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PARLIAMENTARY DEBATES
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HOUSE OF LORDS
OFFICIAL REPORT

ORDER OF BUSINESS

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

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

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

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

House of Lords

Wednesday 2 November 2022

3 pm

Prayers—read by the Lord Bishop of Leeds.

Oaths and Affirmations

3.05 pm

Several noble Lords took the oath or made the solemn affirmation, and signed an undertaking to abide by the Code of Conduct.

Water Companies: Pollution
Question

3.08 pm

Asked by ***Baroness Hayman of Ullock***

To ask His Majesty's Government what assessment they have made of the decision by Ofwat on 3 October to penalise 11 water companies for failing to meet their targets, including on pollution incidents.

The Minister of State, Department for Environment, Food and Rural Affairs (Lord Benyon) (Con): My Lords, the Government welcome this robust regulatory response from Ofwat where water companies are underperforming. It provides a great example of strong environmental and economic regulatory frameworks in action. The penalties to these 11 water companies were the result of missed performance commitments on areas such as water supply interruptions, pollution incidents and internal sewer flooding. The Government will continue to work with regulators to hold companies to account on their environmental and other commitments.

Baroness Hayman of Ullock (Lab): My Lords, the Minister just mentioned that the 11 companies fined by Ofwat missed targets in a number of areas: water supply interruptions, pollution and internal sewer flooding. The problem is that these performance commitments do not set the bar particularly high, which makes it extremely worrying that so many companies are falling short, some by a considerable distance. Does he believe that the current sanction, which sees failing companies having to repay customers a proportion of their bills in future years, is enough to bring about the improvements that we so desperately need? With this in mind, how does he respond to the suggestion by Ofwat's newly appointed chair, Iain Coucher, that the regulator should be granted powers to debar the directors of egregious water companies?

Lord Benyon (Con): I take what the noble Baroness says about the level these sanctions are set at. If she thinks that there are areas that could be improved on, we will work with Ofwat to do that. She talks about this as though it is the only area of enforcement. Where water companies have failed to achieve their environmental standards and illegally pumped sewage into rivers, enormous fines have been applied, which have had a dramatic impact on the amounts of dividends that they have been able to award.

Baroness McIntosh of Pickering (Con): My Lords, will my noble friend estimate for the House the contribution that the 300,000 new houses being built will make to the problem? When will we have an end to the automatic right to connect so that we will have antiquated, antediluvian pipes replaced with modern pipes that can actually take sewage from these new houses?

Lord Benyon (Con): Enormous amounts of money have been spent on new water infrastructure, but sewage companies are responsible for the maintenance and resilience of drainage and wastewater networks. To address current and future pressures on drainage networks, we are making drainage and wastewater management plans statutory through the Environment Act, so they will be consulted. They have to put these forward as a legal measure to ensure that they take into account the pressure of new housing.

The Duke of Wellington (CB): My Lords, is the Minister aware of some analysis done by the Rivers Trust that shows that the monitoring of our rivers by the Environment Agency has much reduced in recent years? It would probably say that it does not have the resource. Could he consider either adding to its resources or at least redirecting its priorities?

Lord Benyon (Con): We have put more money into the Environment Agency and it has been recruiting more enforcement officers to do precisely that. We are also working with citizen science. I pay tribute to the Rivers Trust and others that are providing people to assist the Environment Agency in assessing the quality of river water.

Baroness Bakewell of Hardington Mandeville (LD): My Lords, as someone who lives in an area which is likely to see a reduction in water bills due to penalties from Ofwat, I would prefer our rivers, waterways and seas to be sewage-free rather than to receive a small monetary handout. It appears that the threat of financial penalties is insufficient to encourage water companies to change their damaging environmental practices. Are the Government ready to propose more stringent means to ensure that water companies invest in infrastructure rather than directors' bonuses?

Lord Benyon (Con): We are seeing precisely that. There has been a £56 billion investment in infrastructure, the biggest investment in real terms that the industry has ever seen. Further to the question asked by the noble Duke, I can say that since 2015 the Environment Agency has brought 54 prosecutions against water companies, securing fines of almost £140 million. In 2022 the EA has already concluded six prosecutions, with fines of more than £2.4 million, so we are seeing not only more investment but more enforcement, and the Government will insist on an improvement in the releases of sewage into rivers.

Lord Bellingham (Con): Norfolk is fortunate to have a number of remarkable chalk streams, which provide spectacularly important habitat. What more can be done to protect them?

Lord Benyon (Con): My noble friend raises a very important point. The chalk streams strategy, written by Charles Rangeley-Wilson, whom I suspect was my noble friend's constituent, is a brilliant piece of work which the Government have accepted and which will form the basis of our policies to put these very valuable environmental and ecological systems in a pristine state as quickly as possible.

Baroness Jones of Whitchurch (Lab): My Lords, the Minister talked about the enormous fines that can be given to water companies, but Ofwat has already admitted that it is able to fine up to only 10% of their turnover. Ofwat said that this is a very small percentage of the value of those companies, because they are so asset-rich. Will he look again at the limits on the fines that can be passed on to the water companies, because they are clearly not working?

Lord Benyon (Con): I am very pleased to make the noble Baroness's day by saying that we have increased a thousandfold, from £250,000 to £250 million, the upper limit on which water companies can be fined.

Baroness Browning (Con): My Lords, have the Government given consideration to changing the building regulations, particularly with regard to rainwater run-off, so that the water is recycled and not taken into the system, thus reducing the volume going out of the system?

Lord Benyon (Con): My noble friend is absolutely right to raise this. One of the problems is that water coming off roofs and driveways—absolutely clean water—goes into the same sewerage system. To separate foul water from clean water has been estimated at costing between £350 billion and £600 billion, which would have a dramatic effect on people's bills. However, there is nothing to stop us trying to do this with new housing, as well as retrofitting it into existing housing, and ongoing discussions are taking place with other government departments to see if this can happen.

Baroness Boycott (CB): My Lords, by no means wanting to excuse the water companies anything, I say that, certainly in the west of England, a lot of the river pollution comes from industrial food farming, particularly chickens and nitrates. What are the Government doing to fine it for its contribution to the pollution in our rivers?

Lord Benyon (Con): The noble Baroness raises a very severe problem. We rightly hold water companies to account, but they are only part of the problem. Phosphates from the poultry industry have caused rivers such as the Wye—one of the great rivers of our country—to become, in part and at certain times of the year, practically ecologically dead. We have to recognise that there is a planning issue, alongside the way in which we support and incentivise farmers, and the way in which we enforce these issues, which all have to be brought together. We all want to see things such as food security, free-range eggs and broiler houses in this country, but not at the price that we are now paying in rivers such as the Wye.

Lord Brooke of Alverthorpe (Lab): My Lords, if we are bringing these all together, what are the Government going to do when they have brought them together?

Lord Benyon (Con): I refer the noble Lord to the Environment Act as a first measure, probably the most significant piece of environmental legislation that any country has brought forward. That brings with it controls and sanctions, alongside a new statutory policy statement to Ofwat, to give it more powers, higher enforcement fines and many other things that I have already discussed this afternoon. I hope that he can see, on reflection, that there is a plan, and that we are determined to end the shameful situation of illegal outflows into rivers, whether it is from sewage or from illegal pollution coming from farmland.

Baroness Jones of Moulsecoomb (GP): My Lords, those of us who watch this situation closely do not actually think that Ofwat is doing a very good job. A case in point is that it fined Thames Water £50 million, which was great—but Thames Water is now giving each of its customers £3.40 as a sort of recompense. Does that sound reasonable or fair?

Lord Benyon (Con): As part of this failure to hit its commitments, Thames Water will be returning to customers next year £51 million. An average household water bill to take all the fresh water into a household and remove all the dirty water is just over £1 a day, which is a lot of money for someone on low income, but in terms of household incomes, it probably sits well below energy costs, for example. This system of being able to return money to customers is absolutely at the heart of the kind of incentives we want to see.

Schools: Resources

Question

3.19 pm

Asked by ***Lord Watson of Invergowrie***

To ask His Majesty's Government what resources they plan to make available to schools in England to ensure that they can remain operational for five days a week.

The Parliamentary Under-Secretary of State, Department for Education (Baroness Barran) (Con): My Lords, we will always support schools so they can stay open five days a week. Alongside the additional £4 billion that we are investing in schools' core funding in this financial year, the energy bill relief scheme will protect schools from high energy costs over the winter. There is further support available in cases of serious financial difficulty, and we encourage schools that are struggling to come forward to the department to discuss this.

Lord Watson of Invergowrie (Lab): My Lords, it is a major failure of government support for children's learning that some schools are even considering closing for one day a week to save on crippling costs. The Minister mentioned the £4 billion already committed for this year, but that is not enough: a recent survey by the National Association of Head Teachers found that 90% of schools expected to run out of money by the beginning of the next academic year. Will the Minister commit that she and her fellow DfE Ministers will fight their corner with the Treasury to ensure that sufficient funding goes to schools to enable them to at least maintain current levels of provision?

Baroness Barran (Con): I will respond to the noble Lord in two ways. He is well aware that as a nation we face incredibly difficult decisions over our public expenditure and the fiscal challenges we face, but as a department we are always on the side of children and teachers. We do everything, and use evidence in every way we can, to make our case.

Lord Addington (LD): My Lords, does the Minister agree that schools are an important part of every community? They also contain a large part of things such as playing fields, theatres et cetera. What are the Government doing to make sure that these are available to the community outside the school day? Can we have an assurance that they will not be cut in the name of making sure that budgets are balanced?

Baroness Barran (Con): I absolutely agree with the noble Lord that schools are an incredibly important part of their local communities. The Government's position is that it will be up to individual schools to decide how to use their assets, but clearly those assets can bring in additional revenue for schools, so I would be most surprised if they cut them at the present time.

Baroness Blower (Lab): My Lords, levelling up will not succeed unless schools are fully funded. That includes teachers' and other staff's salaries, as well as energy bills and all other costs, which the Minister has mentioned. I repeat my noble friend's question: will the Minister make strenuous representations on the absolute need to fully fund school budgets?

Baroness Barran (Con): We always make strenuous recommendations on that. Perhaps I was sensitive to the noble Lord's phrase; I think he used the term "fight". We are trying to work collaboratively to get to the best answer for the country.

Baroness Wheatcroft (CB): My Lords, as we have seen in new figures produced today, the cost of basic foodstuffs has gone up by a massive amount. What are the Government doing to ensure that school meals are not losing some of their nutritional value for the children who need it so much?

Baroness Barran (Con): Again, the Government work closely with schools, but ultimately it is within schools' own responsibilities to organise and fund their school meals from their core funding.

Baroness Chapman of Darlington (Lab): My Lords, 98% of the 630 head teachers surveyed by the Association of School and College Leaders said they would have to make savings to meet the rocketing costs of energy, food and school supplies. Two-thirds of them believe they will have to cut support staff and 17 are having to consider closing for a day a week, with a devastating impact on families and children. Does the Minister not find it astonishing that, despite several suggestions of ways to provide funding that would keep schools open, such as making private schools help shoulder the costs, abolishing non-dom status or a windfall tax on the energy companies, Ministers refuse even to consider these options when our schools face such pressures right now?

Baroness Barran (Con): As I said in my opening response, the department is absolutely committed to supporting schools. We have worked through our school resource management teams and saved more than £1 billion so far, and our *School Resource Management* strategy sets out work with schools to save another £1 billion. In the school sector we see pressure on all schools—I do not dispute that for a second—but some schools are finding it easier than others. We need to work to understand how we can share that best practice across the whole sector.

