designed to undermine the principle of devolution than that. From my reading of the amendment, it clearly would apply not just to the circumstances where there was no Executive but even if the Executive were in place.

The other thing I point out is that the amendment would apply only to the appointment of the Irish language commissioner, so there is no compulsion for the Secretary of State to act if there is a failure to appoint the Ulster Scots/Ulster-British commissioner. It seems one-sided in that approach. Nor indeed would it apply to appointments relating to the office of identity and cultural expression. It seems to be very much overstepping the mark. It would not fulfil the purposes it purports to and would create a one-sided

approach in relation to appointments. For those reasons, I trust that the Government will maintain their position from Committee and not support the amendment.

Amendments 28, 29 and 36 in the names of my noble friend Lord Morrow and the noble Lord, Lord Empey, would remove the override powers from the Bill. In his opening remarks, the noble Lord, Lord Murphy, made the very important point that the Bill is designed to stick as closely as possible to the NDNA agreement. That is what we are about. On a number of occasions, the Minister cited in support of his arguments in knocking down some amendments that we must reflect the NDNA agreement and that those provisions were not in it. It is certainly not in the NDNA agreement that the Secretary of State for Northern Ireland would be given override powers, as the Minister admitted in Committee.

If it had been suggested that this would be part of the agreement, I do not think there would have been an agreement. If we had set up a series of checks and balances, and requirements for the First Minister and Deputy First Minister to agree, and then said, "If they can't agree, don't agree, or it appears to the Secretary of State to be appropriate then he can intervene and take on all the powers of the First Minister and Deputy First Minister in this respect", which is a devolved matter, there would not have been an agreement. It so undermines the NDNA agreement and devolution itself that I find it hard to see how the Minister can justify it. He cannot do so on the basis that it is a faithful replication of the agreement, or on the grounds that it faithfully adheres to the devolution arrangements throughout the United Kingdom. It is clearly in breach of the Sewel convention and it acts as a clear disincentive to find agreement.

This is one of the many areas where the First and Deputy First Minister—and, indeed, the Executive—are required to reach agreement without the fallback that if they do not then the Secretary of State will intervene. That forces agreement to be made in the vast bulk of cases. If it is clear to some people that the Secretary of State will intervene if they simply dig in their heels and do not agree, then that is likely what will happen. I think this is a very misconceived part of the Bill. I understand that the argument may well be that it is a difficult area and we need contingency powers, as the Minister set out in Committee, but, again, contingency powers to avoid this problem arising were not part of the NDNA.

I come back to the basic principle. This Bill is about implementing that agreement. We are all agreed on that. These clauses were not part of the agreement. They are unilateral actions on the part of the Government to reserve unto themselves powers to override the Executive. We have seen this in a number of areas recently and I have raised with the Secretary of State and with others within government that we are going down a very dangerous path with this selective overriding of the devolved settlement. We have seen it in relation to the abortion issue, in relation to this issue and in relation to the protocol issue, where the voting mechanism of the Assembly, which is meant to be cross-community and cross-party agreement—there has to be a majority of unionists, nationalists and an overall majority—has been set aside arbitrarily.

Where does this end? What criteria do the Government apply for where they respect devolution and where they set it aside? Can the Minister tell us what are the overall considerations as to when powers are taken by the Secretary of State to override devolution, the Belfast agreement or the NDNA agreement? Is it on a case-by-case basis? What is it? I think it raises very serious questions.

I hope that when this matter is dealt with in the other place, the Government will reconsider this approach because, as I say, it is not a faithful replication of the NDNA agreement.

Lord Murphy of Torfaen (Lab): My Lords, I must say that the final debate of this evening has been fascinating. There are times where I am glad I am not the Minister, and this is one of them. There are quite convincing and interesting arguments on both sides. I remember that the late Lord Cledwyn Hughes, when he chaired the Parliamentary Labour Party, would start his deliberation as chairman by saying: "There are pros and cons for and there are pros and cons against." That is the case here.

It is about protection. My noble friends Lady Ritchie and Lady Goudie were talking about protecting this legislation, protecting the agreement that has produced the legislation so that something which in the past, as we all know, brought down the Assembly for three years ought not to happen again. Of course, we have to ensure that the legislation is balanced for both nationalists and unionists and, indeed, other members of the community in Northern Ireland. I quite understand the need for reassurance but then there is the other protection: the protection for devolution. It would be much easier, by the way, if the Assembly and the Executive were functioning because the argument would be much more effective but, of course, they are not and that is one of the problems. Because there is no real, effective Assembly or Government in Northern Ireland, it is very difficult to ensure that there is certainty about this legislation when they are not there. I can understand that too.

As I said in Committee, when I was the Secretary of State I felt deeply uncomfortable about making decisions for people in Northern Ireland when I was a Member for a Welsh valley constituency. It was for the people of Northern Ireland to decide what they had to do. On schools, education, language, culture or whatever it might be, it is for those people in Northern Ireland who were elected by the people of Northern Ireland to make the decisions. They have elected them and, frankly, it is about time they got into government. I understand all the issues that underlie why that is not happening.

6.15 pm

I urge one thing on what I assume will be a sort of new Government over the next couple of weeks, perhaps even days: for heaven's sake, start negotiating and talking. Start getting around the table with the political parties in Northern Ireland, the Irish Government and whoever is involved to try to resolve all these issues. Half the difficulties we have had, whether with the Northern Ireland protocol, this or anything else, are because people are not trying to resolve it by having decent negotiations. That has to happen.

[Lord Murphy of Torfaen]

We are uncomfortable with this; we do not like it. I know the Minister has given us a concession in the amendment I moved in Committee, which was that if the Secretary of State takes these powers there will be an opportunity in both Houses to debate the decision that he or she has taken. Without pre-empting what the Minister is going to say, I note that there will be two Statements a year indicating what has happened. I ask only that if the Statement is due in July and there is a crisis in March, the Secretary of State comes along to Parliament and gives the Statement then—not automatically at certain times of the year, irrespective of what happens in Northern Ireland.

I look forward to hearing what the Minister has to say. It is a difficult dilemma, respecting devolution on the one hand but ensuring the protection of this legislation on the other.

Lord Caine (Con): My Lords, I am incredibly grateful to all noble Lords who have participated in this Report stage for their contributions. I single out my noble friend Lord Lexden, who appears to be the only Conservative who has sat through the entire Report stage. Given that there might be one or two things happening outside the Chamber of interest to members of my party and beyond, that is commendable.

I agree with the noble Baroness, Lady Ritchie of Downpatrick, echoing some of the comments made by a number of noble Lords at the outset. If this debate has highlighted anything, it is precisely why it should be taking place in the Northern Ireland Assembly, not in this Parliament. It touches on very local, devolved matters that would be much better dealt with in the Assembly by local politicians, accountable to their local electorates. I hope we can reach such a situation. I very much take on board the sensible and wise comments of the noble Lord, Lord Murphy, about the need to discuss and negotiate. I hope we can resolve that very quickly, whatever the immediate future might hold for some of us.

The amendment in the name of the noble Baroness, Lady Ritchie of Downpatrick, seeks to place further obligations on the Secretary of State in relation to the appointment of the Irish language commissioner and Irish language best practice standards after a certain threshold is met. As I made clear in Committee—I appreciate that the noble Baroness was unable to be present, although I am reliably informed that she could watch proceedings from her bedroom while recovering—I sympathise with the intention of wanting to ensure that the provisions of the Bill are not stymied by inaction on the part of the Executive.

I also appreciate the noble Baroness's desire for the Secretary of State to move quickly if such inaction were to present itself. I have had conversations with Irish language groups, in particular Conradh na Gaeilge, on that point. However, my starting point is, as I have said throughout the passage of the Bill, that the Government would not wish to intervene routinely in devolved matters and that the use of any powers in the Bill would require careful consideration.

The powers in the Bill have been carefully drafted to allow the Secretary of State to use his or her discretion and to consider the political circumstances at the time. I fear that introducing a timeframe within which he or she had to act would detract from that flexibility. The noble Lord, Lord Murphy, was Secretary of State for Northern Ireland and a senior Minister during the Good Friday agreement negotiations, so he will appreciate that sometimes the Secretary of State needs a degree of flexibility in exercising his or her judgment.

As I laid out before the Committee, in our view the stipulated timeframe of 30 days set out in the amendment would be wholly impractical, particularly in respect of public appointments, which need to be conducted with rigour and, quite rightly, need a longer timeframe to complete, as my noble friend Lord Dodds of Duncairn made clear in his comments. Such a timeframe would almost certainly preclude important public appointment procedures from taking place, which I suspect is not the noble Baroness's intention.

I also suspect that the consequences of the Secretary of State's intervention being compelled would set us further back from securing the public's long-term confidence in the measures set out in this legislation. Lastly, as my noble friend Lord Dodds pointed out, the proposed amendment applies in this case only in respect of the Irish language provisions of the Bill, not those pertaining to the Ulster Scots and Ulster-British tradition or the new office established by it.

The noble Baroness's Amendment 27 seeks to give a further area where step-in powers could be exercised—namely, in relation to strategies relating to the Irish language and Ulster Scots as set out by Section 28D of the Northern Ireland Act 1998. As I said earlier today and in Committee, this is a separate undertaking from the legislative commitments on identity and language set out in *New Decade, New Approach*. For that reason, we have decided not to include such a provision in this legislation.

The noble Baroness, Lady Goudie, who I welcome to her place here, talked about appointments. At the risk of repeating what I said in Committee, there are well-established appointment procedures in Northern Ireland but these would essentially be matters for the Northern Ireland Executive to take forward rather than Her Majesty's Government.

I turn to Amendments 28, 29 and 36 in the names of my noble friends Lord Morrow and Lord Empey and spoken to by my noble friend Lord Dodds of Duncairn. In Committee, I set out at length the Secretary of State's step-in powers more broadly. I realise that these are difficult areas. Throughout the Committee debates, I stressed that the Government would not wish to intervene routinely and that the use of these powers would require careful consideration, and that remains the case.

I have a good deal of sympathy with the comments of my noble friend Lord Dodds of Duncairn and the noble Lord, Lord Murphy, in respect of these powers. The only reason they are there is to ensure that a key element of *New Decade, New Approach* is capable of being delivered—something that, regrettably, was not happening after the Assembly was restored in January 2020. Agreeing again with the noble Lord, Lord Murphy, I think I said in Committee that one does not always have to be totally comfortable with something to regard it as necessary, and I believe that the powers are proportionate and necessary.

However, as the noble Lord alluded to, the need for appropriate scrutiny of these powers and the importance of accountability before this House are paramount. I therefore make a commitment to noble Lords today on the step-in powers, following my promise in Committee to look further at these issues. Having reflected, I can commit that the Northern Ireland Office will make Written Statements to both Houses every six months from commencement to provide updates on the Bill's implementation. Those statements will include details on any use of the step-in powers within the relevant six-month period and will enable the Government to keep both Houses informed of the delivery of NDNA commitments more broadly. I will also reflect further on the comments of the noble Lord, Lord Murphy, about timings.

I hope that this commitment, from the Dispatch Box, will provide some reassurance to noble Lords and go some way—probably not all the way—to allaying their concerns. The Government remain of the view that these powers are required in the Bill, however uncomfortable some may be. On this basis, I urge the noble Baroness to withdraw her amendment.

Baroness Ritchie of Downpatrick (Lab): My Lords, I thank all noble Lords who participated in this short debate. It was very interesting and different views were offered. I was trying to ensure the protection of the legislation and, obviously, the protection of devolution. I would still urge the Minister to give consideration to the content of both amendments. If he could meet Conradh na Gaeilge in the coming months, in advance of the Bill coming to the other place, to discuss these particular issues, I would be extremely grateful. I beg leave to withdraw Amendment 25.

Amendment 25 withdrawn.

Amendment 26

Moved by ***Lord Caine***

26: Clause 6, page 12, line 6, leave out from "Commissioner" to "Ulster" in line 8 and insert "for the Ulster Scots and the"

Amendment 26 agreed.

Amendments 27 and 28 not moved.

Clause 7: Concurrent powers and powers of direction: supplementary provision

Amendment 29 not moved.

Amendment 30

Moved by ***Lord Caine***

30: After Clause 7, insert the following new Clause—

"Establishing the Castlereagh Foundation

(1) The Secretary of State may—

(a) establish a body corporate or other organisation to be known as the Castlereagh Foundation, or

(b) provide grants for the establishment of such a body or organisation by another person.

(2) A body or other organisation established or funded under subsection (1) must—

(a) have as its principal objective the funding and support of academic research into identity, including national and cultural identity and shifting patterns of identity, in Northern Ireland, and

(b) be operationally and financially independent from the Office of Identity and Cultural Expression (though this does not affect the Office's functions under section 78H of the Northern Ireland Act 1998).

(3) The Secretary of State may dispose of any interest in the Castlereagh Foundation."

Amendment 30 agreed.

Amendment 30A not moved.

Clause 8: Consequential amendments

Amendments 31 to 35

Moved by ***Lord Caine***

31: Clause 8, page 13, line 21, leave out from "Commissioner" to second "Ulster" in line 22 and insert "for the Ulster Scots and the"

32: Clause 8, page 13, line 23, leave out from "Commissioner" to second "Ulster" in line 24 and insert "for the Ulster Scots and the"

33: Clause 8, page 13, line 30, leave out from "Commissioner" to second "Ulster" in line 31 and insert "for the Ulster Scots and the"

34: Clause 8, page 14, line 6, leave out from "Commissioner" to second "Ulster" in line 7 and insert "for the Ulster Scots and the"

35: Clause 8, page 14, line 13, leave out from "Commissioner" to second "Ulster" in line 14 and insert "for the Ulster Scots and the"

Amendments 31 to 35 agreed.

Amendment 35A not moved.

Clause 9: Commencement

Amendments 36 and 37 not moved.

Immigration and Nationality (Fees) (Amendment) Regulations 2022

Motion to Regret

6.27 pm

Moved by ***Baroness Lister of Burtersett***

That this House, while welcoming the provisions in the Immigration and Nationality (Fees) (Amendment) Regulations 2022 (1) to exempt children looked after by a local authority from the fee charged to register their right to citizenship, and (2) to introduce a discretionary waiver for children on grounds of non-affordability, following the Court of Appeal judgment in *PRCBC & O v SSHD*, nevertheless regrets the decision to reintroduce the fee charged to other children at the existing level of £1,012 when the cost of processing an application is officially estimated to be £416; and questions (a) whether this is in the best interests of children, and (b) the justification that the level of fee is necessary to protect the funding of the borders and migration system. (SI 2022/581).

Baroness Lister of Burtersett (Lab): My Lords, this is only the second regret Motion that I have moved in my 11 years in your Lordships' House. It is on the same topic as the first, moved four years ago: the barriers to children registering their entitlement to citizenship created by the exorbitant fee of £1,012. These are children either born here, to parents neither of whom was at the time British or settled, or who have grown up here from an early age and have the right to register as British citizens. A growing number of noble Lords from across the House, now known as "terriers united", have raised concerns since then. Unfortunately, not all of them are able to be here this evening. With the changing of times, I think some were expecting the debate to be slightly later and cannot make it at this time.

These regulations stem from a legal case brought by the Project for the Registration of Children as British Citizens, of which I am a patron and to which I pay tribute for its unceasing work on behalf of these children. As a Written Statement on the regulations explained, the Court of Appeal found that the Home Secretary had failed in her duty to ensure that when setting the fee, regard had been had to the need to safeguard and promote the welfare of children in the UK, as required by Section 55 of the Borders, Citizenship and Immigration Act 2009. The Home Secretary finally accepted these findings and what is called a children's best interests review was undertaken.

The regulations represent progress, but I am afraid that they do not go far enough to remove the barriers faced by children whose parents cannot afford the registration fee. I welcome unequivocally the exemption created for looked-after children, although it really should not have taken a court case to achieve this.

6.30 pm

In a Written Answer to me, the Minister stated that local authorities had been advised of the new exemption and that:

"The Home Office is continuing to reach out to a wide range of organisations"

with an interest in the issue "to notify them". Can she give us more information as to which organisations have been informed and by what means, if not now then in a subsequent letter, given the importance of dissemination of the new policy to as wide a range of interested organisations as possible? I welcome too the recognition, which has been slow in coming, of the importance of British citizenship to these children in both practical terms and, as the Written Statement acknowledges, in terms of the more intangible impacts related to a sense of identity and belonging.

On the face of it, the introduction of a fee waiver on grounds of unaffordability appears another important step forward with regard to children's best interests. According to the Written Statement, the policy aim is to ensure that the fee does not serve as a barrier to the acquisition of British citizenship for eligible children who cannot afford to pay it, an aim to which I am sure we would all subscribe. The problem is that the more I have looked at the guidance and claiming process, the less confident I am that the Government will achieve this policy aim, or even the 63% fee waiver grant rate assumed in the impact assessment, which is acknowledged as being uncertain.

For a start, I understand that those who apply by post—and we cannot assume that people will apply online—will have to fill in a 56-page form on top of a 30-odd page citizenship registration application form. Much of the fee waiver form is a complicated duplication of what is required for citizenship registration. My fear is that many who cannot afford the fee will either be put off applying altogether, in the absence of legal aid to help with it, or be turned down for reasons that I will turn to in a moment. It risks placing unmanageable burdens on the voluntary sector, to which people will turn for assistance if they can—but some will not be able to—and leading to non-lawyers unwittingly attempting to provide information about complex questions of nationality law, rather than simply enabling someone to demonstrate their limited means. Could officials look again at the form to see whether it is possible, first, to omit the citizenship registration questions from the paper form, confining them to the citizenship registration form, and, secondly, to keep the paper form as short as the online form?

I do not know whether the Minister has read the guidance to caseworkers considering a waiver application. Perhaps she could say whether she has, but I and the PRCBC—the experts on these matters—found it very confusing and difficult to follow. There seems to be a fundamental ambiguity at its heart. On the one hand, it can be read as emphasising caseworkers' duty to grant a fee waiver where the fee cannot be afforded or there is insufficient income to meet a child's needs. In such circumstances:

"A fee waiver must be granted."

That instruction is welcome but, on the other hand, the guidance for assessing whether an applicant can afford the fee seems unreasonably restrictive in terms both of the information required and of the means/expenditure test applied, which is based on whether the applicant has sufficient surplus income to meet the fee after accommodation and other essential living needs have been met.

Applicants are to be required to provide a detailed breakdown and evidence of their income and average monthly outgoings over the previous six months, which is pretty daunting. Caseworkers are advised to judge whether the expenditure is excessive in relation to essential living needs with reference to the items and associated costs used in determining asylum support.

However, the asylum support rate has been challenged consistently by the refugee sector as, in the words of Refugee Action, alarmingly low. It is well below universal credit rates and the poverty line. It is quite possible that someone could have been spending above these levels without having made what the guidance calls

"non-essential and excessive purchases".

They could then be turned down, even though this means that the child's or another child in the family's legitimate needs cannot be met if they have to pay the fee. Yet elsewhere the guidance stresses the importance of the child's needs being met.

Can the Minister explain the justification for using the asylum support system as a benchmark for assessing applicants' expenditure when what is at issue is the citizenship rights of children who have been born or lived most of their lives in this country? Would not the

Joseph Rowntree Foundation's minimum income standards be more appropriate? This is a measure of what is needed for a basic standard of living in today's society based on detailed discussions with members of the general public undertaken by the Centre for Research in Social Policy at Loughborough University—I declare an interest as an emeritus professor there.

The waiver can also be refused on a number of other grounds, including where reasonable steps have not been taken to ensure there are

"sufficient funds to pay a foreseeable fee".

Yet where applicants have only just discovered the need to pay the fee, it would not have been foreseeable at all.

So much of this involves subjective judgments which busy caseworkers are going to be required to make on a case-by-case basis using complex and ambiguous guidance. I urge the Minister to take this back to the Home Office and ask that the guidance be reviewed, preferably in consultation with PRCBC and other interested organisations. Could she also say what steps will be taken to monitor the implementation of the waiver and to report back to Parliament? However, I fear that any monitoring will not pick up those who are put off applying in the first place.

Given all this, the level of the fee remains of the utmost importance. It is therefore deeply disappointing that it is being reintroduced at exactly the same rate as before: nearly £600 more than the estimated cost of processing the application. While of course I have to accept the Supreme Court's judgment that the level is not ultra vires, it made clear that the question of its level is a matter for Parliament, subject to the need for Ministers to ensure proper regard to children's best interests.

Can the Minister explain why a reduction in the fee was not considered as one of the policy options in the impact assessment so that Parliament could consider it as an option? It is not terribly helpful for the assessment to consider only the policy proposed and the option to "Do nothing"—an approach criticised more generally by Wendy Williams in her review of the Home Office—when there has been so much parliamentary pressure to reduce the fee for many years. Indeed, both the current and previous Home Secretaries —who knows who is in what role at present?—have commented on the level in the past.

The justification for such a high fee continues to be, in the words of the Written Ministerial Statement,

"the role fees play in funding the borders and migration system"

with a policy aimed at

"those who benefit from the system"

contributing

"to its effective operation and maintenance, while reducing reliance on taxpayer funding".

But the registration of the citizenship right of children born or who have long lived in the country has nothing to do with the borders and migration system. They are not beneficiaries of it, so why should their fees have to contribute to its operation? Their parents will be taxpayers in some form or another.

Moreover, this confusion of citizenship with immigration matters occurs in the waiver guidance. Caseworkers are told to weigh up the impact of paying the fee on the child

"against the public interest of funding the broader functions of the immigration system".

This really should be deleted as irrelevant and potentially damaging to the best interests of the child. Will the Minister consider doing this?

Finally, on the question of best interests, I was again disappointed by the Minister's Written Answer that there are no plans to publish the children's best interests review carried out in response to the Court of Appeal judgment, on the grounds that the summary in the Written Statement of 26 May was sufficient—sufficient for what and for whom? Surely those who brought the case and parliamentarians should be able to see exactly how the Home Office carried out the judgment's requirements and to assess just how children's best interests have been considered, so as to better understand current policy as enshrined in these regulations.

To conclude, I ask the Minister to think again about publication of the best interests review and to take back to the Home Office the need to review, as a matter of urgency, how the affordability waiver is implemented and the associated guidance. These regulations may represent progress, thanks to the Court of Appeal judgment, but I fear that we are still a long way from achieving the stated policy aim set out in the Written Statement; namely

"to ensure the fee does not serve as a significant practical barrier to the acquisition of British citizenship for children"

who are entitled to register their right to that citizenship. Until we have achieved that aim, the terriers will continue to snap at the Home Office's heels. I beg to move.

The Lord Bishop of Manchester: My Lords, I thank the noble Baroness for giving us the opportunity to hold this short debate. The matters she raises are serious and require urgent address.

Greater Manchester—the Minister knows and loves it as much as I do—is a very diverse city region. Many of those who contribute to its flourishing and growth are families whose origins lie elsewhere. The children of those families enrich the life of our schools, including the 190-plus Church schools that educate over 60,000 children every day, often in the poorest communities. While these children rejoice in the distinctive heritage of their ancestral culture, and offer its riches to us, they are being brought up to be as British as I am. They know no other home. They are not immigrants—as the noble Baroness has said, we must not confuse the asserting of citizenship with immigration—they are British. They simply need to clarify that legally.

Ideally, I would not put a price on citizenship; it is far too precious. However, if a charge has to be made, it seems invidious to pitch it at a level where over half of the revenue is pure profit. Indeed, the profit levels might set the mouths watering of some of those who notoriously have milked our public coffers through the charges they have exacted for substandard PPE equipment—but perhaps that is for another day.