Lord Laming (CB): The Minister knows very well that a number of schools employ specialist staff who help children who have difficulty in school. Many of these children come from disturbed homes or have particular problems in their own lives. Will the Minister assure the House that the department will continue to place an emphasis on this kind of staff, so that these children are not lost to the education system?

Baroness Barran (Con): As ever, the noble Lord raises an important point. Obviously, we will be able to say more about that in our responses to a number of the reviews into this area towards the end of the year. He will also be aware that we have raised funding for high needs by £1 billion to £9.1 billion. We remain very committed to that area.

Lord Lexden (Con): Will my noble friend ask the Treasury to bear in mind that, since the Second World War, the proportion of national wealth devoted to education has risen by a comparatively small amount—infinitely less than the amount devoted to the NHS, for example? May I also ask my noble friend whether there is any substance in the recent reports that the Government are, at long last, considering serious reform of the education system, including the introduction of the British baccalaureate?

Baroness Barran (Con): My noble friend is right on the share of national wealth. On the British baccalaureate, the department is obviously considering the remarks made by the Prime Minister and we will be reverting in due course.

Lord Foulkes of Cumnock (Lab Co-op): My Lords, in reply to my noble friend Lord Watson, the Minister said that schools were going to have to suffer because

[Lord Foulkes of Cumnock]
the economy had been trashed by the Conservative Government. Are we living in a parallel universe where the leaders of this country have heated swimming pools in their second homes—

Noble Lords: Oh!

Lord Foulkes of Cumnock (Lab Co-op): Noble Lords can "Oh" away, but it is true. Whereas swimming pools in schools are being closed down and children who desperately need free school meals are not getting them. This is a total disgrace.

Baroness Barran (Con): I think that the noble Lord was in a parallel universe, because I certainly never used the language that he quoted back at me and I hope that he will accept that that is the case. Schools had the largest increase in funding—5.8% in cash terms in the current year. We have increased starting teacher salaries by 8.9% outside London. The noble Lord can shake his head, but those are the facts.

Baroness O'Loan (CB): Will the Minister assure the House that full funding will be made available for the increases in salary to which she has just referred, so that schools will not have use their existing budgets to pay these increases in salaries and as a consequence be unable to stay open five days a week?

Baroness Barran (Con): I think the noble Baroness may be aware that the Institute for Fiscal Studies has commented that in the current year it sees the salary increases as being affordable by schools.

Baroness Hussein-Ece (LD): My Lords, may I take the noble Baroness back to nutritious school meals? She may be aware of distressing reports of some children turning up to school with empty lunch boxes because their families are on universal credit or their household income is more than £7,400, which is the cut-off point for free school meals. What is being done to make sure that no child spends a school day hungry?

Baroness Barran (Con): The number of children who are in receipt of free school meals is at the highest level it has ever been—37% of the school population.

Lord Austin of Dudley (Non-Afl): My Lords, education ought to be the country's number one priority, so school budgets should be the very last place the Government look to make savings, particularly after children had such a terrible time during the pandemic. I do not know a single state school that continued to provide a full timetable during lockdown. Children from poor or overcrowded homes, or those with special needs, will find their lives blighted for ever. The Government need to do much more to sort this out.

Baroness Barran (Con): I am not entirely clear what the noble Lord's question was. The Government do work very closely with schools to support them to do this. The balance that we need to strike is to make sure that schools are using funding as efficiently as possible, and we need to understand the pressures under which they operate.

West Coast Main Line

Question

3.29 pm

Asked by ***Lord Snape***

To ask His Majesty's Government what discussions they have held with Avanti West Coast about the (1) frequency, and (2) reliability, of train services on the West Coast Main Line.

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Vere of Norbiton) (Con): My Lords, the department meets Avanti West Coast regularly to discuss operational performance. This includes monitoring the delivery of its plans to restore and improve its services. From December, Avanti plans to operate 264 daily train services on weekdays, which is a significant step up from the around 180 daily services at present.

Lord Snape (Lab): My Lords, I first congratulate the Minister on surviving the departmental cull. She is one of the few surviving stars in an ever-changing galaxy, as far the Department for Transport is concerned. Long may she continue to twinkle.

Noble Lords: Oh!

Lord Snape (Lab): Will she accept that Avanti is incapable of running the skeleton service that it is supposed to provide at present? Will she accept that its prospects of increasing that service in the way that she outlined are pretty slim, given its record so far? Is there some ideological reason why those of us who are condemned to use the west coast main line cannot enjoy the same facilities as those who use the publicly run east coast main line? Could she ask the Rail Minister —perhaps she could tell us who this is—whether we can be provided with the same standard of service as those who are lucky enough to live on the east coast?

Baroness Vere of Norbiton (Con): I am grateful to the noble Lord for his kind words, and I am sorry only that I am not the Rail Minister, who is my honourable friend Huw Merriman in the other place. As noble Lords may know, he is the former chair of the Transport Committee, so he knows his onions. On Avanti, the noble Lord is right: as I have said many times, we are not content with the service provided. We are content that a plan is in place, and it is being scrutinised as it is being implemented. Avanti remains on probation, and the operator of last resort remains an option, of course.

Lord Mackenzie of Framwellgate (Non-Afl): My Lords, the Minister will recall that I praised the LNER east coast service last week, and I was supported by the noble Lord, Lord Palmer. The Minister agreed that the quality of staff was important, but she also said that nationalisation was not the solution to the

problem on the west coast, as described by the noble Lord, Lord Snape. Has the Minister made an assessment of the management and provision of the services on both sides of the divide in the country to determine why a parallel service working on one side is managed far better by her department than a similar operator in the private sector? Is this due to poor investment, bad management or excessive dividend payments?

Baroness Vere of Norbiton (Con): My Lords, the train network is extremely complicated, and it is not a homogenous system. That is why the performance of the train operating companies is subject to independent adjudication, which is really important. The Government will take their performance into consideration when they come to any future decisions.

Lord McLoughlin (Con): My Lords, I draw attention to my registered interest as chairman of Transport for the North. If Avanti's commitment to 264 services is not met, what does my noble friend imagine the department's response will be, bearing in mind that it does not have very long to do so?

Baroness Vere of Norbiton (Con): The Government are confident that those services will come on stream, as agreed with Avanti. The services form part of its recovery plan, which we are monitoring as times progress, as are the ORR and Network Rail's programme management office. I would like Avanti to succeed, and we are giving it all the support to do so. But, if it does not, action will of course have to be taken.

Viscount Waverley (CB): The Minister might wish to agree on the essential importance of an effective rail system to transport freight. Would she care to make a statement on that, with particular reference to the west of the country and any challenges that are being faced there?

Baroness Vere of Norbiton (Con): Yes, I know that the noble Viscount is a great champion of freight. The west coast main line is a key corridor for rail freight, particularly between the deep seaports and the distribution hubs both in the Midlands and across the country. Indeed, the industry estimates that about 90% of all intermodal trains use the west coast main line for part of their journey—that is, 90,000 trains a year—so that is also great for emissions reduction. We want to keep rail freight moving. We understand that this can be challenging when there are engineering works, and we take that into consideration. Where there is strike action, we do our best to communicate with the freight sector to ensure that it can plan accordingly.

Lord Jordan (Lab): My Lords—

Lord Goddard of Stockport (LD): It is the turn of this side; noble Lords from other parties have had three questions on the trot.

Can the Minister be brought back to the here and now? There should have been a national strike tomorrow; it has been transferred to next week, which is the run-up to Remembrance Sunday. On Monday, there is rail strike and a Tube strike; on Tuesday, there are no tickets for sale for the north on Avanti trains; and on Wednesday, there is a national strike. I spoke to the manager of the Union Jack Club this morning, who told me that this is going to have devasting effects on bookings by people trying to come down for Remembrance Sunday. So what can the Government do to stop this indiscriminate guerrilla strike action that is bringing misery to hundreds of thousands of people at the very time of remembrance? This is a time when people want to remember the freedoms we got from people who died in the First and Second World Wars and other conflicts throughout the world: freedom to move, freedom to associate with each other and freedom to come to remembrances. These union barons must be held to account for at a whim changing these strikes to make it more difficult for people to travel at times when they need to travel—it has to stop.

Baroness Vere of Norbiton (Con): Perhaps the noble Lord would like to cross the Floor.

The noble Lord is completely right: strikes are hugely disruptive to people who want to come to Remembrance Sunday and related events around that time, and to those who want to go to school or work. We remain committed to trying to resolve these strikes; we do not want them to continue. However, we must have an agile and modern workforce so that we can deliver a modern seven-day railway. If the unions stand in the way of that, we cannot the deliver the passenger services that are required.

Lord Herbert of South Downs (Con): My Lords, the performance of the operator on the west coast main line cannot be excused, but is it not also the case that there are severe capacity restraints on the west coast main line? It is Europe's busiest mixed-use line, which means that it is hard to increase the number of passengers or freight in the long term. Does that not remind us of the importance of increasing capacity, which means continuing with the HS2 project that will not only increase speed but capacity, thereby relieving that line and two other main lines in the country?

Baroness Vere of Norbiton (Con): My noble friend is absolutely right: there are capacity constraints on the west coast main line that impact both passengers and freight. It is also the case that the west coast main line is fairly old, and therefore engineering works are necessary; that caused some disruption between 22 and 30 October. So he is absolutely right that we must continue to invest in our railways, and that is what the Government are doing.

Lord Jordan (Lab): My Lords, is the Minister aware that the promises made by Avanti to run three trains an hour from London to Birmingham have not been honoured, and, worse still, that it is now running only one train an hour between two of the country's largest cities? Could she tell us why—despite making surely the understatement of the year that the performance of Avanti trains was dreadful—its contract was extended?

Baroness Vere of Norbiton (Con): I am not entirely sure where the noble Lord gets those figures from, because my understanding is that on weekdays between

[Baroness Vere of Norbiton]
7 am and 9 am—for example, between Birmingham and London—the services are actually at pre-pandemic levels. Of course, there have been changes to the timetable at some other points, but that is very much down to changes in travel habits, such that the system needs to have a demand-led timetable so that we can ensure that people can travel when they need to.

Baroness Randerson (LD): If I were a nurse and decided to work only half my contracted hours and demanded to be paid my full salary, I would be rejected out of hand. Yet Avanti has essentially done this: it has provided less than half its service to some major cities, but it is still paid the standard contract fee. I ask the Minister: why are DfT contracts written so loosely that it is still entitled to that?

Baroness Vere of Norbiton (Con): I think it is absolutely right, as I said earlier, that the performance is subject to independent adjudication. If there is any action to be taken by the DfT, we would follow the legal and contractual processes. We are aware that there is an opportunity to improve our contracting as we move forward and that is why we hope to move to passenger service contracts in due course to encourage competition and enable services to run as they should.

Ministers: Government Business

Question

3.40 pm

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

To ask His Majesty's Government what further steps they will take to ensure that ministers do not use private (1) mobile telephones, and (2) email accounts, for conducting government business.

The Minister of State, Cabinet Office (Baroness Neville-Rolfe) (Con): The Government have robust systems in place to protect against cyber threats and we are vigilant in ensuring that these are up to date and meet the challenges of the modern world. Just yesterday, the Security Minister announced that he was establishing a new task force from across departments, the security and intelligence agencies, the private sector and civil society to meet these big challenges. All new Ministers receive a general security briefing in their first weeks in government. The National Cyber Security Centre and government security officials then regularly provide Ministers with specific advice on protecting personal data and managing online profiles, as well as on best-practice guidance.

Baroness Jones of Moulsecoomb (GP): But the system is not robust, as the Minister claims. The previous Prime Minister had her phone hacked. The Home Secretary leaked classified information and, during the early days of Covid, Johnson, the Prime Minister, used a phone that then was lost with all messages unobtainable. At this rate, we are going to have to ask the Russian secret services for all the details about where and when ministerial decisions were made. [*Laughter*.]

Baroness Neville-Rolfe (Con): I do not think it is right to laugh.

Noble Lords: Oh!

Baroness Jones of Moulsecoomb (GP): I am not laughing.

Baroness Neville-Rolfe (Con): Good. The Government take matters of security very seriously. Of course, I am not going to comment on individual cases—that would not be appropriate—but I draw attention to the fact that the Home Secretary has provided a very detailed account, step by step, in a very full letter to the Home Affairs Select Committee and, of course, she apologised for her error and resigned. The Prime Minister has now appointed her to do a very important job.

Baroness Smith of Basildon (Lab): My Lords, the noble Baroness will be aware that the former Prime Minister, Boris Johnson, and his entire Cabinet at that time, many of whom are now back in the Cabinet, were warned in 2019 not to use their personal phones for business but it appears that some continued to do so. Can the Minister confirm what guidance was given to Cabinet Ministers at that time? Is it still being given to Cabinet Ministers? How is that guidance being enforced and is not obeying those rules a breach of the Ministerial Code?

Baroness Neville-Rolfe (Con): I will not, of course, comment on the particular; however, it is the case that government systems should be used, as far as practicable, for government business. The guidance issued and kept under review does not rule out the use of different forms of electronic communications in some circumstances. There has to be a place for a variety of digital channels. Ministers have informal conversations from time to time and they have to use a variety of digital communications for personal, political and parliamentary matters.

Lord Scriven (LD): My Lords, Ministers have said that they are conducting government business on Signal, a messaging app that deletes messages after five seconds and can block screen grabs. How is this compatible with official rules on the use of private devices for such business, particularly when having to send copies of messages to civil servants?

Baroness Neville-Rolfe (Con): As I said, government systems should be used as far as practicable. In some cases it is not possible to do that, and in some cases it is not appropriate—for example, changing the time of a meeting can be done perfectly well in this digital world. Having said that, the Cabinet Office has previously published guidance on how information is held; it is always being looked at and updated to reflect modern forms of working and technology—and, of course, the changing threat. Cyber and technology are changing all the time, which is why this work is so important and why I mentioned the task force set up under Minister Tugendhat.

The Lord Bishop of Leeds: My Lords, I sympathise over the complexity of this matter, particularly given the technological developments, but there is the question

of principle, which does not particularly relate to the recent cases cited. Several decades ago, when I was at GCHQ, the slightest security misdemeanour meant that you lost your job. Does that principle—that making a serious security error has consequences and a simple apology will not do—still apply? I cannot think of another circumstance in which an apology would have sufficed.

Baroness Neville-Rolfe (Con): I am glad that we have the advice of somebody who used to work at GCHQ; it shows the breadth of this House and what we are able to do on security. I have explained that the Home Secretary apologised and that she resigned. We have discussed before that she has come back—you can have redemption in this life. You need to have respect for security and make sure that you are ahead of the game but, occasionally, you also need to be able to say, "I did the wrong thing", and you need to be forgiven.

Lord Cormack (Con): My Lords, some of us think that government was rather more efficient before the advent of social media. Would not it be a good idea to make twittering an offence?

Baroness Neville-Rolfe (Con): I think you might not be the most popular person in the world, if you made twittering an offence.

Noble Lords: Tweeting!

Baroness Neville-Rolfe (Con): Tweeting has a place in modern news communication. The point that we all need to understand—and I assure noble Lords that, as a new Minister, I have taken the briefing that I have had very seriously—is about when you can use social media and non-government communications and when you need to be very careful. Of course, in some cases you cannot even use official digital communication for secret stuff; it has to be looked at in a particular location and on paper.

Lord Forsyth of Drumlean (Con): Is Halloween not over and is it not time that this witch hunt ended?

Baroness Neville-Rolfe (Con): I agree. Since I came to the Dispatch Box—I am sorry that I have lost my voice—I have been trying to move the debate forward. That is why I was emphasising the role of the UK on cybersecurity, which is an impressive one. I know, because I had to attend three days of a cybersecurity conference in Singapore while Secretaries of State were busy on other matters. I found that the UK's work was highly respected and took a great deal of comfort from that. It is very important that we invest in the future and support the task force that has been set up and is going to draw on expertise from across the House.

Baroness Smith of Newnham (LD): My Lords, it is good to know that the Minister has had training on security but yesterday's *i* suggested that some of the UK's closest allies are so concerned about the Government's use of repeated use of personal devices for government business that they are beginning to consider what security briefings they should make available to the United Kingdom. Is that not a reason why her colleagues in government should think again about using personal devices for government business?

Baroness Neville-Rolfe (Con): I am always careful to question individual reports, but I repeat that we take a leading role on the global stage in countering state threats, and we will continue to work closely on this with like-minded allies and partners to defend UK interests, and the international rules-based system, from hostile activity.

Lord Griffiths of Burry Port (Lab): My Lords, the Minister has told us that she is unwilling to talk about case histories and so on, although she has given us a pretty fulsome step-by-step report on the Home Secretary's resignation and reappointment. In view of the fact that she began by telling us from the Dispatch Box today that this is not a laughing matter—that it is very serious—and the sober words from the right reverend Prelate about his experience of GCHQ and the seriousness of these lapses, can she confirm from the Dispatch Box that to describe what we are going through as a witch hunt is inappropriate?

Baroness Neville-Rolfe (Con): I note what the noble Lord says, but I must say that I have some sympathy with my noble friend Lord Forsyth: we really need to move forward. I went into detail on the Home Secretary only because she wrote a letter in great detail, which I think is of interest to people who take an interest in these matters. We need to move forward and to support those in the security services and others trying to defend national security and, even more importantly, anticipate the new threats coming at us all the time. The digital world is changing, as I know from my recent trip, and we have to work to strengthen defences, but in a reasonable, sensible way.

Police: Vetting, Misconduct and Misogyny

Private Notice Question

3.51 pm

Asked by ***Lord Coaker***

To ask His Majesty's Government how they plan to respond to the report of His Majesty's Inspectorate of Constabulary and Fire & Rescue Services on vetting, misconduct, and misogyny in the police service.

The Parliamentary Under-Secretary of State, Home Office (Lord Sharpe of Epsom) (Con): I thank the noble Lord for his Question. This report contains extremely concerning findings about policing culture and vetting processes, which are falling short of the standards expected and damaging public confidence in the process. Forty of the recommendations in the report are for policing itself to adopt, for chief officers and the College of Policing respectively. Chiefs have committed to addressing the recommendations in full and the Home Office will consider and respond to its three recommendations in due course.

Lord Coaker (Lab): I thank the Minister for the reply, but today we learned from the police inspectorate's report of extraordinary failures in the vetting of applicants to join the force. Is it true that at a time when confidence in the police is being undermined, hundreds, indeed thousands of officers are on our streets who are guilty of serious offences? How has that happened and when was the Home Office aware of it? Is it acceptable that officers with convictions for robbery, indecent exposure and domestic abuse, and links with serious and organised crime, have been accepted? How is it possible that we read of unwarranted stops of women by officers as a result of the so-called booty patrols? This is happening now. It is not historic—it is not "Z Cars" or "Dixon of Dock Green"—so the need for action is urgent. What are the Government, with the police, going to do in practice? The time for reviews is over. It is action that is needed, is it not?

Lord Sharpe of Epsom (Con): It is, and I agree with the noble Lord entirely that it is completely unacceptable to have those people in our police forces. The fact is that the chiefs need to take immediate action to ensure that vetting is prioritised in their forces and the public can therefore have confidence in them. It is the responsibility of the individual police forces; they are responsible for their own vetting decisions, which they should take in accordance with guidance from the College of Policing. Frankly, I agree with the noble Lord: it is incredibly disappointing—worse than disappointing—that, despite some progress, previous warnings about vetting have not been acted upon. Chiefs must make clear to the vetting units the high standards they expect from them. There is no excuse for poorly recording the rationale in the vetting decisions.

Lord Paddick (LD): My Lords, this is yet another devastating report on the police service—devastating particularly for female victims, who will be wondering whether they can trust the officer who arrives when they call the police, and devastating for the majority of decent hard-working police officers, who have again been let down by successive Conservative Governments and their own senior officers. Every single time there is mass recruitment in the police service, more of the wrong people slip through the vetting net, and police misconduct, corruption and criminality increase. It happened in the mid-1970s and in the mid-2000s, and it is happening again now. Will the Government tell the police that quality is more important than quantity, and will they give police chiefs the legislation they need to enable them to deal effectively with corrupt officers?

Lord Sharpe of Epsom (Con): I am not entirely sure I share the noble Lord's analysis of the quality problem. The fact is that a new online application process has been introduced, replacing an old assessment centre system called SEARCH. The new process operates according to national guidelines and it has been reasonably successful so far. Some 83,500 candidates were invited to complete the assessment; 58,000 have had their results marked and 42,500 have been successful—that is 73.55%. It is not just online; all the candidates have to pass each stage of the recruitment process, which includes assessment centres, vetting, medical assessments and fitness tests—there are lots of face-to-face aspects of the process. I am not convinced that an uplift in numbers affects quality.

Baroness Chakrabarti (Lab): My Lords, when asked about these matters the noble Lord says repeatedly that police vetting, discipline and recruitment must be left to chief constables themselves, but should there not be a legislative framework for this? The Government are very ready repeatedly to legislate for extra police powers but not for what the public deserve, which is a rigorous legislative scheme for recruitment, vetting and discipline.

Lord Sharpe of Epsom (Con): That is the way the system is currently set up. As I say, the Home Office is not trying to absolve itself in this regard, but the fact remains that the vetting processes, which vary to some extent across forces, are the responsibility of chief constables.

Lord Dear (CB): My Lords, I remind Members of the House of my previous service in senior positions in a number of police forces in this country. The report in the newspapers this morning will fill all of us with concern—indeed, dismay. The findings of the inspectorate report are horrific. There will be many factors behind this, but I ask a question on one factor only: the need for staff training to develop leadership. The Home Office disbanded the Staff College—and this is nothing to do with the College of Policing—some 12 years ago. It was not re-established, and it badly needs to be so. Do His Majesty's Government have any plans to re-establish the Staff College?

Lord Sharpe of Epsom (Con): Not as far as I am aware, but I defer to the noble Lord's specialist knowledge on this subject and I will take the question back to the Home Office.

Lord Browne of Ladyton (Lab): My Lords, in his first Prime Minister's Questions last week, Rishi Sunak chose to close the session by bragging and baiting the leader of the Opposition—to braying from the Tory Benches—saying that there are 15,000 new police officers on our streets. When he did so, how much did he know about the scale and nature of this—that hundreds, perhaps thousands of those people may have passed through flawed vetting processes?

Lord Sharpe of Epsom (Con): I have no idea what the Prime Minister knew or did not know.

Baroness Foster of Oxton (Con): What is the role of the police and crime commissioners in dealing with a matter such as this?

Lord Sharpe of Epsom (Con): As my noble friend will be aware, and as we debated extensively earlier this week, police and crime commissioners, along with chief constables, are responsible for setting out individual forces' ways of dealing with and performing on these matters.