For cultural and religious reasons, many of these children are being brought up in families where they have more sisters and brothers than the average. We need those larger families to provide the future workers who will sustain our economy in years to come, as our population—noble Lords are no exception—increasingly

[The Lord Bishop of Manchester]
ages. Many of their parents are key workers in those vital sectors of the economy, such as health and transport, which kept this nation going during Covid lockdowns, and they are often employed in the least well-paid jobs. Charging over £1,000 per child, especially when there are four, five or more children in the family, acts as a major disincentive to citizenship applications, one that prevents those children, as they grow up, being able to access the full rights to which they should be entitled as our fellow citizens. I echo the noble Baroness's remarks about the opacity of the waiver regime. There is no point having a regime if it is not clear, when families embark on that process, whether they will be eligible.

I urge the Government to reconsider these charges as a matter of urgency. Perhaps it is not for me to intrude into private grief but, on a day when the moral authority of the Government is up for question, this would be a small but significant assertion that Her Majesty's Government recognise a compelling moral case when they see one.

The Earl of Dundee (Con): My Lords, in welcoming these provisions, I apologise for missing the opening remarks of the noble Baroness, Lady Lister. However, we are still left with some anomalies, one of which follows the decision to reintroduce the fee charged to other children at £1,012 when the application—

Lord Sharpe of Epsom (Con): I am sorry to interrupt my noble friend but if he missed the opening remarks of the noble Baroness—I did not see him come in—then he really should not speak at all.

6.45 pm

Lord Russell of Liverpool (CB): My Lords, I thank the noble Earl for at least attempting to speak; it is always good to have some moral support from the Conservative Back Benches. I thank the noble Baroness, Lady Lister, for introducing this; as an honorary member of the terriers, I am very happy to be here. Most of my fellow terror of terriers, that being the collective noun for terriers, are otherwise engaged, and there seems to be quite enough terror around without inflicting any more of it on the governing party.

My own experience with a regret Motion—I think it was the only one I have done—had to do with the adoption fund. I tabled it, there was a debate and I said at the end that I did not intend to take it to a vote and would abstain if there was a vote, because I thought it was a non-party political issue. The two opposition parties decided, in their wisdom, to take it to a vote, and we won, slightly to my embarrassment. I will try not to repeat that: it is the law of unintended consequences.

The noble Baroness, Lady Lister, covered most of the key points. We genuinely welcome the waiver for children in care, but I ask the Minister to reflect on why we keep returning to this subject again and again. It is partly from a sense of gentle but persistent moral outrage. The barriers that are being put in the way of children who have an absolute and total right to UK nationality seem completely disproportionate and, frankly, morally wrong. To have a fee that is so far above the costs makes one ask oneself: where is the moral compass behind this approach to the way children are treated? When one looks at the highly detailed and, in my view, invasive process that families have to go through in order to demonstrate that their children are, first, eligible, and secondly, that they would have enormous difficulty in paying the fee, I think it is genuinely intrusive and really quite objectionable.

The noble Baroness, Lady Lister, mentioned the details that caseworkers have to go into:

"Caseworkers should normally expect to see information and evidence relating to the applicant's and parent's income—"

remember, the applicant is a child—

"their accommodation, the type and adequacy of accommodation, the amount of the rent/mortgage, or of their contribution towards this, and outgoings in terms of spending on things like food and utility bills. This information should be supported by independent evidence, such as their pay slips, bank statements, tenancy agreements and utility bills."

If any of us had to go through such a process, I wonder how easily we would have access to all that information. I suspect that it would be with a high degree of difficulty.

Having looked at the guidance for caseworkers, I very much hope—and I would like to be reassured, given the complexity of the caseworker guidance—that there is an initiative for specialist training to be given to the caseworkers who will be carrying this out, to ensure that they are completely confident in their ability, and that the Home Office is completely confident in their ability, to conduct these assessments to the professional level required. If not, one will be inviting a process whereby there will be a greater number of appeals against some of the decisions than there needs to be, with all the costs involved and the discomfort for the people involved. That is something that I hope will be the case. Indeed, if the child and the family are refused and the application is denied, they will then have the pleasure of paying an additional £372 for an internal review, which seems to be adding insult to injury.

One thing that the Home Office has undoubtedly been accruing over the last few years is really quite significant legal costs, as it is, again and again, going either to the High Court or to the Supreme Court to answer challenges that are being made about some of these policies and the decisions that are being taken. I would be very grateful, if the Home Office is able to do the sums, to know how much, year on year over the last five years, the Home Office has had to expend on legal fees in specific pursuit of these types of cases. I have a horrible feeling that a not insignificant proportion of the so-called profit—the difference between the cost of the application and the actual fee being charged—is expended on legal fees. That does not seem a very good way of justifying the high level of fees.

In looking at the impact assessment—and I would recommend reading it if any of your Lordships are having trouble sleeping—there is something rather peculiar in it. It mentions, as the Government have often mentioned, that one of the rationales for the very high level of fee, apart from it providing extra income for the system, is that it reflects,

"the benefits that accrue to an individual as a result of a successful application".

That is in paragraph 16 of the impact assessment. But if you then fast forward to paragraph 79, there is a list of 14 bullet points which are the purported benefits that accrue to an individual or a child if they are successful in getting UK citizenship. That is fine, but you then go to paragraph 80, and what it says about the 14 benefits is,

"These benefits are largely intangible and not able to be monetised, and the Home Office do not have data on the proportions of applicants who would receive different benefits".

On the one hand, they are saying that one of the justifications for the high level of fee are the benefits that accrue to an individual who is successful in applying. On the other hand, they are saying those benefits are intangible and unable to be monetised. So, please discuss and provide answers on the back of an envelope because I do not follow that. It does worry me, and I would like to have an explanation, if not this evening, then certainly in writing.

I think that since so much of what we are discussing and will continue to discuss—I hope not for the next few years—is to do with the judgment that is being made by the Home Office on what the children's best interests are, and that comes up repeatedly when the Home Office's rationale is tested in the High Court or the Supreme Court. It would seem eminently sensible to publish how the Home Office assesses the children's best interests, partly in the interests of the Home Office so nobody worries or wonders anymore if it has something to hide, but also to help those organisations which are there to try to help those individuals, who have a right to citizenship, to go through the application process with much greater clarity about how the Home Office actually measures and assesses one's best interests. That seems self-evident, so as the noble Baroness, Lady Lister, said, we would appreciate a proper, reasoned explanation for why the Government have currently no plans to publish this. Perhaps they would be prepared to meet us to discuss this, or at least to say that they have this under review and, at some point in the future, may take a decision to publish.

Baroness Prashar (CB): My Lords, I thank the noble Baroness, Lady Lister, for moving this Motion of Regret, and for her introduction. I thank the noble Lord, Lord Russell, for his contribution also. I support all the points they have made, so I will not elaborate on them further. But I want to underline and reinforce the points they made because we are talking about children who have a statutory right to citizenship, and to put so many obstacles in their way seems to me to be totally disproportionate and, as we said, cannot be morally justified.

Picking up on the point made by the noble Lord, Lord Russell, I think it would be very helpful if the Home Office published the assessment of what are the children's best interests, because it would be helpful to know what they are. It would be helpful also if it can provide confirmation, and a more detailed explanation, of the steps being taken to ensure the citizenship rights of all looked-after children are being secured by their local authority.

Of course, we need to review the application form and guidance to decision-makers on the fee waiver to ensure that the waiver is accessible, because we have heard how complicated it really is. I think the Government need to end the charging of citizenship registration fees at above the administrative cost and the subsidising of the immigration system from statutory citizenship rights. As I said, I do not understand why this should be subsidised through this particular source. They also need to remove the review fee for looked-after children and children for whom a waiver of the registration fee has been granted. These are a few things which it would be helpful if we could actually argue.

I have not been part of the terrier group so far, but when I saw the regret Motion and had a conversation with the noble Baroness, Lady Lister, I was moved to stay on and add my support to this regret Motion. I very much hope that we will get some confirmation and some concessions from the Home Office.

Lord Paddick (LD): My Lords, I am very grateful to the noble Baroness, Lady Lister of Burtersett, for bringing this regret Motion and for so comprehensively setting out the grounds for it.

Time after time in this House and in Grand Committee, other noble Lords and I have questioned the policy that border and immigration systems have to be self-funding. The argument that those using the system should pay for it could just as easily be made for other systems such as the education system or the National Health Service. To say that only those who apply for a passport or visa or for UK nationality use or benefit from border and immigration services is clearly false. Everyone in the UK benefits from border control and control over who receives temporary or permanent leave to remain in the UK, and from the granting of UK citizenship. For example, in terms of counterterrorism, it has been shown that those people who acquire British citizenship are far more likely to show loyalty to the country than those who do not.

The premise is also false in that citizens from EU, EEA and 10 other countries benefit from visa-free entry to the UK and use Border Force services to enter the UK—none of whom at this time pays a penny towards the cost of border control or immigration services. Not only are those who apply for a UK passport, a visa to enter the UK or UK citizenship subsidising border and immigration services that benefit all UK citizens; they are also subsidising hundreds of thousands of foreign visitors who enter the UK every year without the need for a visa.

When asked why the Home Office is unique in being required to make border and immigration services self-funding, the only answer is, "Because this is government policy." Can the Minister tell the House why it is government policy, and why, for example, the NHS is not required to be self-funding? The safety and security of the people is supposed to be the Government's primary responsibility, yet a major part of ensuring that—ensuring that foreign criminals and others not conducive to the public good do not enter the UK, for example—has to be self-funding. Why?

On the other aspect of the regret Motion, whether it is in the best interests of children to charge them for securing their right to UK citizenship, let alone £596 over the cost of processing an application, the answer is clearly no. Let us imagine the case of a young person

[Lord Paddick]
who has come to the UK as a young child, whose parent or parents are legally in the UK, who perhaps finds the transition to life in the UK difficult and does not receive the love and support any child should reasonably expect from his parent or parents, and who goes off the rails, makes mistakes as a teenager and ends up with a custodial sentence of 12 months or more. Is this young person likely to know about and understand the consequences of not claiming the UK nationality he is entitled to before he is deported by the Home Office as a foreign national criminal? Is this person likely to live with a family who can afford over £1,000 to claim the right to UK nationality they are entitled to?

It is not just that. To qualify for the discretionary waiver on the grounds of affordability, as the noble Baroness has said, a long and complex process of means-testing must be gone through, in which even the guidance to Home Office caseworkers is complicated. Every penny of income and expenditure must be accounted for; money spent on "luxuries" or non-essential items such as a holiday would disqualify the family from the fee waiver. What do the Government mean by "luxuries"? Anything more than 43p per person per week spent on laundry and toilet paper, anything more than 69p per person spent on toiletries, and anything more than £3.01 spent on clothing and footwear is considered non-essential. How many of us could say how much we spent on toilet paper a week over the last six months?

7 pm

It gets worse. I shall give an actual example from the guidance. If the child has sports lessons after school and it can be shown that not having those lessons would have a detrimental impact on them, they are allowed. If it cannot be shown that depriving the child of those lessons would have a detrimental impact, they are non-essential. How on earth is any parent supposed to be able to prove or disprove that?

What is the average cost of processing an application for a fee waiver on the grounds of affordability, bearing in mind, as the noble Baroness said, that there is a total of 86 pages if done by post? The guidance says that rarely will a caseworker be able to grant an application in the face of a lack of information, so the caseworker must go back to the family and ask for further information if it is not initially included. If the caseworker is not sure whether they can use their discretion, they must refer the case to a senior caseworker.

Even in the light of the Court of Appeal judgment against the Government, they are clinging desperately to the policy that border and immigration services must be self-funding and that even children have to pay for this—even for an application for UK nationality, which has nothing to do with borders and immigration. Children are having to subsidise foreign tourists coming into the UK—children who may end up being deported because they did not claim the UK nationality they were entitled to but could not afford, or whose parents were unable or unwilling to have their finances trawled through or unable to put forward a convincing enough case that their child would end up being criminally exploited in a gang if they did not pay for them to go to football practice after school.

This Government and Home Secretary care more about maintaining a dogmatic and unjustified policy that immigration and border services must be self-funding than the best interests of children. While welcoming the waiver for looked-after children, we strongly support this regret Motion.

Lord Ponsonby of Shulbrede (Lab): My Lords, I too thank my noble friend for moving this regret Motion. She has done so comprehensively. Many of the questions she asked are more detailed than the ones I have written down here. I look forward to the Minister's answers. I also pay tribute to the "terriers united" club and its aspirant members—I nominate the noble Earl, Lord Dundee, as he tried to speak in this debate but unfortunately was unable to.

An interesting aspect of this debate is the other debates we are having in this House about our relationship with international treaties. The changes we are talking about have been brought about by our court system, which considered the policy in detail and found that it did not meet our obligations in the best interests of the child—namely, Article 3 of the UN Convention on the Rights of the Child, which has been in force for about 20 years.

In this instance, the Secretary of State has been guided into action by the courts to protect the rights of British children—and they are British children. They are entitled to British citizenship. We are talking about a registration, not an application. Of course we welcome the exemption for children who are being looked after by local authorities. This is a key change which has been campaigned for over many years. This and the introduction of the fee waiver in certain discretionary cases are significant changes and improvements.

I will be interested in what the Minister says about how many children who are entitled to British citizenship register that citizenship each year. What is the scale of this issue? Also, we have heard questions about the decision to continue charging the majority of children extremely high fees, but how will the waiver operate in practice? What is the expected timeframe for an application for the waiver to be considered? The published guidance sheds no light on this. It simply says:

> "No specific service standards apply to the assessment of whether the applicant qualifies for a fee waiver. However, caseworkers must make reasonable efforts to decide such requests promptly".

This leads me to the question of what training caseworkers will have. We have heard about the complexity of the guidance. The noble Lord, Lord Russell, asked whether there might be any specialist training. My noble friend Lady Lister asked whether the complexity of this process might be reviewed.

I want to dwell for a second on the point made by the noble Lord, Lord Paddick, about young people who find themselves in the court system—whether, if they get a sentence of 12 months or more, they could be deported, and whether that could be exacerbated if they have not registered for British citizenship. I occasionally see this situation in youth courts. I do not know how the cases are resolved but it is not that unusual to have young people in court who have citizenship issues and modern slavery issues as well as the offences which the court is dealing with. They have

extremely complex lives, and they are often accompanied by a number of professional advisers to try to resolve their issues. I will be interested in what the Minister says about the possibility of deporting young people who have an entitlement to British citizenship but have not registered, if they receive a court sentence of 12 months or more.

I conclude on the central question, which has been asked by all noble Lords who have spoken in this debate: whether the Home Office will commit to publishing its assessment of children's best interests and how this policy fulfils our obligations under international law.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, I thank all noble Lords who have spoken in this debate, particularly the noble Baroness, Lady Lister of Burtersett, whose club of the terriers is growing. There is now a waiting list for applications. I do not know what the criteria is for joining but I wish her well. I can only admire her persistence. She speaks powerfully on this matter, and the Government recognise the continued strength of feeling on it.

As noble Lords have heard, the Government laid legislation on 26 May introducing changes intended to improve access to British citizenship for children who may face issues in paying the application fee, which since 2018 has, as she said, been set at £1,012. These changes include the introduction of a discretionary fee waiver on the basis of affordability, as well as a fee exception for children who are looked after by a local authority. The regulations also maintained the fee at the existing level, to support the continued funding of the borders and migration system. I will come to the numbers on that shortly.

I am glad that the noble Baroness welcomed the changes introduced by the regulations, which, as my honourable friend the Parliamentary Under-Secretary of State for Safe and Legal Migration outlined in his Statement of 26 May, the Government believe represent a positive step in better supporting children to obtain citizenship. I am also pleased that these changes are already beginning to have an impact, with the department having now received hundreds of waiver applications since the provision came into effect on 16 June and with the first waiver grants having already been made. The noble Lord, Lord Ponsonby, asked how many applications there had been in previous years. I will have to get back to him on that, but I think it is a pleasing outcome.

In engaging on these changes, we have initially focused on reaching out to local authorities to increase awareness of the fee exception for children in care through several channels, including the local government bulletin, the Government Communication Service's local network and the Local Government Association. We are also engaging directly with local authorities through established channels, as we did for the EU settlement scheme. More broadly, we are reaching out to organisations that work with children through the department's established stakeholder networks to raise awareness and answer questions on the new provisions. We continue to explore further opportunities for engagement, so I am grateful for the points made.

Engagement will be informed by ongoing monitoring of the take-up of the waiver, which is very important, and the fee exception against forecast, including the rate of applications and grants. We will look at whether there are gaps in the spread of applications across local authority areas, to see where further direct engagement on the fee exception in particular would be beneficial. There are currently no specific plans to report to Parliament on these points, but we are open to providing further updates and will consider the best mechanism for doing this.

The noble Baroness raised concerns about the detail of the policy and supporting process. The paper application form has been developed to align with the online form to ensure consistency in the evidence required from individuals across different application routes. Where possible, we encourage applicants to apply online as it offers a more intuitive and customer-friendly experience, but the paper option is there for those who need it. I take the point made by the noble Lord, Lord Russell of Liverpool, about making it shorter and we are open to feedback.

Caseworking guidance has been developed to support a robust assessment of an individual's financial circumstances. This ensures that waivers are granted only to those who genuinely need them, thus helping to protect the department's finances and ensure that publicly funded resources are allocated effectively. It also aligns with the guidance published for other affordability-based waivers offered by the department, ensuring consistency in the test applied across different customer groups. Where it is clear that applicants face issues of affordability—for example, where the individual might face destitution—I assure noble Lords that there will not be an onerous focus on the evidence required.

Regarding the specific question raised about asylum support allowance, it is important to note that this is included as a guide for caseworkers in assessing essential living costs. It is only one part of an assessment to consider whether paying the fee would result in a child's need not being met.

On the very important question of training, caseworkers undergo specialist training before considering cases, and complex cases can be escalated to caseworking conferences or to senior caseworkers to ensure that consistent and fair decisions are made.

We are, as I said, open to feedback on the guidance and application process, and to considering where appropriate improvements could be made. I hope that the initial figures around the take-up of the waiver will provide some reassurance that it is reaching its intended beneficiaries.

7.15 pm

I also recognise the regret that the noble Baroness expressed about the Home Secretary's decision to maintain the fee at the existing level of £1,012, and the specific questions that she raised regarding the best interests of children and the link to the funding of the borders and migration system, and I will now address those points.

First, on the questions on the best interests of children, the noble Baroness is aware that these changes were made following a review of the fee, which was

[Baroness Williams of Trafford]
informed by a special assessment against the Home Secretary's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 to have due regard to the need to safeguard and promote the welfare of children in the UK when exercising immigration and nationality functions. That assessment looked at questions including the degree to which obtaining British citizenship could be said to be in the best interests of children, as well as the fee level. The conclusion of that assessment was that it was clearly in children's best interests to apply for citizenship if they were eligible and willing to do so, given the specific legal, practical and intangible benefits that accrue to a child as a result of obtaining that status, and for the fee not to pose a practical barrier to such an application. While we do not have any plans to publish the assessment itself, as is usual practice for policy advice of this nature, I hope the noble Baroness is assured by my clear recognition of those points, which are reflected by the steps the department has taken to improve children's access to citizenship through the introduction of the waiver and exception.

It is important to be clear about the other relevant factors the Home Secretary may take into account in relation to fees, and the balance of considerations that she must make in determining her policy. Those factors are set out in Section 68(9) of the Immigration Act 2014, and include the costs of exercising the function, the benefits that are likely to accrue as a result of a successful application, and the wider costs of exercising other immigration and nationality functions.

As the High Court made clear in its judgment of December 2019, while Section 55 requires that the best interests of children are treated as a primary consideration in the Secretary of State's decision-making, this is capable of being outweighed by the combined force of other countervailing considerations. It is therefore incumbent on the Secretary of State to consider the relative weight to be given to the different factors involved in determining her fees policy and for her to decide where the balance of those considerations rightly lies.

This brings us on to the second question raised by the noble Baroness, regarding the justification that the level of the fee is necessary to protect the funding of the borders and migration system. As the House knows, it has been government policy over at least the last decade to increase the role that fees play in providing the funding necessary to support the continued effective running of that system, with the ultimate aim of reducing the burden on the UK taxpayer. This has informed the increases that have been applied to various fees over recent years, including those for nationality, in line with the principles set out in the 2014 Act.

Consequently, any decision to reduce specific fees must be considered in terms of its impact on that overall approach, with any resulting reduction in income needing to be met through either increases to other fees to replace that lost revenue or increased reliance on the taxpayer. The department's assessment is that a reduction in the fee for child citizenship to the cost of processing an application, which is currently estimated at £416—to answer the question of the noble Lord, Lord Paddick—and which many in this House, including the noble Baroness, have argued for, would lead to a reduction in income in the region of about £25 million. If this income were to be met through other fees instead, it would likely require significant increases to other fees, including those for economic routes that support the UK's prosperity.

The alternative is a reduction in the funding available to the department. That may in turn have an impact on its key activities, which include ensuring that the UK's borders are secure from threats and illegal activity, and the effective operation of resettlement schemes to support those in greatest need.

The noble Baroness asked why the option of a fee reduction was not included in the published impact assessment. Final-stage regulatory impact assessments, such as the one laid alongside the regulations, support the appraisal of new primary or secondary legislation by considering the Government's preferred option against the alternative of not enacting the provisions contained in the legislation. In advance of the final-stage impact assessment, a wider options appraisal is conducted internally to identify and define the options and to support advice to Ministers on prioritisation and choice. I hope I have provided some assurance that the option of a fee reduction was considered as part of that wider appraisal process.

The noble Lord, Lord Paddick, asked about the cost of processing a fee waiver application. The published impact assessment set out that the estimated unit cost for such an application is £177, although I should make it clear that that estimate is just that.

Oh! I do have the figure for the number of children who apply for citizenship each year. The figure I have is 41,071 grants made between April 2019 and March 2020.

I acknowledge the argument that the noble Baroness and others in the House have made on several occasions, that it is inappropriate for nationality to be included in the department's system of fees and funding. However, it is important to note that the statutory scheme that underpins the setting of fees, which includes both the 2014 Act and the 2016 fees order, which sets a maximum chargeable amount of £1,500 for an application for citizenship registration, was debated and voted on by Parliament, and that the £1,012 fee for child citizenship set in fee regulations in 2018 was therefore in line with Parliament's intent in establishing that scheme. I know my answer will not satisfy the noble Baroness, who has long registered her objections to this element of the department's fees framework, but I hope it is recognised that, as the Supreme Court recently reaffirmed, the fees are lawfully set and that our difference amounts to one of politics rather than policy.

In answer to the right reverend Prelate the Bishop of Manchester on how much income is generated through fees, £1.01 billion was generated from visas, immigration and nationality income and passport fees in 2020-21, which contributed to the cost of running the migration and borders system. That does not include income from the immigration health surcharge.

The right reverend Prelate talked about profit. We do not make a profit from application fees as the income is used to fund other vital areas of the migration and borders system, in line with the principles outlined in the 2014 Act. The full operating expenditure costs of the migration and borders system was £3.4 billion in

2020-21. That includes HM Passport Office, Immigration Enforcement, the international and immigration policy group, Border Force and UKVI.

Notwithstanding that point of disagreement, I hope noble Lords will recognise my argument regarding the complex balance of considerations to be made in determining the department's fees policy and how this exercise has informed the changes that we are discussing. I suspect the noble Baroness will vote to regret but, in any event, I hope I have laid out clearly the Government's policy.

I think the noble Lord, Lord Ponsonby, asked me one other question, which I am searching for and cannot find.

Lord Ponsonby of Shulbrede (Lab): It was on youth courts.

Baroness Williams of Trafford (Con): Yes, the noble Lord, Lord Paddick, also asked about that. I suspect it depends on the case in question.