Lord Bach (Lab): I ask the Minister gently about the decision to get rid of police officers during the first eight years or so, from 2010 onwards. Now that the Government have changed their policy, there is a need to get a lot of police officers in as quickly as possible in order to tackle crime. Does the Minister not think that those early decisions, in Budget after Budget, to take money away from police recruitment were terrible mistakes?

Lord Sharpe of Epsom (Con): I obviously cannot answer that. I do not know if it was a good idea or not. The fact remains that the recruitment drive, as part of the police uplift programme, is delivering a large number of police officers. To reassure the House, there is no evidence to suggest that this is responsible for any adverse decision-making in vetting.

Lord Campbell of Pittenweem (LD): My Lords, is not the essence of this report contained in the third paragraph of the foreword, which says:

"Some police officers have used their unique position to commit appalling crimes, especially against women. Some forces have repeatedly failed to implement recommendations – from us and other bodies – that were designed to prevent and detect such behaviour"?

Who is responsible for ensuring that the police implement these recommendations?

Lord Sharpe of Epsom (Con): My Lords, it is a matter for individual forces. I am pleased that the HMICFRS report and its recommendations have been accepted in full. The National Police Chiefs' Council chair made the point in the report that chief constables, supported by national bodies, will act on these recommendations and put the problems right. We cannot risk predatory or discriminatory individuals slipping through the net because of flawed processes and decision-making. The noble Lord's question is completely right; this is shocking, and I hope they do something about it with extreme speed.

Baroness Blower (Lab): My Lords, clearly, there is a significant problem here. There is a system-wide failure if, as the report says today, officers were satisfactorily transferred between forces

"despite a history of attracting complaints".

Moving a problem from one force to another does not solve it. Will the Government take urgent steps now to deal with these matters systematically and coherently?

Lord Sharpe of Epsom (Con): Again, the noble Baroness is right: it is not right that these people get transferred across forces. I think I have outlined in previous questions the large number of people who are currently on barred lists. The forces are working on this, and it is a matter for chief constables to enforce. As I just said in my previous answer, they have accepted the need to do so speedily.

Lord Hamilton of Epsom (Con): Following the noble Baroness's comment about transfers to other police forces, can my noble friend tell us whether the Police Federation has had anything to do with this?

Lord Sharpe of Epsom (Con): I am afraid I do not know; I cannot answer my noble friend.

Lord Russell of Liverpool (CB): My Lords, the subject of this Question takes us back to many of the areas we covered in both the Domestic Abuse Act and the Police, Crime, Sentencing and Courts Act, so there is a strong sense of déjà vu all over again. The Minister has made much about it being up to individual police forces to take what action they consider appropriate. I suggest to him, on the basis of this report and others, that they are not assuming their individual responsibility with any degree of similarity or with great efficiency. I listened to BBC Radio 4's "Woman's Hour" this morning, which is very informative. Is the Minister aware that an ex-head of the Greater Manchester police force, when asked what advice he would give to the young female members of his own family regarding interactions with the police, was unable to answer the question, saying, "I'm not quite sure"?

Lord Sharpe of Epsom (Con): I did not hear the programme to which the noble Lord refers, but that is obviously very shocking indeed. The body responsible for vetting guidance is the College of Policing, which will consider any areas where vetting can be strengthened and respond accordingly. This is done within a national application framework, so it is hoped that this will be corrected, as I say, with extreme speed.

Baroness Symons of Vernham Dean (Lab): My Lords, listening to the Minister's answers, one could be forgiven for coming to the conclusion that he is saying that the Government have no responsibility for this. I find that quite extraordinary. Why can the Government not bring forward a legislative framework to ensure that these sorts of police abuses cannot occur?

Lord Sharpe of Epsom (Con): My Lords, I think I have outlined the current system; that is all I am doing. I am not saying that the Government are not very concerned by this report, but the simple fact of the matter is that the Government do not have responsibility for operational policing.

Lord Wallace of Tankerness (LD): My Lords, the Minister just said that that is the current system. Are the Government satisfied with the current system, and if not, what are they are going to do about it?

Lord Sharpe of Epsom (Con): It is not in my gift to do anything about it, but I will take the noble and learned Lord's suggestion back to the Home Office and make sure that there are further discussions on the outcome of this report, and indeed this discussion.

Lord Cormack (Con): My Lords, it is frequently said, "If it ain't broke, don't fix it", but on this occasion it is broke and it does need fixing. Will my noble friend take that message, from all sides of this House? In particular, will he reflect upon the very sensible suggestion of the noble Lord, Lord Dear, who really does know what he is talking about?

Lord Sharpe of Epsom (Con): I reassure my noble friend that I did say I would reflect on the suggestion of the noble Lord, Lord Dear, and I intend to do so.

Lord Brooke of Alverthorpe (Lab): The Minister is very well regarded in the House. He is on a difficult one today, but would he express a personal view on what he believes should be done in regard to the question from my noble friend Lady Chakrabarti?

Lord Sharpe of Epsom (Con): No.

Lord Brown of Eaton-under-Heywood (CB): Does the Minister feel that the time has come for a royal commission? Every day in this House we have a new fundamental problem—police and crime commissioners, police reporting, police culture or the question of whether there are too many differing police forces. Is it not time for a fundamental look at the relationship between government, the police and any other related body, to try to re-establish the reputation, which we have long gloried in, of our police forces in this country?

Lord Sharpe of Epsom (Con): What I would say—and this is a personal opinion—is that it is very clear that the nature of policing is changing dramatically and has done over the past 20 years. We have just heard about the technological changes that have taken us all by storm over the last decade, and about the vast number of reviews, reports and so on. It seems to me that there is a case to be made to bring many of these strands together and do some new thinking.

Lord Judge (CB): What, if anything, is being done to see whether there are serving officers in the police today who may be in the category of those regarded by the whole House, and indeed the nation, as a complete insult to police officers?

Lord Sharpe of Epsom (Con): The noble and learned Lord asks a very good question. Nine forces were—this is appalling English—deep-dived into by the HMICFRS. All nine chief constables have been alerted to the specific case studies that were raised and they are expected to act on this with extreme speed.

Lord Judge (CB): There are 43 forces; the others are not immune from this problem.

Lord Sharpe of Epsom (Con): No, they are not. Indeed, there was considerable data sampling across the rest of the forces, so a very similar process will be undertaken with the rest.

Royal Navy: Conduct towards Women

Commons Urgent Question

The following Answer to an Urgent Question was given in the House of Commons on Monday 31 October.

"I was concerned by the recent reports in the media that have prompted this UQ, little knowing that I would be answering it this afternoon. Allegations of bullying, harassment and sexual assault in the Submarine Service are and will be taken extremely seriously. Any activity that falls short of the highest standards in the Royal Navy is totally unacceptable and not a true reflection of what life should be. Sexual assault and harassment have no place in the Royal Navy and will not be tolerated.

The First Sea Lord has directed a formal investigation into these allegations, and this commenced on 24 October. This independent investigating team, led by a senior female officer, will thoroughly examine the allegations and report back very soon. It is understood that the named individual has agreed to meet the investigation team to provide her account. While this investigation will review specific allegations, Defence will also review the culture of the submarine community and report to Ministers in due course. The House will understand that it would be premature to offer any further comment or debate until those investigations are complete. However, anyone who is found culpable will be held accountable for their actions regardless of their rank or status.

While some of the incidents referred to in the media are historical, it is important to note the large-scale policy changes that were introduced across Defence in the past year. As a result, Defence will deal with incidents and allegations of sexual abuse better. The new policies will ensure zero tolerance of unacceptable sexual behaviour or of sexual exploitation and abuse within Defence. All allegations of sexual offences will be responded to, victims will be given greater support and there will be a presumption of discharge for anyone found to be engaging in this kind of behaviour.

These policies will ensure that Defence will deal with these types of incidents differently. They will build trust and confidence in Defence's ability to deal with unacceptable behaviour and demonstrate that supporting people who are victims of unacceptable sexual behaviour is a top priority. The House should be reassured that the Royal Navy has taken and is continuing to take decisive action to address the allegations that have been brought to light and will report to Ministers when the investigations are complete, at which point I feel sure that there will be a further opportunity to explore the detail."

4.07 pm

Lord Coaker (Lab): My Lords, we are all immensely proud of our Armed Forces and our Royal Navy, and pay tribute to their work to keep us safe at home and abroad. So it is extremely concerning to read recent reports of inappropriate behaviour, including sexual abuse, on the submarines providing our deterrent. Is the welcome report that the First Sea Lord has ordered into this to be made public? What is the timescale for that report and what is its remit? The recent survey by Sarah Atherton MP showed thousands of women had endured bullying, harassment or intimidation. How are the Government building the confidence needed in both the Royal Navy and our Armed Forces in general so that women have confidence in the system when they do come forward?

The Minister of State, Ministry of Defence (Baroness Goldie) (Con): I thank the noble Lord. As indicated, when these very serious allegations surfaced, the First

Sea Lord acted immediately to express his profound concern and order an investigation. My understanding is that the investigation commenced on 24 October. There is a scheduled date of completion of 18 November, with the caveat that there is complicated work to be done. Helpfully, the complainant is, I think, prepared to appear before the inquiry. To reassure your Lordships, the investigation will include an individual from outside Defence, who is currently being selected for his or her independence, probity and integrity, who will be alongside that investigation.

On the House of Commons Select Committee report, I have regarded that as a pivotal influence in the MoD as to how we respond to behaviours within the Armed Forces. To reassure your Lordships, the committee made in total 53 recommendations and conclusions, and I am delighted to say that the MoD has accepted 50 of these. There were three that it did not accept on a matter of policy. We are busy implementing and have already substantially implemented these recommendations. We made an update report to the committee in July, and I will appear before the committee next Tuesday afternoon to further confirm the MoD's position. Great progress has been made, but that does not in any way diminish the sense of horror when we read of allegations such as those which have surfaced.

Baroness Smith of Newnham (LD): My Lords, the Atherton report suggested that 62% of women in the Armed Forces who replied had experienced bullying, sexual harassment, sexual assault, rape or some form of harassment or discrimination during their military careers. It is good to hear that the MoD has responded to many of the recommendations of the Atherton report, and the Minister's response in the House of Commons to Tobias Ellwood on the Question about the Navy does say that this is an historic allegation. Could the Minister reassure the House, and any women currently serving in the Armed Forces, that they are not at risk of rape or other serious crimes—because the legacy is not good?

Baroness Goldie (Con): The noble Baroness makes a very important point. I think it is important to remember that nearly 90% of the respondents to the committee would recommend the Armed Forces to other women. I found that reassuring, but that is no reason for complacency on the part of the MoD. I can say to the noble Baroness that over the past year, since we responded to the Select Committee report, enormous changes have been introduced: we have zero-tolerance policies on sexual offending—people will be discharged if they are convicted; we have a zero-tolerance policy on behaviour below the criminal threshold—if they are found guilty of unacceptable sexual behaviour, there is a presumption of discharge; we have also dealt with the issue of instructors and trainees—any sexual abuse in that relationship leads to mandatory discharge; we have also vastly improved the service complaints system.

While it is discomforting for the MoD to see these negative reports appearing, it does mean—and I have first-hand information about this—that women with increased confidence in the complaints system are now reporting behaviour. I welcome that. It may not be pleasant for the MoD to hear about these things, but I would much rather that women had the confidence to bring these incidents out into the open, so we can address them.

Lord Howell of Guildford (Con): My Lords, these are obviously deeply serious matters, whether all the allegations and reports in the media are correct or not. Can the Minister reassure the House that the work of the investigating team mentioned in the Statement—and also what she calls the large-scale changes in policy in the defence area in the last year—are really going to lead to meaningful, lasting and decisive change?

Baroness Goldie (Con): I very much hope that they will. I have described to the noble Baroness, Lady Smith, where the teeth are in a lot of the changes that have now been made. There are real repercussions for miscreants now if they transgress and fail to observe the high standards of behaviour that we expect. But perhaps helpfully—to reassure my noble friend—we are in fact now publishing the annual reports on sexual complaints within the Armed Forces. We published in March of this year the single service sexual harassment surveys. We have also instigated a D&I programme to monitor and measure the efficacy of our initiatives, to make sure that they are delivering. In April of this year, we mandated climate assessments across Defence, and that is to try and ensure—as my noble friend rightly identifies—that the changes we are making are delivering the improvements we hope.

Lord Browne of Ladyton (Lab): My Lords, the noble Baroness will recollect that, in the interim report into the behaviour of the Met police, the noble Baroness, Lady Casey, revealed that hundreds of police were getting away with breaking the law and with misconduct. The reason for that was largely because, despite the importance of patterns of behaviour to the investigation of sexual predators and other alleged offenders, the misconduct procedures in the police force deliberately ignored patterns of behaviour and dealt with each allegation separately. They therefore could not corroborate each other. Can the Minister give us the assurance that the military misconduct and disciplinary procedures do not proceed on that basis—because it is a deliberate loophole to protect the institution?

Baroness Goldie (Con): My Lords, the dramatic change which has been taking place within the MoD, leading to changes of policy and legislative change, has been accompanied by leadership training and education. One reason why women are now prepared to come forward is because, in improving the complaints system, we have introduced an independent route separate from the chain of command. Women now feel a confidence not just in reporting but because the system is robust and will deliver them a result and something will be done. I very much hope that, with the climate assessments mandated across Defence, any pockets of behaviour that were emerging and looked unacceptable would be rooted out and we would become aware of them. The system certainly is there to improve that transparency.

Lord Robathan (Con): My Lords, when I was working at the Ministry of Defence in 2011, the First Sea Lord came to see me, wanting to lift the ban on women serving in submarines. I said that I was not sure it was a totally good idea to put men and women in the very confined space of a submarine, but he explained that the problem was that they could not get enough male volunteers. It was as simple as that. Most men and women on submarines do an excellent job. They are not guilty of harassment. It is a very difficult job. I ask noble Lords to imagine being confined in a metal tube under the sea for three months at a time on some occasions. They deserve our respect and gratitude. Can my noble friend please pay tribute to the majority of submariners, male and female, who serve us day in, day out, on the continuous at-sea deterrent? Of course, we must support the Royal Navy investigation to stamp out this activity, but the majority of people in the Submarine Service are doing a damn good job.

Baroness Goldie (Con): I thank my noble friend for that very helpful observation. I am sure that we all join him in praising the work of the great majority of submariners. To introduce a little perspective to this, before these recent allegations surfaced, for its own information the Navy launched a conduct and culture review, to get a sense check of any current issues within the Submarine Service. That review is being led by Colonel Tony de Reya, a Royal Marine who is head of the Royal Naval conduct cell, and which will report by the end of the year. I end by saying that HMS "Artful", an Astute submarine, is a finalist in the inclusive team award for the Women in Defence UK Awards 2022. That reaffirms my noble friend's important point that very good things are happening in our submarine service.

National Security

Statement

The following Statement was made in the House of Commons on Tuesday 1 November.

"I would like to make a Statement on national security and safeguarding our democracy. In this new era of global competition, we face constant and concerted efforts to undermine our country and our institutions. A range of actors, including foreign states, are trying to weaken us, to challenge us and to exploit us. We are not alone. It is the burden of liberty shared by democracies around the world. The evidence of that is clear and, sadly, indisputable. Dictatorships are trying to write new rules for a new world. Russia's illegal war in Ukraine is a terrible example of the growing threat from hostile states to our security. Russia is attacking not just a free people but a free world.

Our integrated review, published last year, makes clear the threat that we are facing. This is not a simple clash of armour but a clash of ideas. Across our society, we are seeing the challenge grow and evolve to pose a strategic threat to the security and prosperity of our nation for many years to come. A generation ago, we had the answer: our technology and our wallets were greater than theirs. Today, technological integration has deepened connections and opened doors into areas of our lives that we once thought closed. Now, as our markets integrate, we need to think about the future of our industry and innovation. Our economic security guarantees our economic sovereignty just as our democratic security guarantees our freedom.

The advanced technologies that our rivals have spent time and money developing have levelled the field and made us more vulnerable. Britain has been on the front line of the defence of liberty for generations. Our agencies and businesses have faced the reality of this danger for decades. Our Parliament and our politics are now no different. Whether as Ministers or shadow Ministers, in committee or when leading a campaign, this is about every party and every Member of the House. We have all heard of the attempts of unfriendly states to influence our politics in recent years and of the actions that the security officers of the House have had to take to defend us. They are not working alone. I want to put on record my admiration and gratitude to those who work hard to keep us safe in the House and around the country, because while others are on the front line of our nation, those of us privileged to be elected—at every level and in every community—are on the front line of our democracy.

I am here to make it clear that the Government are, and always will be, here to protect our freedoms, and none is more precious than the freedom of our nation to determine its own future. That is, after all, what democracy is about. It is the debate in towns and villages—in person and online—of free people in a free country searching for answers to the problems that we all face. As all of us know, it does not always go our way, but it is the freedom to choose that we all defend. We are taking action to address these threats.

Just as our counterterrorism legislation in the early 2000s updated the necessary legal powers that our police and security services needed to tackle the growing threat of terrorism, we are enhancing our ability to defend against hostile states and those acting on their behalf. The National Security Bill, which is currently before the House, will give us the powers we need today for the threats that we face now. It will be the most significant piece of legislation to tackle the incursion of state-based threats to our nation in a century. Those actors threaten not just life but our way of life. We have to work even harder to protect and uphold our freedom and the institutions that defend it. From establishing our Defending Democracy programme in 2019 to the continuous work by the National Cyber Security Centre, we have sought to address that, but we must do more. That is why I can announce to the House that the Prime Minister has asked me to lead a task force to drive forward work to defend the democratic integrity of our country. The task force will work with Parliament, departments, the security and intelligence agencies, the devolved Administrations and the private sector. It will work to better protect the freedoms and institutions we hold dear—institutions such as this very House.

The task force will look at the full range of threats facing our democratic institutions, including the physical threat to Members of this Parliament and those elected to serve across the country, so tragically brought home by the murder of our dear friends Sir David Amess last year and Jo Cox in 2016, and the support on offer through Operation Bridger and by the police. The work

of this task force will report into the National Security Council and more details will be set out in the update of the integrated review.

This is not just a task force for this Government. It will be cross-departmental and inter-agency, and I will be inviting cross-party co-operation, because, as I have said, this is not just about Ministers in office, civil servants or advisers across Whitehall. This work is for all of us in this House and those who have asked us to represent their interests. The Government have robust systems in place to protect against cyber threats. We are vigilant in ensuring that these are up to date and meet the challenges of the modern world. The National Cyber Security Centre, government and parliamentary security offer all Members specific advice on protecting personal data and managing online profiles, as well as best-practice guidance. I am grateful to Mr Speaker for agreeing to write to all parliamentarians on that important issue.

Finally, it is important to end by underlining that tackling these threats means providing the protection that defends our democratic institutions and the liberties that we cherish so dearly, because the point of security is not to lock us down but to liberate. My job as Security Minister of this great United Kingdom is to give us all the security to live our lives freely, and to debate and choose our future, guarded by the laws and freedoms of our nation. That is my guiding principle. I commend this Statement to the House."

4.17 pm

Lord Coaker (Lab): My Lords, we welcome the Statement delivered yesterday by the Minister for Security. It is the first job of any Government to keep our country safe. Our national security faces constantly evolving and more sophisticated threats from hostile states and extremist organisations, with activity on and off our own soil, including cyber threats. The aim of these acts is to rewrite the world which we live in, to undermine democracy and to reduce hard-fought-for freedoms for people around the world.

I thank our security services for their work and all those who keep us safe, including those who safeguard the work of this House, to whom we are immensely grateful. We welcome the announcement of the task force that the Government have made and will engage fully with Ministers to support its work on a cross-party basis. The Statement yesterday announced the launch of the task force. When can we expect more detail on its work and when is it expected to become operational? Will it include specialist streams looking at physical threats, cybersecurity and the interplay between these two areas?

I welcome the recognition that this is a whole-UK effort in which we are all united. Have discussions yet started with the devolved Assemblies about taking this work forward? Crucially, how will Members of both Houses be updated on the work of the task force, with appropriate regard to the secure nature of its remit? Will Ministers consider discussing the role of the Intelligence and Security Committee in providing oversight of the task force with the current committee chair?

The Statement focuses on protecting our democratic institutions. We cannot talk about those issues without honouring our friends and colleagues, Jo Cox and Sir David Amess, who served their country and are dearly missed. Will Ministers work closely with Members from both Houses when considering the threats that our democracy faces on the front line, here in London and across the country?

We welcome the tone of the Statement and the cross-party debate with which it was received yesterday in the House of Commons. However, it would be remiss not to reflect on some other serious concerns that have arisen over the past weeks and months. The former Prime Minister—two Prime Ministers ago, rather—took a trip during the height of the Skripal crisis and met a former KGB agent without officials present. He did not declare the meeting and has not given an account of what was discussed. Can the Minister confirm whether the former Prime Minister took his personal phone, which he continued to use while in the highest office, on that trip?

The current Prime Minister reappointed the Home Secretary only six days after she resigned over a security lapse and a breach of the Ministerial Code. She has now confirmed that this was not a one-off incident. Despite multiple attempts to get clarity, we have still not had a clear answer to serious allegations that the Home Secretary might also have been involved in a leak to the *Daily Telegraph* while in post as Attorney-General. Do Ministers and, crucially, the Prime Minister recognise the damage done to our national security when Cabinet Ministers themselves fail to take appropriate action on these issues?

Before I finish on the activities of hostile states in the United Kingdom, I ask: how can it be possible that we read in our papers about so-called Chinese police stations in multiple locations across the UK? When did this come to light? When were Ministers made aware of it? What action and investigations have been taken by, for example, Scottish authorities against the site in Glasgow? Has equivalent action been taken against the two known sites in Hendon and Croydon? What investigation is the Government undertaking with the relevant services to locate whether there are any other unknown operational stations?

Following the outrageous incident outside the Manchester consulate earlier this month, what support is being given to those who might feel unsafe in communities across the United Kingdom? Are efforts under way to investigate whether one of the stations exists in Manchester or, indeed, elsewhere? It is shocking that this activity could take place on UK soil. I think that Members of this House, and indeed the country, will want reassurance from the Government about how this came to light, what the implications are for national security and what the Government intend to do about it. I look forward to the Minister's reply and to the work of this task force.

Lord Paddick (LD): My Lords, as a former senior police officer with more than 30 years' experience, I am acutely aware of the issues of national security, both physical and cyber threats. I welcome the appointment of the right honourable Tom Tugendhat MP as Minster of State for Security. He has a long and distinguished record in this area. He is clearly and quite rightly concerned about the threats facing Members of Parliament, those who work with us and the country as a whole from extremists and hostile foreign states.