Lord Russell of Liverpool (CB): I asked a specific question. Can the Minister come back, if not today then in writing, about the amount that the Home Office is expending in legal fees in some of the challenges? I think she mentioned that the difference between the cost of the child applications and the amount being charged is about £23 million or £25 million a year. I would be very interested to know how the legal fees per annum compare with that, if possible over the last five years.

Baroness Williams of Trafford (Con): I apologise to the noble Lord that I do not have those figures to hand. I also beg to ask the question the other way: I assume the amount that litigants are spending on legal fees is quite significant as well.

Baroness Lister of Burtersett (Lab): My Lords, I thank all noble Lords who have spoken. I think they have amplified the case I have made very well indeed. I was struck in particular by the number of noble Lords who pointed out that this is about the morality of what is happening here. I will come on to what the Minister said, but I do not think her response really addressed the fundamental moral question that underlies so many of what may be practical technical points. That is at the heart and why we keep coming back to this issue.

I am very pleased to have a new member of the terriers. There is no waiting list and no fee, I can assure noble Lords. I am also very grateful to the noble Earl, Lord Dundee, who was not able to speak. It was a shame because I think there was confusion about when we were starting. I am pretty sure he was going to speak in support of the Motion—he is nodding—so we can take that as further evidence of cross-party support.

I thought the noble Lord, Lord Russell of Liverpool, made a very good point about training. The Minister said there is training, but how can you train people to work with, as I said, the deep ambiguity at the heart of this guidance? They are being pointed to meeting the fees and making sure that children's needs are being met, yet at the same time they are being guided—all right it is guidance, but if they do not follow it, what do they follow in terms of assessing people's expenditure and so forth? We heard from the noble Lord, Lord Paddick, just how minimal that is. This is not what we expect people to be able to spend as members of our society. They are our fellow citizens. The Minister talked about destitution. This is not about destitution. You should not have to be destitute to have help with the fees.

I very much appreciate the detailed response from the Minister. I think there are a few chinks of light in it. She said that the Home Office is open to comments on the guidance and the forms and so forth. I have asked that the PRCBC should be able to sit down with officials and go through the form—because it has so much expertise in putting in these applications—just to see whether we can make it less forbidding. I take heart from the fact that there have already been a number of applications. This shows the latent demand is there, with people who have been waiting because they cannot afford to pay the fee, but I suspect there are many more who would be put off.

Like the noble Lord, Lord Russell of Liverpool, I would find it incredibly difficult to fill in that form and provide that kind of information about my expenditure—I quail at the thought of having to do it over six months, on average—so I hope that one practical thing that emerges from this debate is that the form will be looked at again, together with the people who really know what this is all about and have so much experience of applying.

Although the Minister said that there were no plans to report back to Parliament, she seemed open to thinking about how that could be done. It would be helpful. As I said, we are not going away and we want to know how it is working and whether it is working well. Although I will still regularly question the level of the fee, it is not such an issue if we are happy with the affordability waiver.

At the end, the Minister said something about the complex balance of considerations. It is one thing for Ministers to talk about it, but caseworkers are being asked to consider that complex balance of considerations. That is unfair on individual caseworkers. However much training they get, it is unreasonable. The Government did not answer my plea that they delete from the form the reference to weighing up the implications for the border system. An individual caseworker should not have to weigh that up against the needs of the child, so I ask the Minister specifically to look again at that sentence. It is one thing for us to debate it here in Parliament but another for caseworkers to have to take that into account.

I am very disappointed that the Minister resisted what a number of noble Lords asked: that the best interests review be published. Although she said a bit about it, we need to see exactly what went on and the thinking behind the assessment that came out of it. Obviously, I will want to read what she said.

I will not seek the opinion of the House at this point, because what we wanted to do was to lay out the issues and give warning that we are not going away and will seek other opportunities. As I said before, the terriers will yap at the heels of the Home Office until

[Baroness Lister of Burtersett]
they are satisfied that children's best interests are genuinely being met. For the time being, and unless any noble Lord thinks I have left out something crucial, I beg leave to withdraw the Motion.

Motion withdrawn.

House adjourned at 7.34 pm.

Grand Committee

Wednesday 6 July 2022

Arrangement of Business

Announcement

4.15 pm

The Deputy Chairman of Committees (Baroness Barker) (LD): 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.

Procurement Bill [HL]

Committee (2nd Day)

4.15 pm

Relevant document: 3rd Report from the Delegated Powers Committee

Schedule 2: Exempted contracts

Amendment 10

Moved by ***Lord True***

10: Schedule 2, page 76, line 8, after "could" insert "reasonably"

The Minister of State, Cabinet Office (Lord True) (Con): My Lords, before I begin, I would like to make a brief personal statement. Do not get too excited; it is not what you might think—

Noble Lords: Oh!

Lord True (Con): In answer to an interesting question in the Chamber yesterday, I implied that my noble friend Lady Wheatcroft had not been present in Committee. I had not noticed that she was here and I personally apologised to her afterwards. But, as my remark lies in *Hansard*, I thought it appropriate to correct the record. My noble friend Lady Wheatcroft graciously said that she did not expect me to do this, but I think that it is the proper thing to do.

In moving Amendment 10, I will speak to this group of government amendments. Monday was difficult and, on behalf of the Government, I candidly acknowledged the contrition and sympathy that we felt about the number of amendments that were put down. I think that we have arrived at a better place. As noble Lords know, we arranged a briefing for noble Lords on today's amendments and I am grateful to the officials who gave this at short notice. I hope that noble Lords who were not able to be there have had the chance to consider the supplementary information on the government amendments that was circulated. Officials will be available again tomorrow to provide a technical briefing for your Lordships on the remaining government amendments.

The government amendments in this group refer only to Schedule 2, which lists what is an "exempted contract". The exemptions are not mutually exclusive and a contract can be an exempted contract if it falls under multiple paragraphs of this schedule. If a contract is exempted, its award and management will not be subject to any of the legislation, unless it is an international organisation procurement, where some obligations apply.

Amendment 10 to Schedule 2 would ensure consistency with similar drafting elsewhere in the Bill. For any of the exemptions in this schedule to apply, the subject of a contract must represent the main purpose and cannot reasonably be supplied under a separate contract. The amendment would add "reasonably" to this description and is consistent with drafting elsewhere in the Bill—for example, on mixed procurements, the duty to consider lots and estimating the value of a contract.

Amendment 11 clarifies the exemptions for vertical arrangements, which arise where a contracting authority enters into an arrangement with an organisation that is connected vertically with it—in other words, with an entity under its control, or what is called a "controlled person" in the legislation. A typical example might be a trading company set up by a local authority to fulfil a specific task, such as carrying out waste treatment and collection for the authority. We briefly discussed this on our first day, when I said that the Government would bring forward further facilitating amendments; I know that the Liberal Democrat Front Bench expressed an interest in that.

Amendment 12 deals with a consequential update to clause formatting following Amendment 11. These amendments to the definition of vertical arrangements have been tabled following some helpful feedback from stakeholders, including the Local Government Association, of which I believe I still may be a vice-president, in which case I should declare an interest. The feedback showed that the drafting did not properly provide for the fact that such arrangements may involve control by more than just one contracting authority. The government amendments therefore ensure that this exemption will continue to apply where there is joint control of the controlled person, as it does now.

Amendment 13 has two parts. The first part—the inclusion of new sub-paragraph (5)—is a result of the amendment to provide for joint control. It ensures that joint control may still be achieved where one person is representing multiple contracting authorities on the board—or similar body—of the controlled body. This continues the existing position in Regulation 12(6) of the Public Contracts Regulations 2015. The second part—the inclusion of new sub-paragraph (6)—stems from the updated definition of "contracting authority", which means that the vertical arrangements exemption would unintentionally have allowed a wider category of organisations to access the exemptions than intended. This amendment ensures that the vertical and horizontal arrangements are available only to the intended public sector contracting authorities and not to public undertakings and private utilities, which have arrangements that reflect their more commercial nature.

Amendment 14 is a mirror of Amendment 13, for the same reasons. In this case, the purpose is to limit the availability of the horizontal arrangement exemptions to the intended public sector contracting authority recipients.

Amendments 15 and 16 remove the term "legal activity", which is currently defined by reference to the Legal Services Act 2007, and replaces it with the term "legal services". This is necessary because the definition

[LORD TRUE]
in the 2007 Act is not appropriately applicable in a Scots law context. Leaving the term undefined allows the exemption flexibility to adapt to different legal systems within the confines of the remainder of the exemption.

I turn now to the final government amendment in this group. Amendment 17 adds a reference to legislation that explains the meanings of "contract of employment" and "worker's contract" in Northern Ireland. This is a result of the talks with the Northern Ireland authorities. Adding the Northern Ireland reference again allows the exemption flexibility to adapt to different legal systems, provided that the remainder of the exemption is met. I beg to move.

Baroness Noakes (Con): My Lords, I shall speak to Amendment 11A, which is an amendment to government Amendment 11. Amendment 11A is really only a place-holder to discuss some broader concepts about this Bill and about paragraph 2 of Schedule 2 in particular.

I confess that I paid little attention to the government amendments ahead of our first day in Committee. Like other noble Lords, I was completely overwhelmed by the huge groupings and the lack of explanation that arrived before they were tabled—hence, I tabled Amendment 11A only yesterday. I am certainly grateful for the explainer that was circulated yesterday. I have not yet read all 60 pages, but a reasonable summary is something like this: "We are trying to keep the new UK procurement code as close as possible to EU rules."

This is at the heart of one of my main problems with this Bill: we have not created a UK code at all. The Bill may well have simplified or reduced the number of different sets of rules, but that has not achieved a significant simplification of the rules to any meaningful degree. Furthermore, it uses terms and concepts that are comprehensible only to procurement practitioners and in a way that is often alien to the way in which we do things in other areas. It has few principles and a whole load of pernickety rules, of which this schedule is one. In short, this is the EU way of doing things and not the UK way of doing things. I believe that we have missed an opportunity to create something that would have worked better for UK businesses and, indeed, for the UK public authorities that have to comply with it.

I turn to the specifics of Amendment 11A. The amendment would delete new sub-paragraph (2A) in Schedule 2, which is contained in my noble friend's Amendment 11. Sub-paragraph (2A) is not new, as it rewrites sub-paragraph (2)(c) of the existing Bill. The effect of sub-paragraph (2A) denies the vertical arrangements exemption that my noble friend has just described if the body concerned has even one share held by other than a public authority. I think that this is nonsense. Holding one share or any other kind of minority holding does not change the nature of control, which is what paragraph 2 purports to base the vertical exemption on. It would restrict the exemption to bodies that are wholly owned by the public sector, in effect, and I can see no economic rationale for that.

I also want to challenge two other aspects of paragraph 2, arising out of new sub-paragraph (2B), which is a rewrite of the existing sub-paragraph (2)(b). There is one material change from the existing sub-paragraph (2)(b). It is similar to the issue that I raised in the context of Amendment 4, which we debated on our first day in Committee. The existing sub-paragraph (2)(b) refers to a person who

"exerts, or can exert, a decisive influence".

The new version merely talks about a person who "exerts a decisive influence". I explained on Monday that the conventional UK approach when looking at things such as control is to use a test based on the capacity to control rather than actual control. Curiously, paragraph 2 uses that concept of capacity to control because it uses the basic definition of control via the parent undertaking definition in Section 1162 of the Companies Act 2006. Under that section, control exists if a parent undertaking holds a majority of voting rights or has the right to appoint or remove a majority of the board. That is, control exists for the basic purpose of this clause if there is the ability to control, whether or not the right is used. Can my noble friend explain why the Government are using one approach to control but another for decisive influence, deliberately caused by the amendment that he has just moved?

I now turn to the concept of decisive influence itself. If someone other than a controlling authority exercises decisive influence, the vertical arrangement exemption does not apply, so it is important to find out what it means. I expected to find a definition of the term "decisive influence" in the Bill, because it is not a term that is found in general use related to companies or the control of organisations, but I cannot find a definition.

Interestingly—I say "interestingly" as I find it interesting, but I am a bit of an anorak on these things—Section 1162 of the Companies Act contains the concept of dominant influence, which is an alternative way of establishing whether a parent undertaking exists. A dominant interest is defined in Schedule 7 to that Act and requires a right to give directions to a board of directors that the board of directors has to comply with. The Companies Act does not use "decisive influence"; it uses "dominant interest".

How then do we establish whether decisive influence exits? Do we assume that because the Bill does not use the Section 1162 definition it means something different? That might imply that it is something below the level of control, but precisely what it is getting at seems unclear. As far as I can tell, decisive influence is not a term used in English law, which comes back to my point that we are still rooting ourselves in EU law. It is found in EU competition law and, in that context, it is used as part of a rebuttable presumption of control, so that if a majority of shares are held the parent undertaking is assumed to exercise decisive influence on the subsidiary undertaking.

If it means a variant of control, we end up saying that vertical arrangements will not be exempt even if a contracting authority can control a body. If another body in fact controls that body, it does not matter if the other body can control it but does not do so; it just looks at whether it exercises control. However, the exemption is denied if a tiny fraction of the shareholding of the undertaking is held outside the public sector. There is another leg, which is if less than 80% of the activity is carried out for the contracting authority.

There is a confusing set of thresholds for denying the exemption. It is even more complicated if joint control is involved, but I will not go into that. I submit that logic and common sense have somehow gone missing in paragraph 2 and that it needs a rethink.

4.30 pm

Lord Moylan (Con): My Lords, I rise to speak to Amendment 11 only. It carries over into our new domestic legislation what is referred to in the European Union legal context as the Teckal exemption. To that extent, it illustrates and gives force to the point made by my noble friend Lady Noakes that we are very much replicating European Union law here. The reason I rise to address it is that I wish to seek a point of clarification from my noble friend the Minister. It arises from my experience—this is an interest that I once declared but I think has now expired—of chairing Urban Design London, a body that benefited from the Teckal exemption. So I have some experience of how it works.

Urban Design London was—I mean "is"; it still exists and operates—an unincorporated association established between Transport for London, the Greater London Authority and London Councils, representing the London boroughs. Its purpose is to generate training for the benefit of local government officers, Transport for London officers and others in good practice in planning, urban design and transport design. I am very proud of it—it is a successful little body—but it was set up as an unincorporated association, meaning that it is not incorporated and not a company.

I am anxious because there are two versions of the legislation that I can look at: the one that was originally circulated and the one that has replaced it. I might say that the one that has replaced it is a great deal better than the original; it clearly shows the influence of the Local Government Association and people who understand these things. The version in the amendment is generally much better. However, I am concerned about the references to the Companies Act in sub-paragraph (2B), to be inserted by Amendment 11. The clarification I seek is that this is sufficiently broadly drawn that the controlled body that benefits from the Teckal exemption does not have to be incorporated and read in a Companies Act structure. I see my noble friend looking round; I will understand entirely if he is not able to give a firm direction to me on that point today. I simply reserve the right, depending on what he says, to bring something back on Report. I am not pressing him too far on that, but it is something that I would like to know.

I have one other point, which is that I am delighted to see that what was a provision in the originally circulated version of the Bill—whereby an appropriate authority may by regulation make provision about how to calculate the percentage of activities of the controlled body—has been dropped. The percentage of activities is relevant, because one of the qualifiers under the Teckal exemption is that 80% of your activities have to be carried out for the controlling party or parties, but "activities" is not defined. In the case of UDL, which was largely a body which employed staff who did things, we took the view as a board that the appropriate measure was staff time, but there might be bodies where "activities" should be measured by turnover, size of contracts or income and expenditure. I want my noble friend to confirm that the clause enabling an appropriate authority to make regulations on this topic has been dropped in the new amendment.

It should be, because these bodies need to be left to make their own responsible decisions about the best and appropriate means of deciding how to measure their own activities. I see no reason for the Secretary of State to be involved in making regulations about it, and if they behave perversely, they will of course be subject to potentially being sued by a contractor who had failed to achieve business that they might otherwise reasonably have thought they would have obtained.

At the risk of being a little tedious, I seek clarification from my noble friend on those two points, and if he is able to provide it not today but after the Committee, that would be more than welcome.

Lord Wigley (PC): My Lords, I want to address the change in relation to Scottish law. Before doing that, I will pick up the point made a moment ago by the noble Baroness, Lady Noakes, with regard to the influence of European terminology. She will not be surprised to know that I have no problem with the influence of European terminology; if we are to hunt all European influences out of our legislation, it will take a very long time and leave quite a lot of uncertainty around the place. None the less, I take the point she makes with regard to the substance of the implications, and the question of a capacity to influence is a very important consideration. If a capacity to influence exists, that may have an ongoing impact without it being written in black and white. That has to be taken on board.

I want to ask the Minister about the change to get in line with Scottish law. If there is in future a change in Scottish law or a change in the ruling in the courts in Scotland, presumably that could have an implication for the way in which the Bill, when enacted, works out. Does that mean there will have to be a review every time there is a change in Scotland that might impact on this, because we are working within one market and we need to make sure there is consistency running through this? Perhaps I can park that question with the Minister, as it is a relevant one that arises from what he said.

Lord Fox (LD): My Lords, at the beginning of the Committee the Minister had a teaser with his announcement. It is very clear that he is not going to resign, because no Minister would put himself through this process and then resign. We can be clear about his intentions.

The noble Baroness, Lady Noakes, said that she was interested in this and that perhaps some of us might not be. I am interested. Both the noble Baroness, Lady Noakes, and the noble Lord, Lord Moylan, have made important contributions to this group of amendments.

Since Monday, much industry has proceeded. We have new groups of amendments and, as the noble Baroness, Lady Noakes, pointed out, we have explanations for those amendments and what they seek to achieve. We thank the Bill team and the Government Whips'

[Lord Fox]
Office for that hard work, which cannot have been easy. We also had a meeting with the Bill team this morning, which has helped us somewhat.

This is progress, although I always like to spoil praise by saying that we really should not have been starting from here in the first place. This is vital legislation that will set the scene for procurement right across our country, and the details need to be correct. We have started to hear that, in just one area, the details remain very much open to question.

Some of the amendments in this group are relatively small changes, including Amendments 10, 12, 16 and 17; others are trying to do a bit more. As we heard from the Minister, Amendment 11 rights a problem that was identified by both my noble friend Lord Wallace and the noble Lord, Lord Coaker, of groups of local authorities working in tandem.

I welcome that the Government have taken the advice of the LGA, but it seems slightly strange that it was sought or delivered after Second Reading rather than some time before it. One of the problems we sometimes have with the Government is that they forget the central role of local authorities, particularly in something like this. Local authorities should have been front and centre in the process of writing this legislation, but, far from it, it seems that they are something of an afterthought. That is where some difficulties are emerging, because, in a sense, we are trying to bend things back to fit local authorities when they should have been framed for local authorities in the first place. This amendment is welcome, with the caveat that we need clarity.

The noble Baroness, Lady Noakes, brought up the issue of clarity and the lack of definition. We heard the result of one of the legal cases that went to the European Union, the Teckal exemption, set out by the noble Lord. Most of the controversy of the European legislation has been hammered out in courts. As I said on Monday, we are spoiling for lots of legal fights in this legislation because of the loose definitions, absence of definitions and cross-definitions. I completely take the point made by the noble Baroness, Lady Noakes, that if we try to write across something using terms which do not appear in the UK lexicon of company law, we will be starting from first principles in the court in order to define them. That will not be in the interests of any government business or of local authorities. We need a clear and legally binding understanding of what all these terms mean. The Minister must use either the Dispatch Box or the legislation—preferably the latter—to clear up that ambiguity.

The second part of Amendment 13 is an example of what the Government giveth the Lords taketh away. Having cut across the public contracts regulation and removed exemptions for public undertaking and private utilities, as I understand it the Government are, with this amendment, replacing those exemptions and focusing this vertical exemption only on public utilities. As far as we are concerned, that is perfectly fine, but again, this is an example where the Bill has had to be corrected because of missing points that cut across. There are so many cross-cuts in this legislation.

Amendments 15 and 16 are another example. Here, as the Minister set out and as the noble Lord, Lord Wigley, requested, "legal activity" has meaning in Scotland and not the meaning that the Government intended for this Bill. We now have to choose something that has no meaning at all, which is "legal services". In the words of the Government, there is a flexible definition for this. We are being asked to put a flexible definition into the centre of a Bill. I am not keen on this sort of flexibility of language, and this is another example of flexible or misunderstandable language being put into legislation. We are looking for clarity from the Minister. If it is not Pepper v Hart clarity, we need clarity written into what we have. On some of the issues mentioned by the noble Baroness, Lady Noakes, the noble Lord, Lord Wigley, and others, we need to remove that "flexibility" from our language in the Bill.

4.45 pm

Lord Purvis of Tweed (LD): My Lords, I shall add some questions to those posed so far on this group. Before I do, I thank the Bill team for the technical briefing this morning that I took part in remotely and for the further information that the Minister promised and which was provided and circulated with the explanatory statements. They were helpful. Of course, they do not answer all the questions, but that is the purpose of Committee.

Overall, it begs the question as to where we stand on the overall proportion of procurement that would be under covered and non-covered areas, and what is now under exempted areas. The Minister rejected my call for an updated impact assessment. At the moment, we have no information as to what level of procurement we are dealing with in these new areas. It would be helpful if the Minister could say what proportion of the procurement is now likely to be within the covered, non-covered and exempted areas.

With regard to ownership and persons, I posed a question to the technical team this morning, so I hope they have had time to provide some information to the Minister. There seems to be an assumption in the drafting that contracting authorities are either public or private bodies, but it is less clear on the other areas within the broad public sector, where there are, effectively, trust models for the delivery of services. These do not fall neatly into the category of a public or private body. Indeed, I am aware of procuring bodies that delivered services in the Scottish Borders, my former constituency area, that were hybrids between purely public authority bodies, charitable bodies, pension funds and public interest vehicles. I would be grateful if the Minister could confirm whether Amendment 11 will cover all these areas. If it does not, there will still be gaps when it comes to some of the consortia which are both traditional centralised bodies, as we discussed on Monday, and those that are other trust models.

I turn now to my second question, which I also posed to the technical team—to be fair to them, I got some form of answer. It relates to contracting authorities acting jointly when one is English and one is Scottish. What legal framework will they be operating under? The Bill team—I hope I relate this correctly; they have no right of reply, so I hope I am fair in what I say—noted that, later in the Bill, there are regulation-making

powers to cover these areas. However, my concern is that, presumably, we would not be expecting regulations to be brought forward to suit individual contracting authorities acting jointly where one is Scottish and one is English. This is a slightly different point from which the Minister said on Monday he would write to me, because it relates directly to this amendment. I did not receive a letter clarifying these cross-border issues. The Minister may say that he was rather busy—

Lord True (Con): The noble Lord has generously acknowledged, as others have, that the officials have been extremely busy. There will be a response to the noble Lord's question, as I undertook. With respect to the officials, it is unreasonable to complain that a letter has not been received, given all the other activities going on. I repeat the undertaking. The noble Lord will receive a letter, but I must defend my officials.

Lord Purvis of Tweed (LD): My Lords, I hope the Minister will reflect on his comments. At no stage did I criticise officials for not receiving a letter. This is a ministerial responsibility. A Minister gives an undertaking to write to a Member in Committee. A Minister brings forward and moves amendments in Committee which are pertinent to the issue I raised when the Minister said that he would write to me. I was not criticising any officials. If any criticism to be laid, it is against the Minister. I simply said that, in the absence of the letter he promised to send me, I am asking these questions for clarification. That is reasonable.

On exemptions, there has been some reference to legal services. I understand the point that has been raised about making sure that there is a distinction from Scottish legal services as appropriate, and I certainly support the Government doing that. However, my understanding is that, for some of the treaty suppliers, there are obligations under some of the treaties on the mutual recognition of professional and legal qualifications. My understanding is that the exemption for legal services under this Bill will cover those other areas where the mutual recognition of professional qualifications in carrying out certain legal services will also be excluded. I understand that a body would be unable to procure legal services that are separate from those exempted, but they are then covered in other areas of professional qualifications. This will leave certain gaps in our treaty obligations.