[Lord Paddick]

It is regrettable that other members of the Government, past and present, appear not to have taken national security as seriously as the Member for Tonbridge and Malling is doing now. As the noble Lord, Lord Coaker, said, the last but one Prime Minister had a meeting with a former member of the Russian KGB when he was Foreign Secretary, on his own, in a foreign country, without reference to officials. The previous Prime Minister had her phone hacked; and the current, and second but one, Home Secretary—the same person—used her own mobile phone to receive and transmit restricted documents. Does the Minister agree that the actions of senior members of his own party have damaged, rather than promoted, national security?

We on these Benches agree that the Security Minister's initiative is welcome, if not overdue, and we agree that this must be a united effort involving all of us, working with our security and intelligence agencies and the police. Having visited both MI6, where representatives of MI5 were also present, and GCHQ, I know that we have outstanding security and intelligence services, but without Members of this and the other place taking security seriously—particularly members of the Government, not least Prime Ministers and Home Secretaries—their efforts will be undermined.

As the noble Lord, Lord Blunkett, said in the House this week, it is not just the potential for leaks of our own highly sensitive information, as there is a risk that our security partners in other countries will not share vital intelligence with us because they fear that our security is not tight enough. Can the Minister confirm that from now on members of the Government will set an example by their own behaviour in relation to protecting national security, rather than providing counterexamples that jeopardise national security?

It is not only democracy that is at stake if hostile foreign Governments seek to influence or disrupt the democratic process, but the security of each and every citizen and the economic well-being of every business and industry in the UK. I am glad that an adult has been put in charge of this task force; I just hope that those who he is surrounded by will do as they are told.

We have a wealth of experience on these Benches, including privy counsellors and former members of the Intelligence and Security Committee, who I am sure will be only too willing to help and support the Minister with these issues.

The Parliamentary Under-Secretary of State, Home Office (Lord Sharpe of Epsom) (Con): My Lords, I agree wholeheartedly with the noble Lord, Lord Coaker, that the first duty of the Government is the protection and security of the nation. I also echo both noble Lords' praise for our security services, which I also have some experience of and which I think are magnificent and first-rate.

As regards the questions on the task force, I think it makes sense for me to read out what my right honourable friend the Security Minister said yesterday, because I think it answers all the questions in full:

"The taskforce will work with Parliament, Departments, the security and intelligence agencies, the devolved Administrations and the private sector. It will work to better protect the freedoms and institutions we hold dear—institutions such as this very House.

The taskforce will look at the full range of threats"—

I add "including cyber"—

"facing our democratic institutions, including the physical threat to Members of this Parliament and those elected to serve across the country",

as the noble Lord, Lord Coaker, pointed out,

"so tragically brought home by the murder of our dear friends Sir David Amess last year and Jo Cox in 2016, and the support on offer through Operation Bridger and by the police. The work of this Taskforce will report into the National Security Council and more details will be set out in the update of the integrated review",

so unfortunately I cannot answer his question about timing.

My right honourable friend in the other place went on to say:

"This is not just a taskforce for this Government. It will be cross-departmental and inter-agency, and I will be inviting cross-party co-operation, because, as I have said, this is not just about Ministers in office, civil servants or advisers across Whitehall. This work is for all of us in this House and those who have asked us to represent their interests."—[*Official Report*, Commons, 1/11/22; col. 791.]

I do not think I could agree more.

I will go on to the more specific questions. The noble Lord, Lord Coaker, asked about the meeting that the former Prime Minister had in Italy with Lebedev. When he was Foreign Secretary, he declared his visit to Italy, which was published under the usual transparency requirements. At the Liaison Committee on 6 July, he committed to follow up in writing, which he did on 26 July.

Both noble Lords asked about the case of the Home Secretary. I am afraid I am going to repeat an answer given by my noble friend the Minister for the Cabinet Office earlier. The Home Secretary has provided a detailed account of the steps that she took in her letter to the HASC. For national security reasons, we are not commenting on allegations about the then Foreign Secretary's phone.

Going back to the integrated review, I say that it makes sense to remind the House that it concluded that China poses a

"systemic challenge … to our security, prosperity and values—and those of our allies and partners",

and that the Chinese authorities adopt a whole-of-state approach in which businesses and individuals are forced by law to co-operate. We know that the Chinese authorities are actively seeking to gain our cutting-edge tech, AI, advanced research and product development. We are working to protect our national security and ensure that the UK is resilient.

The noble Lord specifically asked about the recent rather troubling stories about undeclared Chinese police stations in the UK. The reports are being taken seriously, and they are concerning. Any foreign country operating on UK soil must abide by UK law. The protection of people in the UK is of the utmost importance. For example, any attempt illegally to repatriate any individual will not be tolerated. As noble Lords would expect, Home Office officials are working closely with FCDO, DLUHC and other government departments to ensure that the UK is a safe and welcoming place for those who choose to settle here. I cannot go beyond that at this point.

Noble Lords asked whether there was a culture of Ministers using personal phones for official business. No, there is not. There are appropriate arrangements and guidance in place for the management of electronic communications within government. Ministers receive support and expert advice to help them meet their obligations in the most appropriate and secure fashion. Again, as my noble friend answered in the previous Question, government devices should, as far as practicable, be used for government business. The guidance does not rule out the use of different forms of electronic communications, however.

Our allies are obviously aware of what has happened here, but I remind noble Lords that we do take a leading role on the global stage in countering state threats. We will continue to work closely with like-minded allies and partners to defend UK interests and the international rules-based system from hostile activity. Unfortunately, as I have already stated, I cannot comment on details of any discussions where commenting publicly on threats to the UK would give an unnecessary advantage to our adversaries. I hope that answers noble Lords' questions as fully as I am able.

4.31 pm

Lord Howell of Guildford (Con): My Lords, the scope of this new task force is, of course, enormous, since nowadays almost every aspect of connection and influence is being weaponised, including education, culture and issues far outside the normal security scope and outside the range of intelligence and cyberattack. We are subject, in this country, every hour of the day, to a bombardment of fake news and distortion, penetrating every aspect of our society and clearly covering our own debates. They say that the best form of defence is attack. Can the Minister assure us that this task force will also look at ways of returning in kind some of the material that pours out, in particular from the CCP in China, attacking not just democracy but our form of democracy and claiming, rather ironically, that China's form is more precise and more effective than ours? Can he assure us that we have a full intellectual force ready to challenge the arguments at their roots in order to refute the kind of poison that is daring to try to demoralise and undermine our society?

Lord Sharpe of Epsom (Con): I am pleased to be able to reassure my noble friend that I can. I am going to give a long answer, for which I hope the House will be forgiving, because this is important. In 2019, we established the defending democracy programme. It is a cross-government programme, with an overarching objective to safeguard elections and referendums related to democratic processes in the UK. It focuses on delivering four outcomes. Elections are secured through the protection of their physical personnel and cyber infrastructure; the safety of elected representatives, parliamentarians, voters, candidates, campaigners and poll workers is protected; the regulation of political campaigning must be robust; the impact of disinformation, misinformation and wider information operations is mitigated and minimised.

There is also, as part of that work, the DCMS Counter Disinformation Unit, which leads the operational and policy response for countering disinformation across HMG. That has included responding to acute information incidents such as the Ukrainian conflict, Covid-19 and general elections. When false narratives are identified, the CDU co-ordinates with departments across Whitehall to deploy the appropriate response. This could involve direct rebuttal on social media or awareness-raising campaigns to promote the facts. Obviously, I cannot go into—and I do not necessarily know—what other sorts of action we take overseas, but that is certainly what we are doing here, and it is fairly robust.

The Lord Bishop of Leeds: My Lords, I really welcome the Statement and the very full answers that the Minister has given. It is very encouraging. However, when the Statement refers to protection that defends our democratic institutions, it is not just external threats: there are internal threats that weaken our defences, such as putting draft legislation into Parliament that threatens to breach international law. If we uphold the rule of law, we cannot continue to do that. Will the Minister give a commitment that the Government will not do this, as they did in the overseas operations Bill, the United Kingdom Internal Market Bill, and so on? Just to encourage him, I suggest that a reading of President Steinmeier's speech on 28 October to the German people sets in a very good context how a Government might approach some of the threats and the wider challenges that we face.

Lord Sharpe of Epsom (Con): I thank the right reverend Prelate for that suggestion; I will read that speech, which to date I have not. He invites me to stray into areas where I would prefer not to go. There are differences of opinion when it comes to these laws; I will leave it there.

Lord Browne of Ladyton (Lab): My Lords, the daily and repeated Russian missile attacks on Ukraine's critical national infrastructure are evidence of the importance of this to our national security. Is the Minister aware of the two week-old report of the Joint Committee on the National Security Strategy about critical national infrastructure, which is scathing about the Government's ability to protect it? It specifically identifies a lack of leadership, an absence of co-ordination among government departments and the disbanding of the Civil Contingencies Secretariat. In short, it calls on the Prime Minister to

"get a much better grip on … national security".

When will we see the long-awaited national resilience strategy?

Lord Sharpe of Epsom (Con): My Lords, I cannot answer that specifically. I have seen that report and have read a variety of newspaper reports with mounting alarm, as I am sure the noble Lord has. I think the task force will address a good deal of the noble Lord's concerns, and I look forward to hearing what it has to say.

Lord Arbuthnot of Edrom (Con): My Lords, I echo the question asked by the noble Lord, Lord Browne, but in relation to the report of this House's risk committee, in which we found that there were real, critical vulnerabilities in our critical national infrastructure.

[Lord Arbuthnot of Edrom]
The urgency of the Government producing the resilience report cannot be overstated. It is surely time for the Government to recognise that the front lines of battles that we face now are no longer in other countries but in our computers, our water systems and our electricity systems. They need to be taken really seriously.

Lord Sharpe of Epsom (Con): I thank my noble friend for that question. I am afraid I will again answer at some length, because the subject of cyber resilience is at the heart of what he, and indeed the noble Lord, Lord Browne, asked me. The current state of UK resilience to cyberattack is an interesting subject, and we are making significant progress in bolstering the UK's resilience. We stop hundreds of thousands of attacks up stream while bolstering preparedness and helping UK institutions and organisations better understand the nature of cyber threats, risks and vulnerabilities down stream.

Despite this, there remain serious gaps in the nation's defences, as both noble Lords have pointed out, and the collective resilience-building effort must continue apace. Poor organisational practices, processes and systems, and a lack of awareness of risks and mitigations, all contribute to attacks getting through. Taking some practical and cost-effective steps, such as improving the use of account authentication, could have prevented a lot of damage. I could go on, but at this point I reiterate my praise for the work of the security services. I have seen some of their work in this area, and it is incredible.

Baroness Jones of Moulsecoomb (GP): Is it not a threat to national security to have a Home Secretary who uses inflammatory, racist language and dehumanises thousands of traumatised asylum seekers?

Lord Sharpe of Epsom (Con): If the noble Baroness is asking whether there was a threat to national security, I would have to say no.

Lord Bellingham (Con): My Lords, following on from the excellent question by the noble Lord, Lord Arbuthnot, I ask the Minister to look again at some of the threats to national security coming from serious organised crime and cybercrime, and the way in which provincial police forces are responding. He touched on this briefly, but what more can the Government do to improve capacity and expertise among those provincial police forces?

Lord Sharpe of Epsom (Con): I thank my noble friend for that question. As he says, I think I have already partially answered it. The NCSC has helped UK institutions and organisations better understand the nature of cyber threats, risks and vulnerabilities. It has helped them to take action to secure systems and services that society depends on. It stops attacks up stream, as I pointed out. It would be wrong to go into more operational factors, but I hope my noble friend is reassured that much work is being done in that area.

Lord Campbell of Pittenweem (LD): My Lords, I welcome the creation of the task force, but I fear I have to return to the issue of the Home Secretary. Had it not been for the fact that the Home Secretary inadvertently sent the email to someone whom she did not intend to send it to, we would never have known anything about this. Since the Home Secretary has ministerial responsibility for MI5, what do these facts do other than undermine her authority in the event that she finds similar instances in the ministry for which she is responsible?

Lord Sharpe of Epsom (Con): I am going to disappoint the noble Lord. I can say only what I said earlier: the Home Secretary has provided a detailed account of the steps she took, in her letter to the HASC. I am unable to comment further.

Viscount Stansgate (Lab): My Lords, there are many definitions of threats to national security. The Minister is right to point to some of the differences between, for example, the more immediate threats posed by Russia and the longer-term strategic threats posed by China. My noble friend Lord Browne has already referred to the Joint Committee on the National Security Strategy's recent report on critical national infrastructure. It is a very good report and very pertinent to this question. Will the Minister assure the House that in the progress of this task force, which I support, it will also liaise with the same committee—of which I am a member—as we have just launched an inquiry into ransomware, which has aspects which directly relate to national security?

Lord Sharpe of Epsom (Con): I agree with the noble Viscount—it absolutely does have aspects which relate to national security. I go back to what I said earlier when I quoted my honourable friend in the other House. This is not just a task force for the Government. It will be cross-departmental and inter-agency and he will be inviting cross-party co-operation. The noble Viscount makes a strong case for his committee's involvement in that area.

Lord Walney (CB): The reports of unofficial Chinese police stations in the UK and other allied nations are deeply alarming and have rightly been roundly condemned by the Security Minister. If the reports prove to be accurate, and these are not immediately disbanded, is there not a very strong case for co-ordinated action across our allies to impose sanctions on the Chinese Government for doing this?

Lord Sharpe of Epsom (Con): The noble Lord is right to point out that these reports apply not just to the UK. I believe that one suspected institution of this type has already been closed down overseas. I think he makes a strong case, but I do not know the progress of the investigation, so I cannot comment as to how they might be shut down.

Northern Ireland Protocol Bill

Committee (3rd Day)

4.42 pm

Relevant documents: 7th and 12th Reports from the Delegated Powers Committee, 6th Report from the Constitution Committee

Clause 12: Subsidy control

Amendment 16

Moved by ***Lord Purvis of Tweed***

16: Clause 12, page 7, line 10, leave out subsection (3)

Member's explanatory statement

This is part of a series of amendments based on recommendations from the Delegated Powers and Regulatory Reform Committee which states that a number of subsections in the Bill "contain inappropriate delegations of power and should be removed from the Bill."

Lord Purvis of Tweed (LD): My Lords, in rising to move Amendment 16, I warmly thank the noble and learned Lord, Lord Judge, for supporting this suite of amendments, which raises concerns about the breadth of the order-making powers that Ministers seek to gain from this legislation.

I start by thanking the Minister for his holding letter indicating that he is conferring with the noble Lord, Lord Caine, on responding to the questions raised on Monday. I am grateful for that and the efficiency of his private office.

The information from the Northern Ireland Executive suggests that there are approximately 14 live areas where there are subsidy controls, which operate within Northern Ireland under one element of the protocol. The purpose of my amendment is twofold: first, obviously, to raise the concern about the breadth of the power, which is in breach of international obligations, and about powers that the Government seek without formulating policy first.

Secondly, the purpose is to further probe what the Government intend the position to be with regard to subsidy control for Northern Ireland, and when they came to their conclusions. We are told that the position is grave and imminent—that is the defence of necessity for breaching international obligations. But we spent a lot of time in Committee and on Report on the Subsidy Control Bill. I moved two amendments relating to Northern Ireland, and the noble Lords, Lord Dodds and Lord Empey, and the noble Baroness, Lady Hoey, also raised these issues in Committee. Like others, I asked on a number of occasions what interaction there would be with the protocol and what difficulties operating two systems would cause. The noble Lord, Lord Callanan, reassured me that they would work together.

4.45 pm

That legislation is now apparently not fit for purpose and needs to be amended—in breach of our obligations, of course. We passed that legislation this year, and it came into force this spring. With seriousness, I say again that, at no stage during the passage of that Bill, which is being amended by this Bill, did any Minister say that there was a grave and imminent threat that required that we withdraw entirely from the agreement on state aid that we negotiated and secured.

In fact, the timing of this is interesting. As we have heard, the Government indicated in 2021 that the protocol was working, but we now hear that there is grave and imminent peril. We legislated during this time, and the Government said that they played no role in bringing about the circumstances of the peril. But, legislating at the time, we obviously had a role to play.

The paper that the Government published on the UK solutions, raising concerns about the operation of the protocol, relates to Northern Ireland, tax and spend, and subsidies. It says:

"The Protocol applies EU state aid rules regardless of developments since—despite the robust subsidy control commitments agreed by the UK and EU in the Trade and Cooperation Agreement, which we have built on in the Subsidy Control Act 2022".

If we put in place robust subsidy control commitments in the TCA, that was after the protocol. I am not sure why the Government say that they are unaware of some of the consequences of the regime that they agreed and then put in place, which they considered to contain robust subsidy control commitments.

I asked questions about the Government's position and what they were negotiating, or seeking to negotiate, with the European Commission. I asked how a dual system would operate, and, when I moved my clarity-seeking amendments, the Minister—the noble Baroness, Lady Bloomfield—said that there would be enhanced referral powers or consultation procedures for subsidies within scope, to enable EU concerns to be properly and swiftly addressed. So, when we were passing this legislation, the Government were negotiating not a removal of subsidy controls from the protocol but a more efficient approach to the operation of the two systems. The noble Baroness, Lady Bloomfield, said to me that, under the two systems, there would be "specific and limited circumstances" where EU rules would apply to Northern Ireland. I asked what "specific and limited" meant, and it seemed to be simply a more efficient way of reporting and declaring. I would be grateful if the Minister could indicate at what time and stage the Government drew the conclusion that they had to entirely remove state aid elements from the protocol.

The consequence of this is a major chill effect, because businesses operating within Northern Ireland and across the rest of the UK simply do not know what the Government's intent will be when they are looking to make investment choices. I repeat that there are a number of live situations where this is currently in operation. So the Government are actively contributing to a state which is bringing about concern and which they cite as "necessity".

As the noble Lord, Lord Caine, was not able to confirm to me on Monday whether the Government are formally seeking that the EU change its mandate for negotiations, in this Bill we are seeking to remove from the protocol a key part that the Government negotiated. So I hope that the Government can provide crystal clarity on this point, because it is needed for the economy of all parts of the UK. I beg to move.

The Senior Deputy Speaker (Lord Gardiner of Kimble): My Lords, I must inform the House that, if Amendment 16 is agreed to, I will not be able to call Amendments 17, 18 or 19 by reason of pre-emption.

Lord Judge (CB): My Lords, I shall be very brief and will say nothing about the breadth of the power being sought by Clause 12. I will read Clause 12(3):

"A Minister of the Crown may, by regulations, make any provision which the Minister considers appropriate".

[Lord Judge]
We all know what that means: a Minister will be empowered to create any regulations as he or she thinks fit. That is not objective: as he or she, sitting down, thinks fit. It is purely subjective. If we allow this piece of legislation to go through, we are saying to the Minister, "At whatever time it may suit you, take a blank sheet of paper and either write with a pen or type on your laptop whatever you think you want". That will then be put before the Commons and the Lords, and, as they have not rejected anything for an eternity in real terms, it will become law.

Is that really how we think that power should be given to Ministers anywhere within the UK? It surely is not. There are other ways of making regulations. Good heavens, no Minister needs a lesson from me in how to create regulations; we are bombarded with them all time. But I do ask the House: is this really how we expect to be governed? The Minister can do what the Minister likes. The clause uses a different and longer phrase—"considers appropriate"—but it really means no more than whatever he or she wishes. It is not good enough.

Viscount Hailsham (Con): My Lords, I simply express my very strong support for what the noble and learned Lord has said: there is absolutely no limitation on the power conferred on the Minister to make

"any provision which the Minister considers appropriate".

There is no test here of necessity or a requirement that the Minister should be satisfied that there are reasonable grounds for thinking that the regulation is necessary. In any event, the regulation is both unamendable—as all regulations are—and subject to the negative procedure, which means in effect that it will never be discussed. So it is thoroughly bad. I have no doubt that it is for that reason that the Joint Committee recommended that this particular power should be removed from the Bill, and if I am given the chance to vote for that view, I shall do so.

Baroness McIntosh of Pickering (Con): My Lords, in the spirit of trying to help the Government, I will repeat what I said in relation to an earlier group of amendments: it would help the Committee, as well as the other place, if the Government could give us an indication of the type of regulations that they have in mind, so that we do not have this blanket provision before us today. There is still time to do that.

I will also ask a question of information. I understand that the "provision" to which the noble Lord, Lord Purvis, refers in removing it from this particular clause does not apply to agricultural subsidies. So, if it is the case that agricultural subsidies are still going to apply, who is in a position at the moment to decide on that, and within what timeframe would that be?

Lord Leigh of Hurley (Con): My Lords, I have been looking at Clause 12 through a particular prism. As my entry in the register of interests discloses, I have a particular interest in financial services. I am also an investor in various enterprise investment and seed enterprise investment companies, which I will refer to as EIS and SEIS companies, and venture capital trusts. For those who are not aware, EIS schemes are those which allow UK investors to invest in UK companies and deduct the amount invested in those companies against their income tax at prescribed rates to encourage investment in private companies.

For some time, I have been frustrated that these truly excellent schemes have been hampered by restrictions. The schemes are hugely popular. EIS has helped some 66,000 companies in the UK in total, with some 3,755 companies raising over £1.5 billion last year alone. Since 2018, VCTs have made some 1,000 investments, raising £1.7 billion, of which 45% were less than £1 million. So I am very concerned by anything that threatens the existence of these schemes and am keen to find ways of enhancing their effectiveness. There are, however, restrictions and regulations reducing the opportunity for UK businesses to raise this vital small equity for essentially risky enterprises, and I have been concerned that these restrictions have in part been due to the requirements of EU state aid rules.

The enormous success of the EIS and VCT schemes is very much a British phenomenon and probably viewed with some mistrust by the EU, given our tremendous track record in starting and growing new UK businesses. In fact, most businessmen and investors I have spoken to are amazed to discover that it is governed by EU state aid rules. Fortunately, at the moment we have EU approval for the design of the EIS and VCT schemes under Article 107 of the Treaty on the Functioning of the European Union, and the smaller SEI schemes, due to their size, fall within Article 21 of the general block exemption regulation. However, as we decide how to plough our own path post Brexit, it is important that we are entirely free to create our own rules concerning subsidies that might amount to state aid—within, of course, the constraints of WTO and other commitments.

As mentioned by the noble Lord, Lord Purvis of Tweed, we now have our own Subsidy Control Act but, under the protocol, some EU state aid rules still apply. I can see the issue, namely that the EU is worried that a company based in Belfast has cheaper finance than a competitor in Dublin—but, frankly, that should be our choice and the choice of other countries to offer incentives to finance their businesses.