I reviewed the Australia agreement on the carve-out on legal services. It is broadly the same, so I understand where the Government are coming from as far as these exemptions are concerned, but it is not exactly the same. Perhaps the Minister could give some further explanation as to what is likely to be allowed under the provision of legal services by certain providers of legal services that have mutual qualification recognition, because the position on legal services is still uncertain. If the Minister could respond to those points, I would be grateful.

Lord Coaker (Lab): My Lords, I start by thanking the noble Lord, Lord True, those who have been working with him and the officials for the briefing we received this morning and for listening to the anger, frankly, that there was on Monday about the situation. We were where we were; we are grateful to the Minister for doing what he could to degroup the amendments and sort things out as best he could. Clearly, there are still a number of issues, and many of us are still struggling to put together the various mountains of paper we have to try to make sense of it.

I congratulate the noble Baroness, Lady Noakes, on her extremely important Amendment 11A. I must say that, in my reading of Schedule 2, I had not picked that issue up, which shows part of the problem—I know that the Minister accepts this—of not having enough time. The noble Baroness's point was on decisive influence and what that means. As the noble Lord, Lord Fox, said, the definition of particular words and phrases bedevils us at the present time. I pray in aid because, later on, I will point out one word in a couple of phrases that I think makes all the difference; I hope the Committee will bear with me and recognise that I am not being trivial—changing one word would make a significant difference to the meaning in the Bill. As well as pointing something out to us, the noble Baroness has made an extremely important point about what "decisive influence" means in paragraphs 2(2) and 2(3) of Schedule 2.

I would add to what the noble Baroness said. This is really important because is it not only

"a decisive influence on the activities of the person";

it is also "directly or indirectly". You then really get into the question of what on earth it means. To be frank, when you get into "decisive influence" and "indirectly", it becomes extremely difficult. Again, I thank the noble Baroness. Like her, I look forward to listening to the answer the Minister gives with respect to that.

I agree with most of the remarks made by the noble Lords, Lord Purvis and Lord Fox, and others. I have decided not to read out my notes, because I want to try to get to the heart of this for the benefit of those who read our proceedings. If I get this wrong, the Minister will need to correct me. We need to understand where we are and what is happening.

My understanding is that the current procurement regime—not the regime envisaged by the Procurement Bill—operates under the existing Public Contracts Regulations 2015. Because we left the EU, the original Procurement Bill sought to transpose the 2015 regulations into British law. Unfortunately, in doing that, the Bill made a series of errors, and in particular around the Teckal exemption—however it is pronounced; I do not have the same mastery of languages as the noble Lord, Lord Moylan. That exemption was not actually in the original drafting. The Local Government Association and all the other bodies were horrified—from what I have seen of the statements they have made to the Government—because it meant that many of the things they were able to do under the 2015 regulations with the Teckal exemption would no longer be allowed and they would have to change their procurement processes. I apologise to the noble Lord, Lord Moylan, who gave the very good example of the transport initiative, of which he was proud, but the LGA and other bodies were worried that these sorts of arrangements would not be operational in the same way as was drafted in the original Procurement Bill.

[Lord Coaker]

The Committee will correct me if I am wrong, but this is the million-dollar question for me, and the reason I abandoned my notes: do the Government amendments in this group, led by Amendment 10, mean—as the noble Lord, Lord Moylan, other noble Lords, the LGA and many other organisations which have made representations to us are concerned it does—that the 2015 regulations have been transposed into the amended version of the Bill, along with the Teckal exemption to those regulations? That is what people will be looking for, because British law, as it will stand when this Bill becomes an Act, will mean that they can operate the various arrangements that they have either vertically with an entity in themselves, or horizontally with other local authorities or bodies.

If we look across the country, we see that in all the areas in which we live—including, I presume, Wales; I am not sure about Scotland, about which the noble Lord, Lord Purvis, may wish to say something—there are hundreds upon hundreds of models of procurement that have been adopted and worked on to deliver services in the way that a local authority, body or entity has decided to follow. The Minister will know this better than me, because of his experience. What they will be looking at is whether the Government's amendments mean that their concerns have been met. That is why I decided to put down my amendment. I cannot debate law as well as many other noble Lords, but if I were someone from the outside looking at this, I would ask whether this means that I can carry on procuring in the way that I have been able to procure previously. That was my concern with the way that the Bill was originally drafted. That is the million-dollar question for the Minister.

5 pm

I will not go on about it, but it seems to me that that is the answer that the Committee—leaving aside the noble Baroness, Lady Noakes, who made a separate but goo, point—is seeking. It is important for us because it will determine what many of us do on Report. Can the Minister clarify that and say with absolute certainty what the amendments do in transposing the 2015 regulations into British law, and whether the Teckal exemption, which is currently in law in the 2015 regulations, means that the Procurement Bill as amended would do that?

On a more general point, Schedule 2 provides for exempted contracts that effectively fall outside the remit of the Procurement Bill, as we have just been talking about. There is a list of exemptions. How has this list been arrived at? This is a more general point about Schedule 2, but it would be interesting to know the criteria that were used to include the various categories. Noble Lords know I am very interested in defence, and it is obvious to me why some defence and intelligence matters may be exempted, but why are many other things exempted? What are the criteria that were used to exempt some of these contracts? Will the Minister say something to give greater clarity about that?

If the Minister will answer on the bulk of my contribution to this debate, which was about what the amendments mean for procurement, that will be a great help to the Committee and to the people who read our deliberations.

Lord Davies of Brixton (Lab): My Lords, I was not going to intervene in this debate, and my questions are effectively procedural. As I understand it, these amendments are to Schedule 2, although according to the Marshalled List, Schedule 2 has already been debated. We also have the report from the Delegated Powers and Regulatory Reform Committee, which made a number of trenchant criticisms of the contents of the Bill, including a provision in Schedule 2. Where and how do the Government respond to the points raised by the committee and where and how should we, as members of this Committee, raise the issues that were raised by the Delegated Powers and Regulatory Reform Committee? As my noble friend said, we have a mountain of paper here, and quite rightly we have been focused on all these government amendments, but I do not want the issues raised to pass by default. Does the Minister respond and, if so, when?

Baroness McIntosh of Pickering (Con): I would like my noble friend to respond to a point that was raised by the noble Lord, Lord Purvis, on Monday, which is pertinent to the remarks from the noble Lord, Lord Coaker, just now. I am confused about whether paragraph 19 of Schedule 2 relates to military contracts only. I think that was the issue raised by the noble Lord, Lord Purvis, on Monday, and I do not know that we got a satisfactory answer. I am very confused about whether paragraphs 19 and 20 of Schedule 2 should be read together with paragraph 26. I think I am right that, on Monday, the noble Lord, Lord Purvis, raised whether the international agreements under paragraphs 19 and 20 relate to defence contracts only or whether they are more general.

Lord True (Con): My Lords, I am grateful to those who have spoken. Of course, this is Committee in your Lordships' House, the whole purpose of which is to probe, challenge, ask and seek greater definition. I make absolutely no complaint about that; indeed, I welcome it. The issue is how and when most effectively we can give the appropriate response. I and my officials will always try to do that in the best possible way and the best possible time to enable your Lordships to do your work. That is the aspiration. I have no doubt that I will fall short of that aspiration and that I will be caned for that.

I will speak to Amendment 11A, which was tabled by my noble friend Lady Noakes, in a moment. First, I have been asked questions on a number of matters, which I will try to address. I fear that the exemption list was drawn up before my time, but I am advised that it was drawn up in consultation with various stakeholders with the appropriate interests covered. Analysis of the exclusions in WTO-Government procurement agreements and responses that the Government received to the initial Green Paper were the leading informatives, as I understand from those who were involved at that stage. However, I will be happy to engage with the noble Lord outside the Committee between now and Report if there is a particular item in Schedule 2, or if he wishes to address it in an amendment on any of those exclusions. That is where we are coming from.

I will deal with a couple of other things because I want to get on to the matters that largely affect local authorities and the amendments. The noble Lord, Lord Purvis of Tweed, raised a question—this is also germane to the point made by my noble friend Lady McIntosh—about the nature of the relationship with, say, the Australia agreement, which he cited. I understand that he raised that in a briefing session this morning in relation to postal services. Indeed, that would not be a defence matter. My officials agreed to clarify this. Since it has been raised, this is the point where we are. By the way, no one should Pepper v Hart anything that I am saying at this stage because this is an exploratory Committee stage and it is important both in correspondence around Committee and in engagement that we get to the right point—I totally agree with the point that the noble Lord, Lord Fox, made about the importance of definition, which is absolutely fundamental.

This is a complicated, technical matter, which requires us to understand both the Bill and how the Australia agreement is structured. However, I am advised that we are satisfied that the Bill is not required to cover postal utility activities. To determine whether a utility is covered by the Bill, one has to look at both the entity and the activities that it is carrying out. Utilities are defined as public authorities, public undertakings and private utilities that carry out utility activities. Utility activities are defined as activities of the type set out in Schedule 4—gas and heat, as well as transport, which we discussed briefly on Monday. It is true that the Australia agreement does not define the terms "utilities" or "utility activities". However, it works on a similar basis. The agreement covers only the utility activities covered in section C of our market access offer and only for the entities set out in section C.

In the Australia agreement, section C of our market access schedule provides that only certain transport services are utility activities and that the only entities that are covered are public utilities. Section C does not include the postal sector or private utilities. Postal services in the Australia agreement are included as services only in section E. This means that those entities only are covered by the Australia agreement in annexes A, B and C of our market access schedule, which does not include utilities in the postal sector that are covered for the postal services in section E that they procure—for example, a local authority procuring mailshot services. It does not mean that entities such as Royal Mail that operate a private postal service are covered. That is the current advice that I have on that matter; I am sure that my officials would be happy to explore it further with the noble Lord.

Lord Purvis of Tweed (LD): I am grateful to the Minister for that and for answering at this stage a question that I have not yet asked about postal services. Our understanding is that that would be in the group with government Amendment 24 on the expansion of utilities. We will be raising some of these issues, but I take note of what the Minister said. The main thrust of my questions in this group were about the joint groups and the different types of ownership for them, but I am grateful for what the Minister has said so far.

Lord True (Con): I am sorry, I thought that I heard the noble Lord referring to the Australia trade agreement. It was my understanding that that would be coming later. I was not sure, given that certain things are cropping up in different places. I assure the noble Lord that the matter of the Delegated Powers Committee and the Schedule 2 recommendations will be discussed in group 2, to follow. I was not sure whether we were going to get the Australia agreement later, since the noble Lord had referred to it, so I thought that I had better get the answer in.

Baroness McIntosh of Pickering (Con): I understand that Parcelforce is a trading name of Royal Mail, but is it a commercial or a public enterprise under the definition that my noble friend has just given?

Lord True (Con): My Lords, I have given the answer that I have been advised to give at this stage. In answer to the further supplementary question that my noble friend has asked, I will ask officials to clarify what I said. I was advised to inform the Committee that it does not mean that entities such as Royal Mail that operate a private postal service are covered. If that needs further clarification, I am sure that we can provide it.

These joint bodies are extraordinarily important. Noble Lords have spoken, particularly of local authorities, with great experience, which I hugely respect. I am second to none in believing that Governments of all colours do not generally do enough to listen to the wisdom of local government. I have said that on the Back Benches and on the Front Bench and under Labour, coalition and Conservative Governments. In answer to the noble Lord, Lord Coaker, this Government are certainly keen to ensure that local authorities will be able to operate as they did before, which was one of the reasons why this amendment was tabled, as he divined. I pay tribute to the Local Government Association for its consistent engagement. The Bill maintains the position in the current procurement regime, albeit adjusted for the purpose of UK law, by using the terminology of bodies that undertake public functions, which is drawn from the test of average functions of a public nature derived from the Human Rights Act 1998—a complicated but well-established test, I understand.

I was asked by my noble friend Lady Noakes about decisive influence and dominant influence. I have to be very careful speaking personally as a Minister from the Dispatch Box, but our position is that we believe that the amendments we have tabled are clear and sufficient. However, on my noble friend's question, the reference to the Companies Act 2006 is used to describe the nature of relationships between those entities that can engage in the exemption. The reference to decisive influence is broad in affecting the decision-making of the contracting authority. I will take away my noble friend's point and consider it further, because interest was displayed by other Members in the Committee.

5.15 pm

Similarly, we will reflect on the point made about capacity to control. This was discussed on Monday, and I said then that we would reflect on that issue. My noble friend made the point on Monday, as she and

[Lord True]
noble Lords opposite did again today, that the mere capacity to control could be as decisive as actual control. I think noble Lords want to understand more what that entails. I cannot promise that the Government will alter their position, but we will certainly reflect on what noble Lords have said.

Amendment 11A, tabled by my noble friend Lady Noakes, would remove a provision on private sector shareholders in Teckal companies. The Teckal exemption is familiar to me—I spent a few hours with my former chief executive discussing what we might or might not be able to do in the light of the 1999 Teckal judgment in the ECJ. It recognises that contracting authorities may wish to create alternative structures, as local authorities do within the public realm in order to deliver public services, including the setting up of companies. In recognition of the fact that contracting authorities exercise equivalent control over these companies to that which they exercise over their own internal departments, they are not required, as noble Lords know, to compete contracts awarded to these companies, as they are effectively in-house arrangements.

The Government's position, contrary to what my noble friend said, and notwithstanding what she said about one share, is that allowing private sector participation in these companies could distort competition, as it puts these companies at a competitive advantage compared with others in the private sector. It is not therefore appropriate that companies part-owned by the private sector can be awarded contracts without competition under this exemption.

However, I recognise the great practical expertise of many noble Lords, including my noble friend Lord Moylan, who spoke on these matters. Given that our intention is not to shackle overall the ability of local authorities to operate—and it is local authorities in particular—and in requesting that my noble friend withdraw her amendment, having set out the Government's position that we are unattracted to allowing private sector participation, I undertake to engage with colleagues on that between now and Report.

On my noble friend Lord Moylan's pertinent question, local authorities set up a range of organisations. Trusts were mentioned. I set up a trust to try to protect a piece of public, open land, but unfortunately the successor council is now seeking a compulsory purchase order to build on it and break the trust. Local authorities have many ways of trying to deliver and protect public services.

I say to my noble friend Lord Moylan that our intent is to include all the types of organisations that are exempt under Regulation 12 of the Public Contracts Regulations 2015. It is the view of officials that unincorporated associations are captured in that, but we will write to confirm and will reflect on these matters. The basic purpose of this Bill is to create, I hope, a more open and dynamic procurement system. I know that noble Lords on all sides have their doubts, but that is our hope and aim. In that light, we will reflect on the points made from all sides.

I was asked about the Scottish legal point. I apologise, but I am not in a position to answer that specifically today—maybe it should be added to the letter which the noble Lord asked for on Monday, which is on the way. If I may, I will take that away. It is an important point that both noble Lords alluded to regarding what might happen in the future. I do not have access currently to the legal advice which would enable me to answer that, but I undertake to write to noble Lords, in common with all the other things that come up in Committee. I will not wait until the end of Committee to send letters, but there was just a particular point of pressure over the last 24 hours.

Lord Coaker (Lab): I am sorry to do this, but may I pick up on the point the Minister was making to the noble Lord, Lord Moylan, about the letter he will write? The answer to the question that the noble Lord, Lord Moylan, posed is quite significant. It would be interesting for the whole Committee to know whether Regulation 12 of the Public Contracts Regulations 2015 applies in a way that would allow the noble Lord's example organisation to continue as it is now, when the Procurement Bill becomes an Act. I apologise for intervening a bit late.

Lord True (Con): Yes, indeed. I totally take that point. It is good practice, and I hope it will be our practice in this Committee, to circulate to all noble Lords who take part. I was not proposing to send a billet-doux to just the noble Lord, Lord Purvis of Tweed, or my noble friend Lord Moylan and not spread it round. I will address that, but I repeat that it is our expectation and hope that local authorities will be able to do as they did before. That is the fundamental point and I will pursue this in that spirit. In that light, I hope the noble Baroness will be prepared to not move her amendment.

Amendment 10 agreed.

Amendment 11

Moved by ***Lord True***

11: Schedule 2, page 76, line 11, leave out sub-paragraphs (1) and (2) and insert—

"(1) A contract between a contracting authority and a person that is controlled by—

(a) the contracting authority,

(b) the contracting authority acting jointly with one or more other contracting authorities,

(c) another contracting authority, where that authority also controls the contracting authority referred to in paragraph (a), or

(d) another contracting authority acting jointly with one or more other contracting authorities, where the authorities acting jointly also control the contracting authority referred to in paragraph (a).

(2) A contracting authority, or a contracting authority acting jointly with one or more other contracting authorities, controls a person if—

(a) the contracting authority is a parent undertaking, or the contracting authorities are parent undertakings, in relation to the person,

(b) no person other than the authority, or authorities, exerts a decisive influence on the activities of the person (either directly or indirectly),

(c) more than 80 per cent of the activities carried out by the person are carried out for or on behalf of—

(i) the contracting authority or authorities, or

(ii) another person that is, or other persons that are, controlled by the authority or the authorities acting jointly, and

(d) in the case of joint control—

(i) each of the contracting authorities is represented on the person's board, or equivalent decision-making body, and

(ii) the person does not carry out any activities that are contrary to the interests of one or more of the contracting authorities.

(2A) A person is not to be regarded as controlled by a contracting authority, or a contracting authority acting jointly with other contracting authorities, if any person that is not a public authority holds shares in the person.

(2B) In sub-paragraph (2)(a)—

"parent undertaking" has the meaning given in section 1162 of the Companies Act 2006, save that an "undertaking" includes any person;

"parent undertakings" means two or more contracting authorities acting jointly that would, if they were a single undertaking, be a parent undertaking."

Amendment 11A (to Amendment 11) not moved.

Amendment 11 agreed.

Amendments 12 to 17

Moved by ***Lord True***

12: Schedule 2, page 76, line 33, leave out "(2)(d)" and insert "(2)(c)"

13: Schedule 2, page 76, line 33, at end insert—

"(5) For the purposes of sub-paragraph (2)(d)(i), one representative may represent more than one contracting authority.

(6) In this paragraph, references to a contracting authority do not include references to a public undertaking or a private utility."

14: Schedule 2, page 77, line 6, at end insert—

"(4) In this paragraph, references to a contracting authority do not include references to a public undertaking or a private utility."

15: Schedule 2, page 78, line 3, leave out from beginning to "provided" and insert "legal services"

16: Schedule 2, page 78, leave out lines 18 and 19

17: Schedule 2, page 78, line 38, leave out from second "contract" to end of line 39 and insert—

"(2) In this paragraph, the expressions "contract of employment" and "worker's contract"—

(a) in the case of a contract awarded by a transferred Northern Ireland contracting authority or awarded as part of a procurement under a transferred Northern Ireland procurement arrangement, have the meanings given in Article 3 of the Employment Rights (Northern Ireland) Order 1996 (S.I. 1996/1919 (N.I. 16));

(b) in any other case, have the meanings given in section 230 of the Employment Rights Act 1996."

Amendments 12 to 17 agreed.

Amendment 18

Moved by ***Lord Wallace of Saltaire***

18: Schedule 2, page 79, line 12, leave out paragraph 17

Member's explanatory statement

This amendment is intended to allow a debate on a recommendation from the Delegated Powers and Regulatory Reform Committee in respect of Schedule 2. The Committee considers that the power under paragraph 17 "should be narrowed unless the Government can fully justify it".

Lord Wallace of Saltaire (LD): My Lords, the previous discussion has demonstrated the active concerns a lot of members of this Committee have that this Bill should not cramp the ability of local authorities to experiment with forms of local procurement, the encouragement of local enterprise, and so on. I had a message from a county council this morning on precisely that point. We are concerned about this. Perhaps there is enough room below the threshold, but we need to explore that a little more.

These amendments respond to the report on the Bill from the Delegated Powers and Regulatory Reform Committee. Members of that committee are here, so I shall be brief and defer to their expertise.

The Minister will be well aware that many in the Lords are deeply concerned about the Government's determined move away from clear, detailed legislation towards skeleton Bills and executive discretion. The perhaps soon to depart Prime Minister campaigned to leave the EU on the promise of restoring parliamentary sovereignty but has worked instead to bypass Parliament wherever he can. The Minister for Brexit Opportunities and Government Efficiency, who, as far as I understand it, has some influence over this Bill, is pre-emptively arguing that the Prime Minister was elected by the people and not Parliament, and therefore does not have to go if he loses the confidence of Parliament. We all recognise that both Houses of Parliament are deficient in a number of ways and in need of reform, but, for the moment, we have the constitution that we have inherited, battered though it is, and the spread of Henry VIII powers across legislation is a breach of that constitution, as the DPRRC notes.

Amendment 18 therefore challenges the delegation of power to Ministers to make exempted contracts for the provision of public transport services. Amendment 21 similarly challenges the degree of autonomy given to Ministers in providing concession contracts for air services. Amendment 28, to the schedule on utility contracts, challenges the width of the powers granted to Ministers to make exemption determinations.

Amendment 31 is more egregious on the same theme. It would give permission for Ministers to specify by regulation which services will be subject to the light-touch regime for contracts and which will be excluded. The DPRRC's comment on this is that the power

"should be narrowed unless the Government can fully justify it."

I suspect that the Minister is unable to do that.

Amendment 208 also addresses the remarkably wide freedom given to Ministers with regard to light-touch contracts. Here, it goes into tertiary legislation, allowing Ministers by regulations to

"specify services of a kind specified in regulations of the authority under section 8".

I hope that members of the Committee understand that; I am not entirely sure that I do.

[Lord Wallace of Saltaire]

Clause 86, to which I have tabled a stand part challenge, gives Ministers powers to make regulations about a range of documents on contracts and information about contracts. Clause 109 gives Ministers powers

"to amend this Act in relation to private utilities",

requiring them to consult

"persons appearing to the authority to represent the views of private utilities, and … such other persons as the authority considers appropriate"—

but not anyone with any standing in terms of public or parliamentary accountability.

Clause 110, which is covered by Amendments 530 and 532, relates entirely to regulatory powers. Our amendments would implement the DPRRC's recommendations to make pricing determinations for qualifying defence contracts subject to the affirmative procedure and restrict the ministerial freedom to raise financial thresholds above the rate of inflation. On all these clauses, the DPRRC argues that the breadth of ministerial discretion should be narrowed. It comments that, in a number of instances,

"the Government … have chosen this approach for no other reason than that it hasn't yet developed the underlying policy."

I ask the Minister to attempt to justify these overextended executive powers or, otherwise, to narrow the powers granted and recognise the importance of parliamentary scrutiny and the principle of parliamentary sovereignty. I beg to move.

Lord Berkeley (Lab): My Lords, I put my name to Amendment 18 in the name of the noble Lord, Lord Wallace of Saltaire. I support everything he said. I am worried about the powers that the Government want to keep for themselves. I apologise to the Committee for not being here earlier; I was having a discussion with Ministers on the future railway structure, on which I believe there will be legislation this autumn. To some extent, that pre-empts what is covered by Amendment 18, which is to do with public passenger transport services. It is not just about trains; it includes buses and probably many other things as well.

5.30 pm

It is quite clear that Ministers want to see competitive tendering, which is the normal way of getting good value for money. I cannot see any reason why buses, trains or the air service, which is in a later amendment, should not be put out to competitive tendering. There may be reasons for this, but we need the Minister's explanation, because it all sounds so easy: "Everything will go fine. Ministers can be trusted". I am sure that they can, but we do not know what will happen in five years' time, when things could be very different. I believe that there will be a good reason for not applying the principle of competitive tendering in the railway legislation—the buses are slightly different—but we need the Minister to explain why all of these powers are necessary. I hope we can persuade him that a small reduction in the powers would give us better scrutiny and make sure that everything was above board.

Baroness Neville-Rolfe (Con): My Lords, I support the noble Lord, Lord Wallace of Saltaire. I put my name to Amendment 18, and I am glad that the noble Lord, Lord Berkeley, did so too and that it is being debated with many other amendments about which I have a similar concern. It is right that this is a cross-party challenge to the Bill. It reflects the report of the Delegated Powers and Regulatory Reform Committee, now chaired by my noble friend Lord McLoughlin, and of course previously chaired by my noble friend Lord Blencathra. I do not think that I have ever seen such an excoriating report on the abuse of delegated powers.

This is a hugely important piece of legislation, affecting £300 billion a year of public money and its impact on those who supply it. That is nearly as much as the enormous sums spent and misspent on Covid. We now need much more information on the secondary legislation and regulations to be made under the Bill. Even if this is clarified and information is provided, my noble friend needs to bear in mind that he cannot bind a future Government or Prime Minister and their teams. Frankly, the regulatory and other delegated provisions before us are extremely dangerous and need to be reconsidered in the light of the DPRRC report and of course today's debate and the answers that we are given. I am just sorry that we are not on the Floor of the House.

I will give a few choice quotations from the report. First, paragraph 20 says that

"in general [the relevant provisions of the Bill] leave the content of such notices, etc to be set out in Regulations".

This includes notices about awards made without competitive tendering, the exclusion of suppliers and modifications or terminations.

Secondly, paragraph 23 says:

"We are also disappointed that the Government have provided no illustrative regulations. Illustrative regulations would have been very helpful and, without them, scrutiny of clause 86 is considerably hampered."

This is delightful in its politeness, but it is very strong.

Thirdly, paragraph 33 says:

"The Government have failed to adequately explain"—

split infinitives would not be allowed in my day—

"why Ministers are to be given such a broad power to override the existing statutory bar on public authorities".

This is an open-ended power to override primary legislation by order. The matters covered include: "conditions of employment" of a contractor's workforce, "industrial disputes", countries of origin and—this stuck in the gullet—

"political, industrial or sectarian affiliations or interests of contractors or their directors, partners or employees".

This is utterly over the top, unless you are Mr Jeremy Corbyn, I suppose.

Finally, paragraph 53 says:

"The Government have failed to provide any justification for leaving entirely to regulations the question of which concession contracts for air services provided by air carriers are to be exempted from the Bill."

From sitting in the Competitiveness Council of the European Union for several years, I can tell noble Lords that air services are big politically, and decisions need to be properly scrutinised by Parliament and not concluded by officials who tend—in my considerable

experience—to exercise the power once matters are put into delegated legislation. There is also a vast shareholder base in aviation that should be quaking when it sees this Bill, if I have understood it correctly.

I apologise to my noble friend the Minister, with whom I have worked so well over the years, but resolving our challenge to these delegated powers is a real test of his mettle and of this Committee's competence. They mean that the Bill is, in practice, regulatory, not deregulatory as we all hoped. I very much look forward to supporting my noble friend the Minister and others in making some very necessary changes to the Bill.

Lord Blencathra (Con): My Lords, it is a pleasure to speak after my noble friend Lady Neville-Rolfe and after listening to the speech of the noble Lord, Lord Wallace of Saltaire. They have gone through each of the individual recommendations of the Delegated Powers Committee's report and each of the amendments, which saves me having to quote from them as well, so I will speak in more general terms.

I did not speak on Second Reading, because a quick look at this Bill convinced me that the delegated powers report would be worth waiting for—and what a scorcher it turned out to be. Now that I am no longer committee chairman, I can speak more bluntly than I have in the past, even though I might not now get a phone call from No. 10 asking me to form a Government of national unity tonight. I fully support the concept of the Bill, but it is an appalling mess. I exonerate my noble friend the Minister, who had no part in drafting it, but how on earth can officials and the Office of the Parliamentary Counsel—the OPC—spend two years coming up with these shambles where 345 government amendments—my count on Monday—are necessary? However, what concerns me today is not the shambolic drafting but the abuses of parliamentary protocols as evidenced in the Delegated Powers Committee's report.

Last year, the Delegated Powers Committee and the Secondary Legislation Scrutiny Committee published two reports: *Democracy Denied?* and *Government by Diktat*. We produced countless examples of legislation presented to the House with very wide regulatory powers granted without any justification for them, but with the usual excuse: "just in case they might be needed one day". The reports cited "skeleton legislation" and clauses where the policy had not been thought through. In addition, powers were being taken to fill in, not just the details, but the general principles which should have been in the primary legislation and not in secondary legislation.

Then we have the negative procedure applied in completely unacceptable cases where the affirmative should be used, such as increasing penalties or charges, for example. Then, of course, we have the dear old Henry VIII powers attached almost automatically now to almost every Bill without any thought. No, I correct that—the thought among Bill teams and drafters is that the department can change any primary legislation it likes in future without having to go through the hassle of producing new primary legislation and getting approval for it. What a marvellous "Get out of jail free" card this is: change any legislation at the stroke of a Minister's pen.

In this Bill, the Delegated Powers Committee has drawn attention to all these gross abuses and—let us face it—they are abuses. Just because Governments have got away with treating Parliament with contempt in the past does not mean that this should be the norm. I will quote only one paragraph from the Delegated Powers Committee's report. Before doing so, I note that the committee is not hostile to this Government or any Government; indeed, it is now chaired by one of the longest-serving Commons Conservative Chief Whips in history, and so it is not a partisan committee. Paragraph 7 says:

> "This report identifies multiple failures in the Memorandum to adequately explain and justify very broad delegations of power which enable implementation of significant policy change by delegated legislation. This would give us cause for concern at any time but is particularly disappointing as it comes so soon after the publication of our report, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, in November 2021, and of revised guidance for departments on the role and requirements of this Committee."

The new guidance by the Delegated Powers and Regulatory Reform Committee was circulated to all departments, and, in the first week of January, I personally wrote to every Minister and every permanent secretary giving them copies of the revised guidance. This is a Cabinet Office Bill, so I want my noble friend the Minister to go back to the Cabinet Office and call in Simon Case, the Cabinet Secretary, Alex Chisholm, the Permanent Secretary, and Elizabeth Gardiner, the First Parliamentary Counsel, and ask them why they seem to have deliberately ignored every word of the guidance with which they were issued.

Worse than that, they have reneged on their promises to the committee. In the response to our report, they said that the Government agreed that the statement of principles of parliamentary democracy set out in both our reports should be included in the Cabinet Office's *Guide to Making Legislation*. We reported way back last December, so they have had five months to adjust the Bill taking that into account. Why have they not done so?

The Government agreed that the routine use of just-in-case powers was not appropriate, so why include them in the Bill? They agreed that guidance should not be used to create rules that must be followed, should not be relied on for interpretation of legislation, and should describe the law accurately. They said that the Cabinet Office's *Guide to Making Legislation* would be strengthened to reflect the committee's revised guidance. Will my noble friend the Minister ask why that has not happened? I am tempted to ask the non-executive board member, the noble Lord, Lord Hogan-Howe, to maybe conduct an investigation into the Cabinet Office, but I will keep that in reserve.

Of course, the Government justified skeleton legislation, Henry VIII powers and the negative procedure even when there were alternatives that would not subtract from the thrust of the legislation. Not one single item in any of the DPRRC reports would stop any Government of any persuasion driving through their programme. At worst, it would mean a Minister—usually a Lords Minister—perhaps having to do a few more 90-minute SI debates.

[Lord Blencathra]

I conclude with something the Government did agree on. They welcomed the end-of-Session report that the Delegated Powers Committee said it would produce. The committee has now produced the first end-of-Session report, even though it covers only half or less than half of the last Session, and it makes for some very uncomfortable reading for some Bill teams and OPC drafters. It criticises the quality of delegated powers memoranda by the Ministry of Justice, and two of those by BEIS and the Home Office each. If we cannot trust the delegated powers memoranda, how can we trust the rest of the departments' assertions?

The report highlights serious deficiencies in the Health and Care Bill, describing it as

"a clear and disturbing illustration of how much disguised legislation a Bill can contain and offends against the democratic principles of parliamentary scrutiny."

However, by far the most egregious and insidious example was the Subsidy Control Bill, which had a delegated power which enabled the Government to disapply the Bill's subsidy control requirements by a direction that had to be kept secret from Parliament. Added to which, the delegated powers memorandum had the effrontery, and indeed the honesty, to justify this absence of parliamentary scrutiny on the grounds of

"the potential for non-approval by Parliament"

—in other words, a risk of defeat.

Can noble Lords believe that? Noble Lords who were on the committee can believe it, because they had it removed eventually. Officials drafted provisions to enact a law in secret and not tell Parliament in case Parliament voted against it. We do not have that in this Bill, but I am quoting some general examples to show how appalling some of the general delegations of power have been.

Of course, Ministers have ultimate responsibility, but we all know that Ministers were not responsible for the 345 government amendments in this Bill. Nor are they the ones who have devised and insisted on inserting all these parliamentary abuses into legislation. I suspect that my noble friend the Minister was as shocked as the rest of us when he was handed this Bill and saw the extent of the completely inappropriate delegation of powers.

I want him to go back to the Cabinet Office and tell officials and parliamentary drafters that if they do not want their names on the list of bad boys and girls when the DPRRC publishes the full report at the end of this Session, they had better bring in the changes on Report, as suggested by the Delegated Powers Committee. They should amend the Bill not only to keep their noses clean but because it is the right, democratic thing to do.

Lord Hope of Craighead (CB): My Lords, I support the amendment in the name of the noble Lord, Lord Wallace of Saltaire, but I have a question for the Minister. As an example of the grouping of paragraphs and sections to which objection is taken, I point out that paragraph 17 of Schedule 2 refers to

"services of a kind specified in regulations made by an appropriate authority."

The phrase "appropriate authority" occurs in all the paragraphs and measures that are under attack and is defined in Clause 111(1) as meaning

"a Minister of the Crown … the Welsh Ministers, or ... a Northern Ireland department".

There is no mention of any of the Scottish Ministers.

5.45 pm

I may be missing something, but I cannot understand why the exemption regulation power being referred to does not include the ability for the Scottish Ministers to exercise a power with regard to contracts that are to be excluded. There may be a very simple answer to that and it may be my own fault for having failed to understand the reach of the legislation, but it applies without qualification to Scotland as well as to Northern Ireland and Wales and it seems odd, if these provisions remain unaltered, if the appropriate authority does not include Scottish Ministers.

I apologise to the Minister for springing a question of that kind on him. It may be that he would like to consider it and reply by letter at a later stage, but it puzzles me why Scottish Ministers are not included in the definition of "appropriate authority".

Baroness Hayman of Ullock (Lab): My Lords, I thank the noble Lord, Lord Wallace of Saltaire, for tabling these amendments in the first place, and I thank those Members who put their names to them. It is important that we have had the opportunity to debate the report produced by the Delegated Powers and Regulatory Reform Committee, a report that the noble Lord, Lord Blencathra, described as a scorcher. I think we all agree that there is a lot in here of great concern, and it is very important that we have spent this time going through it. I also thank members of the committee for the work they did in going into such detail on this very complex Bill, to draw our attention to their serious concerns and the problems that we need to look at and resolve.

I will not go into a great amount of detail. Other noble Lords have talked about the detail of the report so there is no point in my repeating that. I will just draw the Committee's attention to a few things. My noble friend Lord Berkeley started the debate by expressing his concerns about the broad range of powers—the Henry VIII powers, as they are described—and other noble Lords have talked about their concerns about them. The noble Baroness, Lady Neville-Rolfe, felt that some of them were potentially dangerous. If noble Lords' concerns are that strong, it is really important that we look at how to address them. She drew attention to a number of particularly damning paragraphs. There was also talk about the fact that a large number of clauses should be subject to the affirmative procedure rather than the negative one, and of course we absolutely support that.

I draw the Grand Committee's attention to paragraph 60 of the report, which was the one that struck me in the context of the way that a lot of Bills, legislation and policy development have been happening recently. If noble Lords will bear with me, I will read it out. Talking about Clause 109, it says:

"This is, in effect, a skeleton clause as the real operation of the exemption process is to be left to regulations. We are very concerned that the Government appears to have chosen this approach for no other reason than that it hasn't yet developed the underlying policy."

That gives me great concern because it seems almost to be becoming the norm, and it is not the right way to go about making regulations and legislation. The DPRRC then talks about its *Democracy Denied?* report, which the noble Lord, Lord Blencathra, mentioned, and says that

"we drew attention to the issue of the inclusion of powers in bills which were, in effect, 'a tool to cover imperfect policy development'. We said this was unacceptable and that we looked to the Government to undertake the systemic reforms necessary to prevent its happening. It is disappointing to find evidence in this Bill that this issue has not been addressed."

That was the only further concern that I wanted to draw the Committee's attention to today. A number of us have worked on a lot of Bills now, and there is a worrying lean towards this lack of policy development before Bills are drawn together and published. That is often why the Bills then come into so many difficulties. It would be better if all this was sorted out much earlier, so that we all knew where we were and could understand and better support the Government in producing good legislation. Some very interesting questions have been asked, including a very specific one from the noble and learned Lord, Lord Hope of Craighead, and I look forward to the Minister's response.

Lord True (Con): My Lords, I thank all those who have spoken. I take seriously the gravity of the remarks made. I assure my noble friend Lord Blencathra, whose chairmanship of the committee was distinguished—he can speak even more freely now that he is no longer in that role—that while I did not catch the names of all the individuals that he asked me to refer his remarks to, I will make sure that that is done as he requested.

On the question raised by the noble and learned Lord, Lord Hope of Craighead, it is a matter of regret—we discussed this on the first day—but the Scottish Government have declined to be part of this legislation. They do not wish to be. They wish to pursue their own course and obviously that is why they are omitted from the definition of an appropriate authority under the legislation. It would be odd if they were an appropriate authority to alter legislation which they declined to take part in. That is the explanation.

Lord Hope of Craighead (CB): Of course, it is possible that the Administration in Scotland will change. This Bill will become an Act which will perhaps last longer than the present regime in Scotland. Assuming one has an Administration who are favourable to participating in this system, the question then is why they should not be included, or at least mentioned, in the definition of appropriate authority. It is quite a serious issue, because appropriate authorities is referred to in many places in the Bill, as the noble Lord knows. If, as I think the noble Lord is indicating, this is simply a sort of penalty for not participating in the legislation, it seems unfortunate that that should be set in an Act which will last for, I imagine, many years into the future. Is it not worth rethinking this? Might it not be better to mention the Scottish Ministers and leave it to the future to see whether they actually exercise the power that has been given?

Lord True (Con): My Lords, I hear what the noble and learned Lord says. Those remarks might also be addressed to the First Minister in Scotland. I expressed regret—I think it is shared across the Committee—that the Scottish Government have not wished to take part in the constructive way in which the Welsh Administration have. We have had good co-operation with the Welsh Administration, and that has had an impact on the Bill. Clearly, if the policy changes, then a Bill can be amended, but I am about to reply to a series of complaints about the Government taking all sorts of potential regulatory powers to change this, that or the other, and that would be quite a substantial secondary power to take. It is regrettable, but that is the position.

Lord Purvis of Tweed (LD): Further to the point from the noble and learned Lord, I am less convinced at the response that this is discretionary as to the choice of Scottish Ministers. I understood that these provisions were for public passenger transport services that do not cross the border into Scotland. Therefore, these are for the provision of public transport services that begin and end in England.

If that is the case, they are within the scope of this legislation. If they are public passenger transport services which begin and end within Scotland, they would be under Scottish legislation. Therefore, this would not apply and the appropriate authority would not be Scottish Ministers. Would it not be better if the Bill simply stated where the public passenger transport services are? The area of concern for me is cross-border public passenger transport services, for which, under the 2016 legislation, there was further ministerial devolution to allow some form of regulations to be passed on cross-border public transport services. I declare an interest because I use them every week.

Lord True (Con): I hear what the noble Lord says. I come to this House and I am asked to respect the position of the devolved Administrations. The position of the devolved Administration in Scotland is that they do not wish to be part of this legislation, so I am caught. If at a later stage, or even at this stage, the noble Lord wishes to put forward an amendment to change "appropriate authority" to include the Scottish Government, no doubt we can debate that matter, but the position now is the one I set out and I have given the explanation that is the policy decision of the Scottish Administration.

Lord Purvis of Tweed (LD): We are making law so, for the record of the Committee, is the Minister saying that public passenger transport services under paragraph 17 of Schedule 2, for the exempted contracts, are public passenger transport services that begin and end in England? Is that correct?

Lord True (Con): My Lords, the noble Lord is right to raise the issue of cross-border services. We will come to that later in the Bill. I am not excluding discussion of cross-border. It is an overall policy position that I am stating. We will come to the cross-border issue later in the legislation. I do not want the noble Lord to think that we are having a kind of Sicilian motorway approach, where the Mafia money ran out. I fully understand where he is coming from on that. I was really replying on the broader point.

[Lord True]

Time runs on and I must get on to the specific and very important points made not only by the Delegated Powers Committee but by noble Lords who have tabled amendments. I will try to persuade the Committee that the amendments are unnecessary and that the strictures of the Delegated Powers Committee were strong. I heard the word "a scorcher", but perhaps I do not necessarily need that. I heard the remarks from all sides on that. We will carefully consider them, notwithstanding what I say now. Obviously, it believes it is a reasonable position, but we will consider those remarks.

Amendment 18 would remove paragraph 17 of Schedule 2, which has been alluded to. The effect of this would be to remove an exemption for certain public passenger transport services that exists in our current procurement legislation. The exemption exists and it is necessary as procurement for such services is governed by a separate regime operated by the Department for Transport. It is important that the Bill does not impinge on that separate regime and that the exemptions under the Bill fully align to ensure that public passenger transport services are regulated by the correct regime. There is no intention to exempt public passenger transport services beyond those currently exempt and governed by the Department for Transport regime.

Amendment 21, tabled by the noble Lord, Lord Wallace of Saltaire, seeks to remove a provision that exempts concession contracts for air services provided by a qualifying air carrier. Removing this would bring those contracts within the scope of the Bill, which would be a fundamental change to the existing position.

Air services are separate markets driven and operated by the private commercial sector. The public sector does not generally procure or intervene in these services. Given the distinctive features of the air transport market, and the state's historical limited intervention in it, it would not be appropriate to bring air transport within the scope of the mainstream procurement rules. However, I assure noble Lords that the power is limited to specifying the meaning of a "qualifying air carrier", which is, in essence, someone licensed under the existing regime for air carriers. This power is not wide-ranging and is needed only to ensure that the definition refers to the correct regime. Therefore, I ask noble Lords not to press Amendments 18 and 21.

6 pm

Amendment 28, tabled by the noble Lord, Lord Wallace of Saltaire, would remove the ability of the Government to make an exemption determination which would exempt particular utility activities from regulation under the Bill where they are exposed to competition. This power cannot be used to alter the basic parameters of the exemption, set out in paragraph 7(2) of Schedule 4. This provides that utility activities will not be regulated where there has been an exemption determination establishing that there is fair and effective competition for the activity and entry to the market is unrestricted. These decisions cannot be taken lightly and we cannot just exempt certain utility activities because we want to. Utilities are covered under the WTO Agreement on Government Procurement and other agreements. An exemption under those agreements is available only where we are satisfied that competition exists.

The justification for this power is that regulation of procurement in the utilities sector is unnecessary when competition is functioning well and access to the market is not restricted. Effective competition is a much better mechanism than procurement regulations for improving outcomes for utility consumers, leading to lower prices and better-quality services. This power replicates a power previously exercised by the European Commission under the Utilities Contracts Regulations 2016 to exclude certain utilities where they were subject to competition. The Government therefore do not support this amendment.

Amendment 31, tabled by the noble Lord, Lord Wallace, would remove Clause 8(2), which gives an appropriate authority the power to specify in regulations the services within the scope of light-touch contracts. We will come to those later, but light-touch services are currently identified by common procurement vocabulary codes, which are well used and understood in the market. The services currently identified via CPV codes are outside the scope of the WTO Agreement on Government Procurement, albeit they are within scope of some national treatment provisions in certain international agreements. This important context demonstrates that this power is more limited than it may at first appear. It would not be permissible for Ministers to enact such regulations in a manner contrary to the UK's international agreements. For example, they could not just determine on a whim that professional services covered by international agreements should be subject to light-touch provision. There is therefore a natural limitation on the scope of the power.

Furthermore, the CPV codes currently listed in Schedule 3 to the Public Contracts Regulations 2015 will be captured by regulations made under paragraph (2) of Schedule 3, so the application of the power will result in no wider a light-touch regime than exists under the current arrangements. We will discuss light-touch contracts and Clause 8 further in a subsequent debate, but I hope noble Lords agree that this power is not as broad as it may first appear, alleviating concerns about its use and allowing the amendment to be withdrawn.

Amendment 208, tabled by the noble Lord, Lord Wallace, looks to remove Clause 33(8). It would restrict an appropriate authority's ability to specify which services may be reserved for public sector mutuals and the ability to amend the list over time. This power is appropriately restricted to services that have already been specified in regulations made under Clause 8 for light-touch contracts. Thus, while the power under Clause 33 may at first appear broad, on closer inspection that is not the case. It is not intended to be tertiary legislation. Clause 33(8) merely allows an appropriate authority to specify in regulations which of these services already specified as light-touch services by regulation under Clause 33(8) too can be reserved for public service mutuals, though I understand where the noble Lord was coming from in his concerns.

Clause 33 is similar to Regulation 77 of the Public Contracts Regulations 2015 and is intended to reserve similar contracts for similar organisations. The 2015

regulations contain a list of services, identified by CPV codes, which are currently able to be reserved, and this includes services such as welfare and rehabilitation. Under the Bill, a list of services, also to be identified by CPV codes, will be specified as reservable light-touch services in regulations made under Clause 33, so that the regime will continue to operate in a similar fashion. However, while changes to the reservable light-touch services are not currently anticipated, it may prove appropriate to expand the list of reservable services in line with the evolution of the market in the future. Setting out the reservable services in the Bill would require an amendment to the primary legislation to effect these possible changes, vastly reducing the ability of the regime to respond and adapt when necessary. So, in that light, I would respectfully request that these amendments not be moved.

I now turn to the particular concerns expressed about Clause 86. In support of this Government's move towards ensuring greater transparency in procurement, there are a number of provisions in this Bill which place requirements on contracting authorities to publish information in the form of notices. Clause 86 confers a power to set out the information to be published or provided in such notices as well as the place it is to be sent. Again, the GPA sets out the core of the detail of many of the notices we have described in this Bill. That should give noble Lords a clear indication about the sorts of information that will be required to be published using these powers. However, the Government wish to push further on transparency than required by the GPA. For this reason, we have created a range of new notice obligations and proposed the power to set out the detail of the notices. The flexibility inherent in taking this power allows us to tailor the transparency regime over time to ensure that we can benefit from greater transparency across the procurement landscape. Using the power, we can also ensure that the technical requirements for publication can keep pace with developing information technology regimes.

In deference to the breadth of the power, and I acknowledge what noble Lords have said, the Bill makes provision for regulations to be subject to the affirmative procedure so the content will come before both Houses for consideration, both as the regulation is laid the first time, and then for subsequent changes, giving oversight to this House.

Amendment 530, tabled by the noble Lord, Lord Wallace, would mean that the power to make regulations specifying a method to price qualifying defence contracts under the Single Source Contract Regulations 2014, other than by applying the pricing formula set out in the Defence Reform Act 2014, should be subject to an affirmative procedure. As drafted, the amendment would not achieve the intent. However, we note and will consider the committee's recommendation on that point.

Amendment 532 would require regulations making above-inflation increases to the financial thresholds on publishing specific notices subject to affirmative resolution. It is clear that such thresholds will need to be amended over time to take account of inflation and other such economic changes. In addition, our expectation is that as contracting authorities adjust to the administrative burdens of publishing such information, over time the threshold may be lowered to increase transparency, but we may also find that some types of contracts and some types of contracting authority benefit from higher or lower thresholds. The power proposed in the Bill will therefore allow regulations to set a more targeted and appropriate threshold, based on experience as the regime develops. We believe that these thresholds are not a matter that justifies the fullest examination, in terms of parliamentary time, to oversee and therefore we have proposed the negative procedure. However, again, while we cannot support this amendment, we will consider this further alongside the other recommendations from the DPRRC.

Lord Fox (LD): I appreciate the comment the Minister has just made. This is a straight question: under what circumstances would these thresholds be changing, other than the GPA change? This would either be with or without inflation—inflation has nothing to do with it; the GPA has so far determined what these thresholds are. I am a little confused about what power the Government were seeking in the first place with this.

Lord True (Con): I believe that there may be potential, for example, for an evolution in the nature of the regime. However, I will come back to the noble Lord with further examples, if that is helpful. We can add that to the list of matters to take up.

Finally, the noble Baroness, Lady Hayman of Ullock, quite understandably expressed concerns about Clause 109. This is specifically related to private utilities; it provides a power for an appropriate authority to reduce the regulation of private utilities under the Bill to reduce regulation. As the Bill provides at Clauses 81 and 89, contracting authorities owe a duty to treaty state suppliers to comply with a substantial part of the Bill. The power can be exercised to make amendments only where those amendments do not put the UK in breach of its obligations to those suppliers, and this will inherently limit the scope of the amendments we are able to make. For example, private utilities will still be required to publish tender notices and contract award notices.

Private utilities are covered by the Bill where they have been granted a special or exclusive right to carry out a utility activity, where that right substantially limits other entities that have no such rights carrying out those activities. The clause requires the appropriate authority to consult persons representing the views of private utilities and other appropriate persons prior to making regulations. The Government, quite rightly, would have to seek the approval of Parliament under the affirmative procedure for any deregulation measures.

While those are the explanations, I have tried to give the Committee a detailed explanation on each of the amendments of the Government's position and view. I return to the fundamental point I set out at the outset: we are giving, as I have indicated as we have been going along, proper consideration to the recommendations of the Delegated Powers and Regulatory Reform Committee. We intend to return to this on Report, in cognisance and consideration of what noble Lords on all sides have said.

Baroness Neville-Rolfe (Con): I want to express a concern. Although the Minister's argument seems to be that the powers are already rather limited and that there are natural limitations—for example, the GPA—I am not convinced that we actually need to put all this into delegated legislation. In some places, we could decide things and make it clear in the Bill. Then, if there is future evolution of the market or the development of technical regimes, as my noble friend suggests, we should come back to the House and look again at legislation in those areas.

Obviously, I come from a business background, and, as I said, the thought that officials can effectively make major changes that will affect the market in which you are operating is actually quite worrying. We had an example of this on Monday. The example we received from the noble Baroness, Lady Hayman of Ullock, about

"a tool to cover imperfect policy development"

was a quote from the report in relation to private utilities. Therefore, I did not repeat it, but it is a good example of where there might be a changing market, which might then generate quite substantial uncertainty in the procurement field and be a big problem for our companies.

I took four egregious examples out of a respected cross-party report to try to be constructive, but my noble friend has unfortunately tried to explain why the Bill is as it is, rather than to respond to these individual examples. I really need his response to these examples because I need to know how much to press on things such as notices and concessions when we get to those parts of the Bill. If it is clear that the delegated powers cannot be misused, it makes it a lot easier to agree to other parts of the Bill. I apologise to the Committee for speaking at length, but I feel very strongly about this.

Lord True (Con): My Lords, it is Committee and my noble friend and all other noble Lords are entitled to intervene as much as they wish. She makes an important point, and I was just on that paragraph in my speech—it is slightly small compared to the rest of the speech—and was trying to set out the Government's rationale for why the balance is probably right.

6.15 pm

However, with full respect to the Delegated Powers Committee and noble Lords' points, I recognise that change could be considered. We have given an undertaking to engage on these areas before Report, in full cognisance of the Delegated Powers Committee report and the important submissions of noble Lords, including my noble friend, in the debate. In seeking to explain the Government's belief that the position that we have set out is justifiable, I certainly did not intend to close down discussion on these important points, which include the right and duty of Parliament to hold Governments to account. We must carry through that dialogue on the Bill, and I give that undertaking.

Lord Berkeley (Lab): I take the noble Lord back to his response on Amendment 18 in relation to public passenger transport services. He argued, probably rightly, that they are the responsibility of the Department for Transport and should therefore be exempt here. Paragraph 17 of Schedule 2 defines a "contract", and paragraphs 33, 34 and 35 at the end of the schedule cover "Concession contracts", which are all exempt. I assume—perhaps the Minister could confirm this—that the exemptions for "air services" and "a qualifying air carrier" come under the definition of "concession", because the Bill says this, although it does not define what a concession is.

I am concerned that there are examples in this country of a third category: a franchise. I am not sure where that comes into this; I know of one air service that is a PSO and probably a franchise, and, certainly, some bus and train contracts are franchises. If the Minister does not have the answer to that today—it is a little detailed—perhaps he could write to us, because it is quite important. If the Bill is going to exempt all these things, the whole lot needs to be exempted and handed to the Department for Transport. It is no good having concessions exempted and franchises not. I look forward to the Minister's comments.

Lord True (Con): My Lords, I will have to take counsel and advice on that, and I will certainly come back. As I said, the fundamental position is to try to keep things as they are, exempting passenger transport services that are currently exempt and covered by the Department for Transport. Concession contracts are dealt with slightly differently under the regime—we will discuss that later—but I will come back to the Committee to clarify the points that the noble Lord asked about.

Lord Wallace of Saltaire (LD): I thank the noble Lord for his explanations; if some of them had been available earlier, it might have been easier to accept some of the Government's arguments. I find Clause 109 the most difficult: it gives the Minister the power to amend primary legislation without any reference to Parliament. But I note that he said that this will be looked at and perhaps discussed with others between Committee and Report, and I thank him for that constructive approach.

In turn, I am sure that he noted the strong views around the Committee about this particular Bill and the broader issues with skeleton Bills. We will return to this in a number of other areas in the Bill where we want to see spelled out things that we are at the moment expected to take for granted that the Minister will later say something about, provide a strategic policy statement on or whatever. That is simply not enough, so this will be a continuing issue.

In passing, as we keep stubbing our toes against the GPA, I am quite surprised that Jacob Rees-Mogg has not demanded that Britain withdraws from the GPA, because if we are to take back control we had better take it back properly of some of these international obligations, which clearly limit and constrain what we can do in a range of quite often important issues, but perhaps that is an over-partisan remark in Committee on a Bill. We will have to return to this, but I thank the Minister for the constructive way in which he has responded. I beg leave to withdraw the amendment.

Amendment 18 withdrawn.

Amendment 19 not moved.

Amendment 20

Moved by ***Baroness Scott of Bybrook***

20: Schedule 2, page 81, line 6, leave out sub-paragraph (2)

Baroness Scott of Bybrook (Con): My Lords, I start by clarifying what utilities are covered in the Bill. Utilities are defined in it as public bodies, public undertakings or certain private undertakings that carry out utility activities. Public undertakings differ from public bodies in that they do not have functions of a public nature; their activities are more economic and commercial in nature. While it is no longer one, before the Government sold their shares in 2015 Eurostar International Ltd was a public undertaking.

The Bill covers private utilities only where they have been granted a special or exclusive right to carry out a utility activity. These are rights that have been granted by a statutory, regulatory or administrative provision and that substantially limit other entities from carrying out those activities. Rights are not special or exclusive when granted by following a competitive procedure or where the opportunity was adequately publicised and the rights were granted on the basis of an objective, non-discriminatory criterion.

Private utilities which enjoy "special or exclusive rights" are effectively in a monopoly position and therefore they could, however unlikely it is, engage in preferential treatment that, for example, favours their own affiliates or strategic partners and discriminates against other suppliers bidding for the contracts. The Bill applies to utilities only where they are carrying out the utility activities set out in Schedule 4: specifically, gas and heat, electricity, water, transport services, ports and airports, the extraction of oil and gas, and the exploration for or extraction of coal or other solid fuels.

The two government amendments in this group are minor and technical in nature. Amendment 20 to Schedule 2 is consequential on government Amendment 231, which amends Clause 35(6) to ensure a single definition of utility is applied to the whole Bill. In Schedule 2, paragraph 28(2) is therefore no longer required. The definition at Clause 35(6) is exactly the same as that contained in the deleted sub-paragraph (2).

Amendment 24 amends Clause 5(1) to define a utilities contract as a contract

"wholly or mainly for the purpose of a utility activity".

The addition of "wholly or" is to reflect the reality that a utility contract can include solely or predominantly utility activities. This amendment to the terminology ensures consistency with the approach to mixed procurement used elsewhere in the Bill; for example, with Clause 8(1) on light touch contracts, where the same principle applies. I beg to move.

Lord Purvis of Tweed (LD): I am grateful for the Minister's explanations. Her colleague the noble Lord, Lord True, previewed some clarification regarding the Post Office, so perhaps she was forewarned. I have two questions for clarification, further to what she said.

The more specific question relates to freeports, which I raised in the technical discussion this morning. I would be grateful if the Minister could respond now, but if not I would be happy if she does so in writing. There are a number of areas of government policy—I am not debating the rights and wrongs of this—which have activities linked to the provision of utility services but which are not directly, wholly or mainly a utility service. I am concerned, for example, about whether the more commercial activity of freeports, which are government policy and have the benefit of being linked with a utility but do not provide utility services, may well be exempted. That would not bring about the level of transparency in the thresholds that I believe there should be. I am still scratching my head about the status of freeports.

The element raised earlier by the noble Lord, Lord True, on postal services is concerning. I am particularly interested in the status of Post Office Ltd. The noble Baroness, Lady McIntosh of Pickering, raised Parcelforce. I understand that Royal Mail and Parcelforce have a relationship with Post Office Ltd, and they provide different services. I understand that the Post Office is not considered a Schedule 4 utility, but clarification on whether it is covered under the public undertaking elements would be helpful. I ask because postal business of the Post Office is included under the procurement chapter, referred to by the noble Lord, Lord True, and annexe 16A of the UK-Australia agreement, as are postal services, which relate to letters, parcels, counter services and other such services. The classification under the WTO which the annexe uses links with the pick-up, transport and delivery services of letters, newspapers and journals, whether for domestic or foreign markets. I am not entirely clear about the status of that when it comes to Royal Mail services. They are covered within the procurement chapter of the Australia agreement, but I am not sure of their status in this Bill.

This speaks to the wider point that we are now in the realm of having to look at each of the 24 agreements in the schedule. Any authority or likely bidder for any of these works will have to study all these FTAs and all the procurement chapters, in addition to the EU-UK TCA, this legal framework, and the Scottish and Welsh ones. At the very least, we are now replacing one system with 25—or more likely with 27. That means it is not a more efficient way of covering it.

Finally—I asked earlier, because it is not clear in the impact assessment, and Ministers might write to me on this—now that the Government are clarifying their position in the Bill on those that are covered, not covered and the exemptions, I would like to see an update on the information about the likely number of contracts and the values in all these categories. I would be grateful for that information and for clarification on the Post Office.

6.30 pm

Lord Wigley (PC): My Lords, I want to raise one narrow aspect; that of Dŵr Cymru, Welsh Water. The position of Welsh Water is somewhat different from that of the other water providers within England and Wales; I think the situation in Scotland is different again. Dŵr Cymru is a not-for-profit company, and the assumption and understanding is that nothing in the Bill undermines the capability of the Welsh Government to award the contract within the service area of

[LORD WIGLEY]
Dŵr Cymru to a not-for-profit company of this sort. Quite clearly, that has a different impact than if that market was open for competition on a profit-making basis.

The performance of Dŵr Cymru is generally in most areas regarded as having been very satisfactory. There are ongoing arguments about quality of river water, et cetera, and noble Lords will be aware of those, but with regard to the provision of water, there is no wish—certainly at present, and I cannot foresee one in the near future—for there to be anything that disturbs that apple cart. I hope that the noble Baroness will be able to give an assurance on the record in this Committee that nothing in the Bill can, in any circumstances, undermine the ability of the Welsh Government to award the franchise for providing water in Wales to a not-for-profit company such as Dŵr Cymru.

Lord Fox (LD): My Lords, very briefly, I thank the Minister for her clear statement. The subject of utilities has come up both on Monday and today, and we are beginning to get some clarity around how the whole utility story fits together, but anything more she can give us on that would be helpful. This is probably not helpful, but it seems to me to be an analysis of the issue. The majority of the trade deals to date are essentially rollover trade deals, and to paraphrase the noble Baroness, Lady Noakes, this legislation is essentially rollover legislation. However, trade deals such as the Australia deal are not rollover trade deals. We are in danger of trying to pour new wine into old skins here.

The issue that my noble friend highlighted here is an example where the new-style trade deal is not easily catered for in the old-style legislation, which is essentially rollover legislation. I am not sure what the solution to that is, other than "more work needed", but I think—and this is a dispassionate and hopefully helpful observation—we are looking at a new trading position. The Government talk about that all the time, but we are essentially looking at legislation that was dealing with an existing set of trade deals which are, by their nature, different from the new ones. This is what is being thrown up, and we will start to see problems thrown up increasingly.

Lord Berkeley (Lab): To go back to Amendment 20, the noble Baroness gave some useful explanation of the definition of a utility. I want to go on briefly to the example that the noble Lord, Lord Purvis, mentioned, which is freeports. That presumably comes under paragraph 5 of Schedule 4, on page 86. It is not clear to me whether any of the activities of a freeport are exempt or not. In other words, the freeport gets a load of money from the Government, but does it have to comply with the procurement regulations and everything else in the Bill? Does it have to be transparent about how it complies, whether it has sent out for three quotes or whatever, and whether the contracts have been awarded fairly? That is one example, and I expect there are many others in other sectors. It would be interesting to know because when we get to Schedule 2, there are so many different definitions in there that it is quite difficult to understand which applies to what. I am sure that, at some stage, the Ministers will try to give us some examples of all these different issues on page 81.

Baroness Hayman of Ullock (Lab): My Lords, I must say, I find the utilities section of this quite confusing in some areas. The more clarification we can get from the Minister, the better. It is not just this bit; it is the fact that it is cross-referenced a lot right across the Bill and is impacted by so many other pieces of legislation, including internationally.

We talked with officials about the Australia trade agreement this morning; the noble Lord, Lord Purvis, raised this. I am still slightly confused as to how that all links together. Rather sadly, after the discussion, I went and found the relevant parts and read them. The Bill talks about universal service obligations, postal monopolies, exclusive suppliers and specified collection, transport and delivery services. I know that the Minister is not able to come back to us on this now but I would appreciate some kind of written explanation of how this all works together and what the implications are of having that kind of reference to postal services in a trade agreement. What impact does that have on future procurement legislation? Will the Procurement Bill have an impact on future trade agreements in this area? Personally, I find this quite confusing; it would be extremely helpful to have it laid out in a crystal-clear fashion so that we do not end up with this kind of confusion and the debates we are having.

I will not repeat all the things that noble Lords said when they talked about having more clarification on Schedule 2. I will just briefly come back to cross-referencing throughout the Bill. In the previous debate, we talked about the committee report, which again mentions Schedule 4, the utility activities exposed to competition, the provisions of the WTO agreement—the GPA—and so on. For me, a lot of this is about having a clear understanding of which utilities lie in this group and which lie in that group; which utilities will have to follow certain rules; which will be exempt; and how they will be exempt. I would appreciate proper clarification on all those areas because this is a lot to take in; a lot of it needs to be right as well.

I appreciate that I have asked the Minister to do quite a complicated task but, in Committee and certainly ahead of Report, that sort of information and clarification would be extremely helpful.

Baroness Scott of Bybrook (Con): I thank noble Lords. We have listened—I thought that we explained the Australian postal services to the noble Lord, Lord Purvis, in our debate on a previous group—but obviously further questions still need to be addressed. As the noble Baroness, Lady Hayman, clearly said, the issues of utilities' groupings and the rules that apply to each group are not yet clear enough. I know that will take extra time for everybody but I suggest that we pull together another meeting purely on utilities and their interaction, particularly with the trade agreements that are in place now and future trade agreements that could be in place.

At the same time, I remember freeports coming up in the first Committee debate. I do not have any further information but we will get that information

and discuss it. If required, we will send a letter afterwards confirming everything we have discussed so that noble Lords have that in their packs.

I have good news for the noble Lord, Lord Wigley. I can assure him that this Bill will not change anything from the current regime with regard to Welsh water. I will not try to say it in Welsh because I am not very good at it. I hope that this assures him that everything is fine in Wales.

I think that the noble Lord, Lord Berkeley, brought up freeports on the first day of Committee. We will invite him to have a discussion on that.

These were minor and technical amendments that seem to have grown into something much bigger but they serve to clarify the Bill and ensure consistency on the provision of utilities contracts. I therefore hope that noble Lords will support them.

Amendment 20 agreed.

Amendment 21 not moved.

Schedule 2, as amended, agreed.

Clause 3 agreed.

Schedule 3: Estimating the value of a contract

Amendment 22

Moved by ***Baroness Noakes***

22: Schedule 3, page 83, line 38, leave out from "contracts" to end of line 39

Member's explanatory statement

This amendment probes what "good reasons" are acceptable for the purposes of not aggregating contracts.

Baroness Noakes (Con): My Lords, Amendment 22 is in a group of rather different amendments, most of which have more meat in them than my amendment. It is a probing amendment to paragraph 4 of Schedule 3, which contains a provision to ensure that contracts are not fragmented in order to escape the value limits that govern some of the procurement rules. The basic rule in paragraph 4 is that the contracting authority has to add up the value of all the contracts if they could reasonably have been supplied under one contract.

However, paragraph 4(2) allows the contracting authority not to do this if it has "good reasons". Amendment 22 proposes to remove this in order to find out exactly what the Government intend to allow contracting authorities to do and to probe why they have not been more specific in the Bill. At first sight, paragraph 4(2) is a massive let-out clause, enabling authorities to avoid aggregating contracts. I look forward to my noble friend the Minister's explanation. I beg to move.

Lord Wallace of Saltaire (LD): My Lords, I rise to speak to Amendment 81, which we on these Benches regard as particularly important. It would put in the Bill one of the most important decisions to take before embarking on the procurement of public goods and services: make or buy? That is the subject of an entire chapter in the Government's own *Sourcing Playbook*. This key decision process is missing from the Bill. We seek to put it in as an essential part of the pre-procurement process. The choice of delivery models should be based on careful and impartial consideration of the different forms of delivery available for each type of work, supply or service.

Conservatives in Government have sometimes acted as though outsourcing to for-profit companies—often large outsourcing companies that have been labelled "strategic suppliers"—is the only model worth considering. Unless the Minister wishes to argue that *The Sourcing Playbook* and other recent publications on procurement guidelines are no longer operable, it seems entirely appropriate to put in the Bill that the choice between in-house and outsource should first be considered. Later, we will move other amendments on the delivery model choices between for-profit and not-for-profit provision.

We have carefully followed the Government's own language in these publications in drafting the amendment. The Minister may argue that we should leave the Bill a skeleton as far as possible to allow Ministers as much flexibility as possible; we have heard him press the case for flexibility already. We argue the case for clarity, accountability and future-proofing. The principles of the procurement process must be in the Bill, not left for later in the policy statements issued by changing Ministers as they pass through the relevant office.

6.45 pm

The UK has now had 40 years' experience of outsourced procurement of public services. Some provision has been a clear improvement, at lower cost and higher quality; some has failed to make very much difference from earlier public provision, either in quality or in cost; some has failed to provide what was promised; and some has cost a good deal more than in-house provision would have done.

When in government, I was a strong proponent of the Government Digital Service. Others in Whitehall resisted this Cabinet Office intrusion into departmental digitalisation and ended up instead paying enormous sums to consultancies and outside contractors for what turned out to be poor outcomes. We are all aware of the weaknesses of the outsourced model adopted for the rail network, now being brought partly back in-house. We watched the water companies transfer substantial dividends to their largely overseas owners while failing to provide the additional investment in the sector that privatisation was intended to stimulate. And, as we will argue in later amendments, there are sectors in which private, for-profit provision seems almost entirely inappropriate: social care, care homes, probation and children's services.

The wilder and more ideological members of this Government—Mr Rees-Mogg, for instance—would happily slash the Civil Service and employ outside consultants at much higher rates instead. There have been times when the relationship between the large outsourcing companies and this Government have looked too cosy and too close, without sufficiently critical assessments from within Whitehall of the overall value for money of alternative forms of delivery.

This amendment would put into the Bill, as an essential stage in the preliminary steps to contracting for public services, consideration of the whole-life cost of procurement—in-house, outsourced or some form

[Lord Wallace of Saltaire]
of mixed-economy model. I hope the Minister will accept it as something that would guide a future Government, of any complexion, and which should be included in the Bill.

Lord Hunt of Kings Heath (Lab): My Lords, as this is my first intervention, I remind the Committee of my presidency of the Health Care Supply Association. I have Amendments 82, 92 and 141 in this group, none of which have much to do with each other, but that is part of the mysteries and delights of grouping.

Amendment 82 is particularly concerned with the challenges facing charities seeking to obtain contracts from public authorities. I am very grateful to NCVO and Lloyds Bank for their briefing on this matter. While all types and sizes of charities experience challenges relating to the commissioning and procurement of public service contracts, smaller organisations often face considerable barriers. Yet a large proportion of the voluntary sector is actually fundamental to the delivery of public services. There are many examples, but we know, for instance, that the voluntary sector is the leading provider of services—according to research commissioned by DCMS—in relation to homelessness, and there are many other services where we are absolutely reliant on the voluntary sector.

However, there is a real problem in the huge amount of work that needs to be done to assemble information and make bids. Advance notice of tender opportunities is important for charities. We know that many of them have far fewer resources than private companies to support bid-writing, so they need time to plan. They also want to take time to work with service users or other charities to develop an offer, and that cannot be rushed. When commissioning services for people, especially those experiencing a range of intersecting challenges, a market does not often exist, so preliminary market engagement is critical for understanding what people need and how those needs could be met.

All my amendment seeks to do is create a presumption that contracting authorities should have ample notice through a planned procurement notice, unless there is a very good reason not to do so. This would allow the necessary time, particularly for smaller charities, to prepare bids.

My Amendment 92 is about the need for rigour and accountability in procurement. It starts from the requirement set by Her Majesty's Treasury to ensure that the investment of public money, especially large sums, is done objectively and in a way that those who have to authorise the investment can rely on. It also deals with the principle of transparency and would ensure that business cases are routinely published.

My understanding is that it is already required under Green Book guidance from Her Majesty's Treasury, particularly for major projects managed in the government portfolio, that at least a summary of the business case has to be published within four months of contract award. The Green Book, which has been regularly updated by the Treasury as circumstances require, describes in great detail the rigorous process that needs to be followed. The principle is that if you do not abide by this, you will not get approval for the expenditure of resources. Much in the Green Book is based on the need for a proper business case and I believe it was also envisaged that the business case would be published.

The problem is that regulation and good practice are too often ignored in the public sector. I think athere is less appetite for proper enforcement of that guidance. All campaigners can do to raise concerns about a particular tender process is go for judicial review, which, as we all know, can be very expensive.

My particular interest is the NHS. When I was a Health Minister, which seems a very long time ago, there were very strict rules about spending and investment by trusts. If public money was sought for a major procurement or programme then a strong authorisation path led from region to department, and often to the Treasury itself. Some of that remains, but what is missing is that the former strategic health authorities ensured that the required processes were followed properly and intervened when they were not. They also ensured that the public were consulted, but much of that has foolishly been thrown away. That means that it has become much harder for the public to hold decision-makers to account.

It is very noticeable that, last month, the Public Accounts Committee published a report on the Department of Health's 2020-21 annual report. It commented that the department

> "has regularly failed to follow public spending rules and across the Departmental Group there is a track record of failing to comply with the requirements of Managing Public Money. The Department is required to obtain approval from the Treasury before committing to expenditure where such authority is needed. The Treasury has confirmed that £1.3 billion of the Department's spending in 2020–21 did not have HM Treasury consent and was therefore 'irregular'. The Treasury has stated that 'in the vast majority of cases' this was because either the Department and/or the NHS had spent funds without approval or in express breach of conditions."

If the noble Baroness, Lady Noakes, was still in the position she held on financial management in the Department of Health, that would not be happening.

My amendment would ensure that there is a proper business case and that it should be publicly available before crucial decisions are taken. If the Minister says that it is already required, the fact is that parts of the public sector are not listening. I hope that this debate will be helpful in ensuring that the Treasury and government departments look at this very closely in the future.

My third amendment follows a briefing from the RNIB and concerns the fact that, in replacing the existing legislation, the Bill overwrites requirements that are of particular significance to 14 million disabled people in the UK because they ensure that publicly procured goods and services are accessible to everyone. It is pretty unclear at the moment how the current Bill will replace that regulatory framework, and my Amendment 141 seeks to re-establish a requirement that contracting authorities have due regard to accessibility criteria for disabled people.

In June last year several organisations, including the RNIB, wrote to the Cabinet Office seeking assurances that accessibility for disabled people would be maintained in public procurement legislation. Responding, the then Minister, the noble Lord, Lord Agnew—who has certainly

shown how you should resign, in style and with full transparency and visibility to your Lordships' House, although I do not think he quite managed the grace of the noble Lord, Lord True, in his very perceptive remarks yesterday—said that the Government are committed to ensuring that accessibility for disabled people is maintained as part of public procurement legislation, and that the new regime will ensure that specifications take into account accessibility criteria and design for all users. Despite that, the only reference we can find to accessibility is in Clause 87(2), which states that any electronic communications utilised as part of the public procurement exercise must be

"accessible to people with disabilities."

This is partly probing—finding out the government response to it. If the Minister argues that the public sector equality duty under the Equality Act is sufficient, we will argue that it is not sufficient because we have seen contracting authorities failing to consider their obligations and procuring inaccessible products. This amendment is only a start, but I hope the Minister will be sympathetic to the issue.

Lord Lansley (Con): My Lords, before I speak to my Amendments 84 and 88, I will just say that, while I do not think it is a registrable interest or a conflict of interests, my experience in these things is largely derived from my work, over a number of years now, advising LOW Associates SRL in Brussels, which has a number of contracts with the European Commission and other European agencies. We have participated in procurements on a number of occasions each year in the European context. That gives one quite a lot of experience of the system we are moving from and some of the ways it can be improved. I put that on the record.

My noble friend and other noble Lords may recall that at Second Reading the most important point I made—it is one I will return to on a number of occasions, including when we talk about the procurement objectives and the national procurement policy statement—is that procurement by the public sector is a very large element of economic activity. The way in which it is conducted can have a significant and beneficial impact on productivity in the economy if the issues of innovation are properly incorporated into the consideration of how procurement is undertaken and who the suppliers to public authorities are.

In a sense, the noble Baroness, Lady Worthington, is trying to do the same kinds of things in Amendments 85 and 87. We are maybe trying to approach it in slightly different ways. The same will be true in relation to the procurement objectives.

I hope that in responding to this debate my noble friend can at least give us a sense that we can work together to try to ensure that the promotion of innovation is one of the central aspects of how contracting authorities go about their process of delivering best value, and that the broader externalities of procurement, through promoting innovation in the economy, are realised. They are significant.

7 pm

Amendment 84 comes to one of the mechanisms which is really helpful from that point of view, which is that tenders themselves should be expressed in terms of what you are trying to achieve, rather than trying to specify in detail how it should be done. I have sat there with tenders for tedious amounts of time, trying to avoid the process of merely rehearsing back to the people who wrote the tender how we are going to do the things that they have already specified we must do, when I would much rather they had said, "This is what we're trying to achieve, these are the outcomes we're looking for, and these are the key performance indicators we propose to put into place—tell us how you're going to do it." If there is a budget limitation or specific requirements, they should tell us those, but they should not tell us that they already know how everything should always be done—as, frankly, it very often felt like they were doing. Often, of course, there was an implicit motive behind this: things were specified in ways that were extremely helpful to incumbents and were difficult for new entrants to comply with, particularly if they had innovative or new solutions to the problems that the public sector was trying to deal with.

I am not fussed about the language; I will not make a stand on it at all. If we can find some way of including in this preliminary market engagement that contracting authorities can go out, engage with their suppliers and new suppliers and find out how the tender can then be expressed in terms which are geared to outcomes and performance indicators, not to specifying detailed processes, let us try to get to that. That is the purpose of Amendment 84.

The purpose of my Amendment 88, on page 11 of the Bill, is geared also to the course of the preliminary market engagement. I was slightly worried when I read this because it seemed to me that, during the preliminary market engagement, contracting authorities need to give additional attention and opportunity to small and medium-sized enterprises, and the same may well be true for new entrants into a marketplace. They need to give them access to information and understanding, because they are often competing against large incumbents.

It feels to me that the legislation is somewhat being written in a way that makes it very difficult for procurement managers not to say, "Oh, but I can't have this conversation with you because I'm not having that conversation with them", and an unfair advantage is then created. It would be very easy to say that an unfair advantage had emerged as a result of such a conversation. So, I thought we needed to make clear that in that context, procurement managers must take account of the relative size of the supplier. I have rewritten it; I ask that the contracting authority takes account

"of the size or experience of the enterprise concerned".

So, if new entrants or SMEs are suppliers to whom contracting authorities can give additional information, opportunities and engagement, the authorities should not construe that to be an unfair advantage. This is all about trying to bring everybody into the tender on a much more level playing field; that is the purpose of Amendment 88, and I commend these amendments to the Committee.

The Deputy Chairman of Committees (Baroness McIntosh of Hudnall) (Lab): My Lords, I understand that the noble Baroness, Lady Brinton—who is contributing remotely to the debates this afternoon—was expecting to speak on this group, but unfortunately,

[Baroness McIntosh of Hudnall]
that message did not reach the clerks or the chair. I believe that the noble Baroness is ready to speak now, so with the permission of the Committee, I invite her to speak.

Baroness Brinton (LD) [V]: My Lords, I declare my interests as a vice-president of the LGA and as a disabled person. I am speaking to Amendment 141, which would ensure that contracting authorities must follow accessibility principles as defined under the UN Convention on the Rights of Persons with Disabilities, or UNCRPD.

The Public Contract Regulations 2015 set out the rules for technical specifications in Regulation 42, saying that it must include "accessibility for disabled persons" as core to characteristics including quality, environmental and climate change performance levels, whole-life design, performance and safety—indeed, many of the things that this Bill is covering.

So, in theory, Amendment 141 should not be necessary. However, Regulation 42(9), on the technical specifications, says that:

"Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications shall, as far as accessibility criteria for disabled persons or design for all users are concerned, be defined by reference thereto."

There are three other sets of regulations—the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011—which all also confirm the conformity with the EU procurement directive. I spoke at Second Reading about that directive.

The very helpful briefing from the RNIB sets out the technical concerns about how we need to ensure that accessibility rules are embedded in legislation following Brexit. This amendment is needed because we must have clear rules for accessibility criteria for people with disabilities and the principles of universal design, as defined under the UN CRPD.

This Government repeatedly say that they were proud to get Brexit done. They also say, proudly on their website, that they want

"disabled people to fulfil their potential and play a full role in society."

In 2017, however, the UN published its *Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland*, which was less than complimentary about the UK Government's progress in abiding by the CRPD. In paragraphs 6(a), 6(d) and 6(e), the UN refers to:

"The insufficient incorporation and uneven implementation of the Convention across all policy areas and levels within all regions, devolved governments and territories under its jurisdiction and/or control … The existing laws, regulations and practices that discriminate against persons with disabilities … The lack of information on policies, programmes and measures that will be put in place by the State party to protect persons with disabilities from being negatively affected when article 50 of the Treaty on European Union is triggered."

It goes on to say in paragraph 7(c) that the UK should

"Adopt legally binding instruments to implement the concept of disability, in line with article 1 of the Convention, and ensure that new and existing legislation incorporates the human rights model of disability across all policy areas and all levels and regions of all devolved governments and jurisdictions and/or territories under its control".

There are 78 paragraphs in this UN report setting out what we must still do to comply with the UN CRPD; the Government are due to report back by 8 July 2023. In other parliamentary debates, Questions, Statements and legislation, Parliament is being told time and again by this Government that they want to meet those requirements because complying with the UN CRPD is an absolute priority.

I give two extremely brief illustrations of the failings, which are obvious to me as a disabled person but may not be to others. They would be resolved with a clear and legally binding requirement for accessibility criteria. The first is a bus driver on a publicly funded route, contracted by a council, who refuses to accept a wheelchair user because that driver still has the power to ignore the law and does not want to ask people to move out of the wheelchair space. The second is that a large number of DWP offices and those of their subcontractors —which are used for the assessment of individuals for their access to benefits, whether specifically disability benefits, universal credit or any other benefit—often have steps or stairs and no lift. There continue to be regular reports in the press of disabled people being marked as "no shows" at interviews when they could not access the building, which then results in them being penalised and not receiving the benefits. That is shameful. It also presumes that there would be no staff with disabilities who need to access the buildings, which is just unacceptable.

That is why we need Amendment 141. I look forward to the Minister's explanation of how this Bill will meet the UN CRPD in relation to all matters on public procurement.

Lord Aberdare (CB): My Lords, I have added my name to Amendment 82, in the name of the noble Lord, Lord Hunt of Kings Heath. As at Second Reading, my contributions in Committee will mainly reflect the interests of small businesses, including in the construction sector, and other smaller providers such as charities and social enterprises; of course, one of the Bill's aims is to increase access to public contracts for such smaller organisations. I am grateful for the briefings that I have received from the engineering services alliance Actuate UK, from the NCVO and from the Lloyds Bank Foundation.

I will try not to repeat the arguments so strongly made by the noble Lord, Lord Hunt, but small businesses and charities often struggle to compete effectively in competitive tendering processes. They do not have teams with specific bid-writing expertise, so it is often chief executives or managers within the businesses who have to prepare proposals on top of their existing full-time and front-line roles. The process of completing pre-qualification questionnaires and invitations to tender is often onerous and complex, requiring considerable time and resources. Tenders are often launched with little or no warning and with tight timescales. Greater lead-in times and awareness of when tenders will be published would better help small businesses and charities to prepare and subsequently compete for relevant contracts.

The existing wording in Clause 14(1) allows for better practice, confirming that contracting authorities are able to publish a planned procurement notice.

But your Lordships will know that being able to do something within legislation does not mean that it actually happens. Amendment 82 seeks to beef up the wording by replacing "may publish" with "must consider publishing" to place a greater onus on contracting authorities to publish a planned procurement notice. I feel that even this requirement is rather a low bar, as well as being extremely difficult to monitor or enforce. My preference might be simply to replace "may publish" with "must publish".

The amendment also states that a planned procurement notice must be considered whenever "no significant barriers exist" and

"no detriment to service recipients would occur".

Again, I might have preferred a more positive criterion spelling out that such a notice specifically should be published when this would enable a diversity of suppliers, including of course small businesses and charities, to participate in the contract. I hope the Minister will be able to tell us how the Government plan to ensure that small businesses and charities will receive proper notice of tenders that might be suitable for them, preferably through a requirement for planned procurement notices to be published in most circumstances.

This is just one aspect of ensuring that smaller contractors are involved early enough in the process, not just to be aware of and prepared for tenders for which they might be able and suitable to bid, but also when appropriate to bring their own skills and innovation abilities to influence the shape of the overall bid. Early contractor involvement is something I may come back to later. I welcome the amendments from the noble Lord, Lord Lansley, which also seem to point in this direction. Meanwhile, I am happy to support the noble Lord, Lord Hunt, in his Amendment 82.

Baroness Worthington (CB): My Lords, I declare my interest as co-chair of Peers for the Planet and will speak to Amendments 85 and 87 in my name in this group. I also apologise as this is the first time I have spoken on this Bill, having not been present at Second Reading, but I read the debate with great interest.

I have tabled amendments to this Bill with three goals in mind: first, to try to embed a consideration of the climate change crisis facing us and the environmental goals we must meet into primary legislation. It is important that this appears on the face of the Bill rather than in a yet to be approved policy statement to show the long-term leadership and clarity around tackling these issues, given that public procurement is such a huge lever on both these issues. Secondly, I am seeking to put climate and nature-positive procurement processes in from the very outset of preliminary market engagement and embed it throughout the award criteria setting process to appointment. Thirdly, I want to bring greater transparency to the process and visibility so that all can see how this important lever is being deployed.

The Climate Change Committee highlighted in its recent progress report to Parliament the importance of ensuring that all procurement decisions by all government departments are aligned with our net-zero goals. My amendments seek to address this recommendation. I look forward to hearing the Minister's thoughts and ask if he would agree to meet myself and other supportive Peers to discuss whether these amendments might be supported.

Amendments 85 and 87 relate to Part 3 of the Bill, under Clause 15, "Preliminary market engagement". They aim to bring in an ambition to the new procurement regime to positively reward and incentivise those suppliers who are innovating and providing climate-positive and nature-positive sustainable products and services. I am very grateful for the interventions of the noble Lord, Lord Lansley, who I think is seeking to achieve a similar goal: to open this market to new entrants and providers. We cannot stay with the status quo; we must see a transition of our economy towards a more sustainable future. This offers government at every level a very important lever. I hope that it would bring economic benefits for business and wider society if we were to do this.

I am very grateful for the cross-party support of the noble Baronesses, Lady Verma, Lady Boycott and Lady Parminter, on these two amendments.

7.15 pm

Amendments 85 and 87 would ensure that, at the preliminary market engagement stage,

"contracting authorities engage with suppliers in relation to designing a procurement process that"

actively seeks out suppliers whose products and services

"maximise public good and encourage innovation … in pursuit of a sustainable and resilient society",

planet and economy. Again, I am not wedded to the wording but simply want to ask the Minister whether there is interest in putting this in the Bill to be clear that this is not a continuation of business as usual and that this is a future-facing Bill seeking to change the issues we know are causing long-term problems.

I remind the Committee that the Cabinet Office's impact assessment on the Bill estimates that the value of spend is approximately 10% of GDP. That suggests that this government procurement accounts for about 15% of emissions globally, so this lever is significant and important. With the support of Parliament, the Government have set themselves stretching targets in relation to climate and nature; as the progress report alluded to, we are not on track. We need a gear change if we are going to get back on track.

The net-zero strategy highlights the role of innovation and accelerating the UK's transition to net zero, as well as the need to leverage public procurement as a tool that drives greener and more resilient outcomes across public services. This has been acknowledged as an important thing and further makes the case for this to be included on the face of the Bill.

The Government have already highlighted their willingness to use almost £300 billion of the annual procurement spend to advance broader policy objectives, saying in the NPPS that authorities should incorporate

"award criteria for comparing final bids and scoring their relative quality, to encourage ways of working and operational delivery that achieve social, economic and environmental benefits."

As the Bill reads, we really only have the words "public good" to give us anything to hang from in defining that; I am sure that we will come on to debate that in further groupings. My amendment seeks simply to

[Baroness Worthington]
operationalise these goals to ensure that, at the point at which we consider offering tenders, we think about the widest possible way in which they could be met, encourage innovation and do not simply settle for the business as it is.

I have great sympathy for Amendment 81, tabled by the noble Lord, Lord Wallace of Saltaire, and the need to introduce a further test to see how we can best meet our goals of public procurement and whether this is an important part of the process that seems to be missing. On that, I will sit down; thank you very much for your time.

Baroness Verma (Con): My Lords, in supporting Amendments 85 and 87, I declare my interests as someone with small and medium-sized businesses in adult social care; as the chair of a renewable energy company; and as someone with 44 years of experience in the SME sector—taking away the 10 and a half years of my Front-Bench life, which excluded me from my businesses.

I start by supporting the amendments tabled by my noble friend Lord Lansley. They very much touch on what the SME sector faces constantly: the challenge of being able to enter into procurement. Today, I had a delegation of small and medium-sized manufacturers come to me from Leicester because they are fed up to the back teeth with constantly being outed from the process of some public sector contracts, with which we could reinvigorate our manufacturing sector. Covid taught us a lot about outsourcing. What we want to do is build back our insourcing. It hits all the challenges that we want to get to net zero on.

Listening to their struggles, I know, having come from the textiles industry at the early age of 19, that this country is remarkably good at producing goods if people are given the opportunities. This Bill will be one of those routes in to being able to demonstrate how much this country can focus on supporting industry, making the procurement system a lot easier. I know that, when we have to do this in adult social care, it is a nightmare to get through the processes because we as an independent business are competing with large organisations that are based overseas and have tens of thousands of pounds to put behind writing bid tenders.

I champion small and medium-sized businesses—particularly from the Midlands because that is my place and I will always champion it—but we are constantly missing out on the great talent that we have here. Reducing our carbon footprint because we can produce things here is a no-brainer for me.

I will go back to my script, which I have worked a little bit on. In its guidance on sustainable procurement, the World Bank recognises the role that procurement can play in driving sustainability goals and highlights the value-for-money benefits of sustainable procurement, stating:

"Sustainable procurement is strategic procurement practice at its optimum."

Taking sustainable procurement considerations into account from the outset of the procurement process is critical. These amendments will help to deliver on that vision and meet the Committee on Climate Change's recommendation in its progress report to Parliament last week that procurement decisions by all government departments be aligned with the net-zero goals.

In ensuring that contracting authorities design a procurement system that proactively seeks out suppliers who are doing the right thing and providing goods and services that help to deliver a resilient society and tackle climate change and biodiversity loss, I hope that my noble friend the Minister will look at these changes and try to incorporate them in the Bill. If we have an opportunity, we should take it now because it will save the planet and will save our own sectors in this country as well.

Baroness Boycott (CB): My Lords, I am happy to support Amendments 85 and 87 in the name of the noble Baroness, Lady Worthington. As we have heard, procurement is an incredibly powerful tool and, if we do not use it in the right way, we will never get to our net-zero targets.

I thoroughly support the aim to shift the ambition of any new procurement regime to positively reward and incentivise suppliers who are innovating and providing climate-positive, sustainable products. As well as helping to achieve our climate and environmental goals, it will bring economic benefits. I would go further and say that we should not award any contracts to people who do not fulfil these categories from now on.

I note that the Government's response to the consultation on the procurement Green Paper commented that many respondents had

"provided details of aspects that they would like contracting authorities to take greater account of, for example more focus on social and environmental impact."

This amendment would help to ensure that contracting authorities always take this goal forward. The net-zero strategy, which many of us have referred to, clearly establishes the strategic importance of net zero at the project design stage. This amendment would make it much easier to draw this golden thread right through the procurement process to the end product.

With that in mind, I conclude that this amendment to incorporate the climate, environment and wider public benefits of procurement at preliminary market engagement when the authority's procurement exercise is at the design stage is fully in line with policy. It needs only to be reflected in the Bill in the permissive way in which it is expressed in this amendment. I very much hope that the Minister will welcome it.

Before I sit down, I support Amendment 82 from the noble Lord, Lord Hunt of Kings Heath. As someone who has chaired many charities and tried to work with local authorities about picking up contracts that have lapsed, such as meals on wheels, I can say that you really need to know in advance what money might be available. No one should take the charities sector for granted in this respect.

Lord Wigley (PC): My Lords, I am delighted to follow the noble Baroness. This group of amendments brings together three different but equally important threads that are material to this Bill, each of which deserves a place in these debates on the Bill in its own right.

First, there are the environmental points, which were mentioned a moment ago by the noble Baroness, Lady Worthington, and noble Lords subsequently added to them. They are fundamental. If it is government policy to aim at challenging targets to save our environment, that must be written into every aspect of public policy. It must be written into this aspect of public policy and others. We should not leave any opportunity going begging. This is an opportunity to have that in a Bill and to make sure that it is clearly understood by all those involved in the various diverse aspects of the procurement system.

Equally important is the question of how we regenerate the economy. Central to that must be the role of SMEs. They are a vital cog in the economy. They are the acorns from which the future will grow. They can also be very compatible with the environmental arguments to which we have referred. The points made by the noble Lord, Lord Lansley, the noble Baroness, Lady Verma, and my noble friend Lord Aberdare are important. I know that we will return to them on subsequent amendments, but we must not lose sight of them because these elements are vital to regenerating the economy in a sustainable way.

The third aspect, which I want to concentrate on for a moment, is disability. That agenda has been close to my heart for the past 40 or 50 years. The speech made by the noble Baroness, Lady Brinton, brought it home to us. As long ago as 1981, I had brought to my attention the social definition of disability: that a handicap is a relationship between a disabled person and his or her environment, be that the social environment, the physical environment or the psychological environment, and that we may or may not be able to do anything about the basic disability but we can almost always do something about the environment, be that the physical environment, the social environment or the psychological environment. Therefore, the extent to which a disability leads to a handicap rests with us in society in controlling those three elements. Clearly, that responsibility must run into all aspects of economic life and is therefore relevant to the Procurement Bill before us.

I very much hope that the amendments we have heard about—in particular, Amendment 141 in the name of the noble Lord, Lord Hunt, but others as well—are passed to ensure that this matter is written into the Bill and that we have no misunderstanding. These three elements—the environmental element, the small business and economic regeneration element and the disability element—are central to the procurement system.

Baroness Parminter (LD): My Lords, it is a great privilege to follow the noble Lord, Lord Wigley. I echo all the comments he made. I want to make a brief remark in support of Amendments 85 and 87 in the name of the noble Baroness, Lady Worthington, which I and my colleagues have co-signed, and in support of the point made so powerfully by the noble Lord, Lord Wigley, about ensuring that there a commitment in the Bill to deliver the net-zero and environmental goals through a commitment to ensuring that "public goods" includes sustainability goals. That is fundamental.

I will add only one point that has not been covered by colleagues. It is that this is not happening at the moment. The National Audit Office and the Environmental Audit Committee in the House of Commons have looked into public procurement by government departments and found there to be a woeful lack of connection with consideration of net zero and our environmental goals, and that is when government departments already have a statement from the Cabinet Office that is meant to guide them towards it. It is not happening, but that is completely separate from the far wider issue of where it is absolutely not happening, which is in public services procurement, where there is no guidance. If we do not have a national public policy statement on that, it will not happen, so it is absolutely fundamental that we get this in the Bill.

7.30 pm

My second point, which has been alluded to by a number of colleagues, is the way that the noble Baroness, Lady Worthington, has skilfully linked putting sustainability in the Bill with innovation. I absolutely agree that those two things are fundamental. I do not mind what wording the Government take, but those two things have to be looked at together. With all the issues that the noble Lord mentioned, if we do not get innovation clearly sorted out, then companies involved in net zero and the environment are the disruptors. They are small companies, not the established big boys—or big girls, if you want to be gender neutral. That is about as far as I will go on gender neutral before we get into arguments. We need to make sure that the Bill prioritises innovation. Otherwise, we will not be able to ensure that the smaller disruptor organisations which are involved in net zero and the environment can play the role that we need them to play in future. Therefore, I look forward to the Government's response to these points around putting into the Bill a commitment to sustainability goals through delivering the net zero and environmental goals and ensuring that innovation is in the Bill at the same time.

Lord Berkeley (Lab): My Lords, I support all the amendments in this group, but particularly those tabled by my noble friend Lord Hunt of Kings Heath. In his introduction, he emphasised the importance of rigour, accountability and transparency. I would add advance notice. The Minister who responds may say that it is all in the Treasury Green Book. It probably is, but anybody who has looked at small projects—localism, levelling up, town centres—will know that you have to comply with the Treasury rules, but it is hard to find them, especially for people who do not understand them too easily. My noble friend has put in this amendment and all the other things that go with it. It is really important in a Procurement Bill that people know what to expect and how to do it.

It also needs to be not confidential. I have a couple of examples. The first is an excellent example of the need for a business case. Some noble Lords may know that Cornwall Council was supporting a new stadium for football, rugby and everything else in Truro, which everybody seems to want, and there is private sector involvement. Last week, Cornwall Council decided that it was not going to do this and withdrew from it,

[Lord Berkeley]
saying that there was no proper business case. That was brave, when everybody wants it, but there was no business case. At least it understood what was going on, but that is not the case for an awful lot of other people—I have mentioned the ferry to Scilly before, but will not mention that again—and the other side of it is things such as HS2, where the budget goes up through the roof.

My final question to my noble friend—I know he will do it for Report—and a few other people, concerns how you enforce these things when something goes wrong. That is the biggest problem that we have not solved yet. I look forward to the Minister's reply.

Lord Wallace of Saltaire (LD): My Lords, I hope the Minister is impressed by the cross-party consensus on a number of things on this issue. At the moment, this is very much a skeleton Bill. The demands to put more in the Bill come from all parts and relate to a number of different clauses. I hope that he will be able to respond outside Committee, between Committee and Report, to consider whether the Government might be able to come back to satisfy some of these requests with appropriate language. As we have already stressed, the language is already there in a number of government publications; it is just not in the Bill. I look forward to his response.

Lord Coaker (Lab): My Lords, here we go. This is an important part of the Bill dealing with process, and some things have been incredibly difficult to understand. Now we get to things that we can feel. We are talking about purchasing, buying and procurement. We are saying that if we are going to do that, we have a real opportunity as a Parliament—and the Government have a real opportunity, to be fair, but it is going to be driven by some of the amendments here—to use procurement to produce the country and society that we want. Many Governments and local authorities have failed to use the power of that purchasing to drive social change. That is what these amendments are about. I think it is sometimes important to set the context for the various amendments here. I suspect that to an extent there will be a bit of a clash on that because, to be honest, some of us take a position that the free market should be interfered with more than it is. Others take the view that the free market will sort these things out because it will. That is a view, and I think there will be a clash.

Some of these amendments should be in the Bill. The Government will say what they are seeking to achieve. The amendments in this group on the pre-procurement phase are to legislate to enforce it and to make it a reality rather than an aspiration—something that we think would be a good thing to happen. I wanted to say that. I shall wax lyrical at different times to set the context of amendments because otherwise they get lost. Many of the points that have been made on amendments are very important. If I were the Government, I would make more of them. To be frank, the Government may need a bit of advice at the moment. I would not be the person to give it to them, but if I were doing that I would make more of it as a Government, saying that this is what the Government are seeking to achieve, and they will be driven by people in this Committee, and no doubt elsewhere, to go further.

I have a couple of things specifically on the amendments. The noble Baroness, Lady Noakes, will be pleased because this is about a word—I warned them. In Clause 14, which is about the pre-procurement phase, the word "may" is used on a number of occasions. We are discussing what should be in planned procurement notices, which is Clause 14, what should be in preliminary market engagement, which is Clause 15, and what should be in preliminary market engagement notices, which is Clause 16. Those clauses do not insist that the notices are published but say that they "may" be published. Why not have "will" or "must"? The word "must" is used in other clauses in this part, so somewhere along the line, whoever drafted the Bill said, "We will have 'must', but in these clauses, we will have 'may.'" I am always told that this does not make any difference and that the intention is to do that, but why leave it to chance when many of the amendments in this group, ably spoken to by different members of the Committee, are dependent upon a planned procurement notice being published, a preliminary market engagement taking place or a preliminary market engagement notice being published? The amendment could be passed, but it would not make any difference because it only "may" be done, not "must" be done. I hope that is as conflated and convoluted as I get and that the Committee takes the point. I think it would be helpful to the Committee to understand why the word "may" is used in certain clauses and not "must".

All sorts of really good amendments in this group have been presented to us. I want to make a couple of points about them. My noble friend Lord Hunt, the noble Lord, Lord Aberdare, and the noble Baroness, Lady Boycott, made a point about the role of charities and small businesses, as did the noble Lord, Lord Lansley. Everybody agrees that we have to do more to help small businesses, that we cannot let the big players dominate, that we have to get new entrants and to support them, and asks why we cannot grow business in this area and do more about young people trying to start something. Here is the opportunity. Here is the chance to use procurement to drive the sort of change and make the social difference that we want it to make. The noble Lord, Lord Lansley, is absolutely right that we should use procurement to do it. Other noble Lords who have spoken have made the same point, so it goes all the way through.

The noble Lord, Lord Wallace, is absolutely right about the delivery model for outsourcing that he talked about. One of the disgraces of the last 20 or 30 years is the way in which some things have been forced to be outsourced. I am not an ideological puritan about this; I understand that sometimes it might be the right thing to do—I have got in trouble with my own party for saying that. It is the compulsion to do it that is the problem; where it defies common sense, that is the problem. In those circumstances, the noble Lord, Lord Wallace, and those who support him are quite right to address that.

I was also particularly pleased with the noble Lord's proposed new subsection (1)(c) in Amendment 81, which I thought he might have emphasised. It talks

about outsourcing being able to be brought back in where it is not delivering what it said it was going to deliver. That has been the plague of many things: when something is outsourced and it seems that it is impossible to do anything about it. That is what the amendment seeks to do—another noble Lord in the debate made the point about what you do in those circumstances.

I will just say quickly that I support what the noble Baronesses, Lady Worthington, Lady Verma, Lady Boycott and Lady Parminter, and other noble Lords said on climate change and environmental protection. We need to wake up to this. People say that people are not interested in politics, but they are interested in climate change and environmental degradation, and they cannot understand why something is not being done—why billions of pounds are not used to drive change. This is a real opportunity to do that, and I hope that the Government will take it. No doubt the Government will say that they have all sorts of policies around climate change—Acts, regulations and other things—and that of course they support tackling it. Who does not support trying to do something about climate change and environmental degradation? Everyone supports it. But sometimes the actual will is not there to deliver it through practical policy which will make a real difference. That is the point of the amendment before us.

Lastly, on my noble friend Lord Hunt's point about disability, I cannot remember the figure from the RNIB briefing—I had a quick look but I cannot remember what it was—but millions of people were potentially impacted.

A noble Lord: It was 14 million.

Lord Coaker (Lab): Some 14 million people were potentially impacted according to the briefing that we had on the limitations on access ability and all those sorts of things. That should be a wake-up call to us as well, and again, it is something that we can use. I thank my noble friend Lord Hunt and those who have supported him for bringing that forward.

I will finish there. This is a wake-up call to this Committee. This debate should be in the Chamber. This is a massive debate about billions of pounds which can be used to generate social change and to change the direction of the country in a way that there is probably a consensus about in many ways. Sometimes in Committee we forget how important it is. We are legislating in a way that will have an impact on the lives of millions of people in this country—and people across Europe and so on, without going into it too much. The impact is enormous, and that is what we are doing in this Room, and why we are bothering to stay here on a Thursday night without finishing.

Noble Lords: It is Wednesday.

Lord Coaker (Lab): Is it, my Lords? I am that excited and I have been speaking that long—is it still Wednesday?

Lord True (Con): My Lords, if that is an offer to come back tomorrow and carry on, I do not know how popular that will be.

There are many things that I like about the noble Lord opposite. First, he is very likeable and fun to be with. Secondly, he has a long connection with the great city of Nottingham, which he will know is something that I share. Thirdly, there is what Mr Baldwin would call his awful frankness. However, there is something of a philosophical divide that will come through in this discussion. I will reply in detail to the amendments, but what we have heard from the noble Lord is that the Labour Government that he envisages would want to use the powers under this Bill to constrain individual private companies that sought to provide public services to conform to the will of whatever the Labour Party's wishes in power might be.

7.45 pm

"Hear! Hear!" from the whole of the other side. That is the interventionist Labour Party that has never changed and will never change its spots and there it is. The noble Lord invited this: he made a great declaratory statement about the importance of Committee, when we can set out what we actually believe and think, and we heard that. Yes, he is right: that voice should go beyond this Committee because there is a philosophical difference.

I understand all the points that are being made in this debate, fundamentally important points in relation to accessibility, disability, environmental concerns, small businesses and so on. I understand the aspirations of noble Lords to see these objectives going forward. As the noble Lord himself said, this is done through the broad construct of the legislation that a Government that has been formed can put before the country. It does not have to be, and I would submit it should not be in many of these cases, put through a procurement Bill that is designed to enable. We heard a great plea, which I support, to enable SMEs and charities to come forward. If we make this Bill too complicated, and encrust it too much, as some noble Lords are asking, that will work against the very objectives that some others in the Committee have been asking for. So, there is a philosophical difference: the Government wish to have a flexible and lasting framework, and we hope one that is more simple.

Lord Wallace of Saltaire (LD): Flexibility, I think I understand, means a skeleton Bill. I think we all understand that. It will either be in the strategic policy statement, which we will come to, or it needs to be in the Bill. I think that around the Committee, everyone will feel that more ought to be in the Bill than is there now, so that we all know where we are going. If we are not allowed to have a draft of the strategic policy statement before the Bill finishes its passage, that is really not adequate.

Lord True (Con): My Lords, I think the noble Lord makes a slightly different point. It is a point of concern, and we discussed it on the earlier group. I understand that how much is in secondary legislation and so on is a concern to noble Lords. When I talk about flexibility, I am talking about a structure that is simple and clear, and does not say, "Before you apply to procurement, you have to do a, b, c, d, e, f, g, h…". We could probably use up the whole alphabet with the aspirations

[LORD TRUE]
that we will hear in this Committee before anyone can get past the starting gate that we are discussing now. One needs to bear in mind the need for that sort of flexibility. That is the relative simplicity I am thinking about. However, time is late and I need to respond, not to the debate launched by the noble Lord opposite, but to the amendments.

My noble friend Lady Noakes came forward with a very thoughtful amendment, as always. There has been an outstanding debate, and I will want to study it in *Hansard* and reflect on everybody's contributions. My noble friend had a very specific point in relation to estimation of cost and how services should be aggregated. Her probing amendment seeks to establish where the Government are coming from.

The proposed methodology in the Bill for estimating the value of contracts, which allows some flexibility, is very similar to the long-standing valuation rules in existing regulations and will therefore be helpful to procurers. Paragraph 4 of Schedule 3 contains an "anti-avoidance" provision that is designed to ensure that contracting authorities do not artificially subdivide procurements in order to evade the rules. This mirrors an analogous concept in the long-standing regulatory scheme but we think that it is presented in a simpler and more user-friendly way. It involves a general rule that contracting authorities should, where possible, seek to aggregate for the purposes of valuation but, as my noble friend said, it also permits exceptions where there are good reasons. Without the "good reasons" exception, the provision becomes something of a blunt instrument.

My noble friend asked for some examples so I will give one: an authority buying its printers from a particular supplier does not necessarily mean that it should buy all its toner, paper and servicing from the same supplier if it believes that it can get a better deal elsewhere. We believe that contracting authorities need to continue to have discretion not to aggregate where they have good reasons not to do so. I will look carefully at my noble friend's point about the overall estimation of costs but we do not believe that it would be desirable to set out in legislation what constitutes a good reason because this will depend on the circumstances of each case. I request that this amendment be withdrawn.

Amendment 81, tabled by the noble Lord, Lord Wallace, seeks to add elements from the Government's *Sourcing Playbook* as a new clause before Clause 14 to require contracting authorities to conduct a "delivery model assessment" when introducing "significant change" in their business model, helping to inform strategic decisions on insourcing and outsourcing. I agree with the noble Lord that rigorous assessment of contracting authorities' plans is essential for good delivery. However, again, we have continuously sought throughout the development of the Bill to ensure that it remains flexible and does not unnecessarily stipulate blanket requirements, which tie contracting authorities down to a single process that adds unnecessary burdens or will not necessarily work in all cases. For example, "make or buy" decisions, which the noble Lord asked about, need to be considered carefully—indeed, our commercial guidance in playbooks includes comprehensive guidance on this—but, in our submission, it is not necessary for this to be mandated in legislation. Furthermore, large outsourcing contracts will obviously be scrutinised by departmental, Cabinet Office and Treasury controls to ensure value for money and successful delivery.

So we believe that these things should not be mandated by legislation and that this is already achieved through the development and implementation of the sourcing playbooks, which the noble Lord kindly drew our attention to and actually complimented very much with his desire to put them into primary legislation. I am grateful for his endorsement of those principles.

I turn to Amendment 82, tabled by the noble Lords, Lord Hunt of Kings Heath and Lord Aberdare. Some of the underlying arguments on this clause obviously touched on extremely important issues. The amendment proposes to amend Clause 14 to create a presumption that contracting authorities should publish a "planned procurement notice" unless there is good reason not to. Again, I agree that it is vital that the market—particularly certain aspects of it to which the noble Lord and others referred—is given sufficiently early warning of what contracting authorities intend to buy so that suppliers can gear up to deliver. This is particularly important for SMEs and charities, which were referred to by the noble Lord and others.

The Bill makes additional provision to this effect in Part 8. Contracting authorities with an annual procurement spend of more than £100 million will already be required to publish a "pipeline notice", which will contain information about upcoming procurement with an estimated value of more than £2 million that the contracting authority plans to undertake in the reporting period. This will allow suppliers to see higher-value upcoming procurements and make a decision on whether they wish to bid.

However, contracting authorities should be left to determine where planned procurement notices are useful for lower-value contracts, owing to the potential burden. I will come back to charities. Contracting authorities are incentivised to make use of these notices through a reduction in the tendering period in circumstances in which they are properly issued. They will not necessarily be useful in all circumstances; as such, the Government are currently not of the view that it would be helpful to mandate their use, but I will reflect on what the noble Lord said.

Amendment 84, tabled and interestingly spoken to by my noble friend Lord Lansley, seeks to add to the purposes of "preliminary market engagement" in Clause 15(1). This includes,

"ascertaining how the tender notice may be expressed in terms of outcomes and"

KPIs

"for the purpose of minimising … processes".

Focusing on the outcomes of the contract, as opposed to being too prescriptive on how these are achieved, is indeed a sensible reason for conducting preliminary engagement—I agree with my noble friend on that. Contracting authorities are encouraged to consider KPIs in their preliminary market engagement. For example, Clause 15(1)(c) includes

"preparing the tender notice and associated tender documents".

I will look at the Bill against what my noble friend has said, but, as I have said, in some respects the Bill already provides for this and encourages the purpose that he has asked for in terms of Clause 15(1)(c) giving the purpose of preparing the tender notice and documents.

Amendments 85 and 87, tabled by the noble Baroness, Lady Worthington, and others, are important. They provide that, when undertaking "preliminary market engagement", contracting authorities may engage with suppliers in relation to designing a procurement process that will maximise certain public goods and encourage innovation. I very much hear what noble Lords across the Committee have said about innovation, and I will certainly take that thought away. I think there would be a lot of understanding and support in government for that aspiration; innovative new entrant suppliers should be actively sought out.

We wish to promote and encourage contracting authorities to conduct preliminary market engagement. However, this engagement needs to be appropriate and related to the subsequent procurement. Imposing such an obligation on contracting authorities could have the counterproductive effect of disincentivising preliminary market engagement which, I am sure we all agree, would not be desirable.

Baroness Worthington (CB): Just to clarify, Amendment 85 would not make a mandatory requirement; it simply places it under the "may" condition of Clause 15. Therefore, it does not materially change Clause 15 but just explicitly states that we are seeking this process to draw out innovation.

Lord True (Con): I take the noble Baroness's point and understand what she is saying. This takes me back to the opening remarks. We have doubts about the appropriateness of including wider policy objectives, such as those suggested in the noble Baroness's amendment, in this piece of primary legislation. Each procurement is different, and what is appropriate, for example, for a large-scale infrastructure project, may not be appropriate for a smaller, price-driven transactional arrangement. The strategic priorities that a Government require contracting authorities to have regard to when carrying out their procurement functions are, therefore, better detailed in the national procurement policy statement—which we will debate later in Committee—than in primary legislation.

Amendment 88, tabled by my noble friend Lord Lansley, seeks to require contracting authorities to take into

"account … the size or experience of"

suppliers when determining whether the supplier's involvement in preliminary market engagement has placed them at an unfair advantage and, therefore, whether they should be excluded from any subsequent procurement. Like other noble Lords who have spoken, my noble friend put forward a thought-provoking point. As I said earlier, I agree with the importance of building capacity among SMEs. We have seen an increase in spending on SMEs in recent years. Figures published last month show that government spending with small businesses rose to a record £19.3 billion in 2020-21—the highest since records began. We hope that the new procurement regime will make it simpler, quicker and cheaper for suppliers, including SMEs, charities and social enterprises, to bid for public sector contracts, and with lower barriers to entry to the market.

8 pm

The noble Lord, Lord Aberdare, made a powerful speech on this, and later in the discussions in Committee we will come, in Clauses 32 and 33, to provisions that reserve certain contracts to supported employment providers and public service mutuals directly benefiting charitable organisations and the people they serve. The Government's sourcing playbook encourages procurers during preliminary market engagement actively to seek out, as my noble friend was asking, small and medium-sized enterprises that can help improve delivery, as well as voluntary, community and social enterprises. That is important and is in the playbook. The legislation will help SMEs, I say in response to my noble friend Lady Verma, who also made a strong speech. I forgive her for being Leicester; one cannot be Nottingham all the time. It is a wonderful and great city.

Under the Bill, bidders will have to submit their core credentials only once on to a single platform, for example, making it easier for smaller organisations to bid for a public contract. Simplified bidding processes will make it easier and more efficient to bid and increase opportunities for SMEs. Reforms to frameworks will allow longer-term open frameworks, which will be reopened for new suppliers to join at set points so SMEs are not locked out. Dynamic markets, a new concept which we will discuss later in the Bill, will remain open to new suppliers and will, we hope, provide greater opportunities for SMEs to join and win work. We will come back to this issue on later groups. Prompt payment is another important matter. The Government certainly share my noble friend's aspirations that contracting authorities are able, under the new legislation, to design their preliminary market engagement in a way that gives consideration to small and medium-sized enterprises, but the amendment as drafted risks breaching the equal treatment obligations that contracting authorities owe suppliers by putting smaller suppliers at an unfair advantage. That is a point that my noble friend wishes to challenge us on and we will have engagement on these matters. We will no doubt discuss it before Report.

Amendment 92 from the noble Lord, Lord Hunt of Kings Heath, seeks to insert a new clause to ensure that for any contract in excess of £1 million a business case is published at least 42 days in advance of a tender notice being published. Again, while we share the noble Lord's drive towards greater transparency and have worked hard to deliver that, in our view this would create disproportionate burdens for contracting authorities that would outweigh the real-terms transparency benefits. While we would hope and expect that for contracts of that size, contracting authorities would have a clear business case, that is not the same as saying they should be published. Such documents may contain confidential commercial information that the contracting authority might need to keep private, or they might need a public interest test and redaction, which would add to the burden on the contracting authority. In our view, once the burden of publication is balanced against the benefits of the transparency of

[LORD TRUE]
the data, there is no overall advantage to requiring publication, but I will reflect very carefully on what the noble Lord has said because in seeking to protect legitimate commercial interests, it may create work as well as opportunity: there is a balance there.

Lord Hunt of Kings Heath (Lab): I am grateful to the noble Lord for considering my amendment. Does he accept part of my premise, which is that some public authorities are really not doing the right thing at the moment, despite Treasury rules and guidelines? In fact, the qualification the PAC made to the DH report is some evidence of that in relation to the NHS.

Lord True (Con): My Lords, I could not possibly be tempted, particularly at 8.04 pm when the Committee needs to finish shortly and I already have a very long response to a large number of amendments. The Bill does have pipeline notices, which I have discussed: I will engage with the noble Lord on that before Report and I welcome that.

Amendment 141 is about a hugely important issue to which so many noble Lords spoke. The noble Baroness seeks to amend Clause 24 to require contracting authorities to take account of accessibility and design for all principles when drawing up their terms of procurement, except in duly justified circumstances. This is an issue of fundamental importance. It is of concern for disabled people, and I know that your Lordships hold concerns about accessibility very close to their hearts; it comes up in every piece of legislation.

As part of our broader goal of a simpler regulatory framework and increased flexibility to design efficient, commercial and market-focused competitions, the Bill does not dictate how terms of procurement including technical specifications are to be drawn up, which is the issue around Clause 24. It simply contains what is prohibited by international agreements and applies to all "terms of a procurement" as defined in Clause 24(5). We believe that this approach is better than the existing approach, as buyers are forced to truly analyse and develop the content of their specifications to address the needs of all those the public contract should support.

The UK has legal obligations, which we readily own and which will dictate how terms of procurement are drawn up, with accessibility covered by Section 149 of the Equality Act 2010, as mentioned by the noble Lord opposite. We consider that helps deliver the intended outcomes of both the current duties in this area contained in Regulation 42 of the Public Contracts Regulations 2015 and of this amendment.

I have heard the very strong speeches made by noble Lords on all sides, and I have seen the submissions from the RNIB and others. It is very important that we should have constructive discussion to test whether the Bill delivers the accessibility that your Lordships hope for. The Government remain absolutely committed to ensuring that public procurement drives better outcomes for disabled people. In our contention, there is no dilution of the commitment to accessibility under the Bill. The Government are clear that accessibility criteria should always be taken into account in every procurement, and the existing legislation ensures that that is the case.

However, we will engage further on this and on the other themes and points put forward by so many noble Lords in this wide-ranging debate. In those circumstances, I respectfully request that the amendments are withdrawn and not pressed.

Baroness Noakes (Con): My Lords, the only amendment that is going to be withdrawn is my rather small amendment in this group, Amendment 22. My noble friend said that we needed flexibility, and that good reasons were there to allow flexibility. I completely buy the need for flexibility in the procurement rules, but I still wonder whether good reasons without some other constraint around them are sufficient. I was pondering whether the good reasons need to be attached to value for money, or something similar. That may be covered by the interaction with Clause 11, which sets up procurement objectives, but I am probably too tired to work that out in my own mind at the moment. I will consider it further, and my noble friend the Minister, who also said he would consider it further, might like to reflect outside this Committee on how that works out. For this evening, I am sure that everyone will be mightily relieved if I beg leave to withdraw my amendment.

Amendment 22 withdrawn.

Schedule 3 agreed.

Clause 4: Mixed procurement: above and below threshold

Amendment 23 not moved.

Clause 4 agreed.

Clause 5: Utilities contracts

Amendment 24

Moved by ***Lord True***

24: Clause 5, page 3, line 41, after "works" insert "wholly or"

Amendment 24 agreed.

Clause 5, as amended, agreed.

Schedule 4: Utility activities

Amendments 25 to 28 not moved.

Schedule 4 agreed.

Clause 6 agreed.

Clause 7: Concession contracts

Amendment 29 not moved.

Clause 7 agreed.

Committee adjourned at 8.10 pm.