Why do we have this problem? As Andrew Harper helpfully wrote in the *British Tax Review* in autumn 2020, the two sides promote opposing perspectives: the EU very much promulgating its state aid regime on the basis of the level playing field and the UK adopting the subsidy language of the World Trade Organization. This is much more than a semantic or linguistic distinction. It is one of substance, both in the scope and the enforceability of the rules.

In these circumstances it appears sensible to point out the key issues that could arise. Without Clause 12 —and I am aware that there is a stand part debate following—first, the EIS and VCT schemes as they operate in Northern Ireland will presumably have to remain fully EU state aid compliant because of EIS companies and VCT investees based in the Province trading with the Irish Republic or the wider EU. Secondly, following from that, barring the UK Government being prepared to countenance two separate systems within the UK, the EIS and VCT schemes as they apply to England, Wales and Scotland will be difficult to modify.

Thirdly, if, post transition, these schemes were to diverge as between Northern Ireland and the rest of the UK, what is the position in the case of, say, an English EIS company raising scheme funding that would be in excess of that sanctioned by EU state aid rules? If that English company then sends its goods to Northern Ireland, where potentially they can be traded with the south or the rest of the EU, how will that be allowed to happen? It simply cannot make sense to exclude Clause 12.

5 pm

Just to give some perspective and a feeling of the situation at the moment, the proportion of EIS recipients in Northern Ireland is really very small. In 2020-21, out of the aforementioned 3,755 recipients of EIS I mentioned, only 40 were based in Northern Ireland—some 1%, and by no means all are goods traders, to whom the protocol applies. Some may say that the state aid provisions in the protocol do not really apply to the sort of state aid such as EIS and VCT, but there is a risk that it might—and, of course, famously, of reach-back, which would be wholly unwelcome. That is why we need Clause 12(1). I welcome Clause 12 to ensure we have a single UK-wide subsidy control policy and that, for example, with a Covid-19-type recovery loan scheme there would not be greater restrictions on Northern Ireland companies than GB ones, and that we would be free to amend our own rules freely.

There is a pressing example of an EU state aid restriction that needs urgent attention: the sunset clause imposed by EU state aid rules on EIS and VCT, which kicks in on 6 April 2025. It urgently needs to be repealed, as suggested in the mini-Budget. Indeed, the current Chancellor specifically said that those sunset clauses would go; it is about the only bit of the mini-Budget that he said he wanted to keep. This issue of sunset clauses was raised on page 119 of the May 2021 report from the Taskforce on Innovation, Growth and Regulatory Reform, which people cannot resist calling TIGRR, chaired by Sir Iain Duncan Smith, along with other restrictions that it wanted to see lifted. These include the age restrictions that apply to an investee company and, of course, the maximum investment thresholds, particularly those for the smaller SEIS, which presently has to be less than £150,000. The mini-Budget seeks to raise that to £250,000 for a single company, but it is still far too low.

The criticisms of Clause 12, which is needed to enable a Government to accommodate the result if the EU successfully takes international action in respect of something it regards as unhelpful, are answered by my amendments, which tighten up the ability to make change through regulation. In particular, proposed new Clause 12(4)(c) in my Amendment 19 deals with the most unfortunate case, if there is a change, to stop it applying retrospectively. My amendments would ensure a minimum framework for the Minister's regulatory power, which could arise following alterations in national law to provisions within the scope of EU state aid at the international level, and set the boundary between the exercise of the regulatory power by the Minister and the requirement for primary legislation. I appreciate that, under Clause 23(3), any regulation has to be a statutory instrument and is treated as such. However, most importantly, the amendments would ensure that the Government were unable to make any retrospective provision, so that investments and reliefs to date were protected.

I hope all those speaking to Clause 12 standing part understand that there is a fundamental difference in approach to subsidies between the EU and UK. The EU tends to favour money handed out to companies at its discretion for the companies' direct benefit—frequently, of course, through individual states. We like to empower investors and, as such, the markets to decide where the money should go. It is, in effect, the investors who decide which companies will benefit from their money, which is enhanced by a tax break. Like so many areas in business life, we have a different way of thinking from the EU and we have to protect our interests first. Concerns that this is a breach of other international treaties or laws are fair to raise and difficult for many of us non-lawyers to understand. But even if they are correct, what I do know is that UK companies need protection to enable them to carry on being financed in the way our Parliament feels appropriate.

Lord Pannick (CB): May I ask the noble Lord two questions? First, should these problems not have been considered by the United Kingdom Government before they signed the protocol? Secondly, is there any reason why these problems cannot be raised in the negotiations with the EU to take place in the near future?

Lord Leigh of Hurley (Con): I cannot answer for the UK Government on whether they should have been raised before; that is clearly historical and we are where we are. In theory, there could be a negotiation with the EU to try to deal with some of these problems, but we would be on the back foot and there would be no reason for the EU to agree, whereas Clause 12 deals with it satisfactorily.

Lord Campbell of Pittenweem (LD): My Lords, I associate myself with my noble friend Lord Purvis of Tweed and the noble and learned Lord, Lord Judge, who have made the case in very strong terms for why subsection (3) should be removed. I pause only to make one observation: it does not even specify the Minister but says:

"A Minister of the Crown".

So not only is it an extremely wide power, it is a power available to any Minister in any ministry of any kind, at any time, without any restraint whatever. How can that possibly be consistent with the principles on which we pass legislation in this Chamber?

Lord Lisvane (CB): My Lords, I apologise for not having been present for the first two days in Committee for family reasons. I am in violent agreement with my noble and learned friend the Convenor. It seems to me that this amendment, others in this group and, indeed, others in the Marshalled List seek to address something of a legislative slough of despond. If that is the case, it is a swamp that needs draining. I think noble Lords on the Government Front Bench will realise that the bar will be set very high indeed on Report.

[Lord Lisvane]

I shall briefly address two other contributions. First, to respond to the noble Lord, Lord Campbell of Pittenweem, I may be misremembering but, from my past, I think "a Minister" is used as a generality in drafting to reflect the collectivity of government. It could be any Minister given the particular responsibility at the time, although I agree that some of the flanking provisions might draw that into a certain amount of doubt.

As for the noble Baroness, Lady McIntosh of Pickering, she is ever the peacemaker but I would discourage noble Lords from pursuing the idea of putting in an illustrative list of measures that might be subject to these powers. Illustrative is only illustrative: if they are not in the statute, they are simply a bit of an Explanatory Memorandum, if you like. Even if they are in the statute, no drafter or Minister will allow them to lie there without the assertion that they are not an exhaustive list, so that anything can be added at the whim of Ministers. As my noble and learned friend the Convenor pointed out, quite a lot is being done at the whim of Ministers.

Baroness Crawley (Lab): My Lords, I too support the amendment in the name of the noble Lord, Lord Purvis of Tweed, for all the reasons that the noble and learned Lord, Lord Judge, gave. When the Minister replies to the noble Lord, Lord Purvis, will he point to the incident that triggered the grave and imminent peril that forms the basis of the doctrine of necessity that the Government have used in justifying the Bill, with its extraordinary powers for Ministers?

Lord Cormack (Con): I should just like to ask a question of whichever Minister will reply to this brief debate. I am of course entirely on the side of the noble and learned Lord, Lord Judge, and the noble Lord, Lord Purvis, in what they said. I understand why my noble friend raised his commercial points, but between us and him is a great gulf fixed. What we are concerned about is the arbitrary and unfettered power of Ministers.

I have great respect for all three of the Ministers who are handling this Bill, and great sympathy for them, but are they truly happy to exercise such unfettered powers without reference to Parliament and proper debate? We go back to where we were on Monday: the imbalance of power and the excessive power of the Executive, which has been growing like a mad Topsy for the last few years. It is deeply disturbing to anybody who believes in parliamentary government, and I want to know if it is deeply disturbing to the Ministers on Front Bench this afternoon, because if it is not, it should be. I would be much more worried than when I got up if they tell me that they do not mind.

Lord Pannick (CB): Could I suggest to the noble Lord, before he sits down, that the real question is not whether the Ministers on the Front Bench would be happy to exercise these powers, but whether they would be happy for their opponents, were they to be in office, to exercise these powers.

Lord Cormack (Con): As so often, the noble Lord puts it very well. It ought to be a parliamentary lesson to us all: never seek to take to yourself powers that you would not be happy to see the other side have. The noble Lord put it very succinctly and I endorse what he said.

Lord Dodds of Duncairn (DUP): My Lords—

Lord Kerr of Kinlochard (CB): The big point about this clause is the one made by the noble and learned Lord, Lord Judge, supported by the noble Lord, Lord Campbell. We should not be writing into our statute book such extraordinary sweeping powers, to be exercised at the stroke of a pen, with no real supervision or scrutiny by the Executive.

I would like to speak briefly to the second important point, which is, in my view, the one made by the noble Lord, Lord Purvis of Tweed, when he spoke of the "chill effect". I also found things I agreed with in the speech of the noble Lord, Lord Leigh of Hurley, rather to my surprise. The chill effect is real and will continue. Investors will be deterred from coming to Northern Ireland, and Northern Irish businesses will be deterred from investing, by the uncertainty which will not be resolved by the passage of this Bill but created by its passage. The effect of Clause 12, taken with Clause 22, is to enable the Minister to establish a different regime in Northern Ireland from the regime in Great Britain. The assumption might be that if the protocol falls, what results is the status quo ante: the UK rules. That is not the case. The Minister would be entirely free to produce whatever rules for Northern Ireland he thought fit. It is obvious what that uncertainty does to investment.

I am surprised at the silence of the DUP.

Lord Dodds of Duncairn (DUP): We cannot get in.

Lord Kerr of Kinlochard (CB): I am delighted that the silence may be about to be broken. It seems to me it would be odd to be insouciant about this uncertainty. The DUP may have been given assurances that only UK rules will be applied and nothing will be different, in which case I suppose it might believe such assurances. That would be a triumph of hope over experience, because we would not be where we are today—we would not have this Bill to discuss—if the DUP had not been betrayed and misled by the last Prime Minister but one.

5.15 pm

Lord Dodds of Duncairn (DUP): My Lords, I am truly grateful for the opportunity to participate, and would have done so earlier had I stood up more quickly. I will address some of the issues raised by the noble Lord, Lord Kerr, and the noble and learned Lord, Lord Judge.

First, the noble Lord, Lord Leigh, touched on the reasons behind Clause 12 and why it is necessary, and I think it is worth reminding noble Lords of the current position following the approval of the Subsidy Control Act. Under the provisions of that Act, Northern Ireland is specifically excluded from the UK subsidy scheme. Therefore, we are subject, as per Article 10 of the Northern Ireland protocol, to EU state aid laws, and all the laws listed in Annexe 5 to the protocol shall apply to the UK

"in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol."

I have spoken to Invest Northern Ireland—the body that looks after foreign direct investment into Northern Ireland—about these matters. In effect, while the UK is setting up a new, more flexible state aid regime, under Article 10 of the protocol the UK subsidy control regime would apply only to about 50% of the financial support that will be provided to Northern Ireland, with the remainder continuing to fall within the scope of EU state aid rules, applying mainly to the manufacturing of goods.

So, Northern Ireland will be forced to adhere to the strict rules and conditions of EU law on things such as no expansions, maximum grant rates, only new establishments and so on, and when the projects are large or outside the scope of the exemption regulations, Northern Ireland will have to seek European Commission approval. Effectively, we have two regimes which are very different in policy terms and practical effect. Under the UK scheme, things effectively will be automatically approved unless specifically prohibited, and in Northern Ireland, under EU rules, everything will be prohibited unless approved—very different policies, and two very different systems operating in one country.

The reasons behind Clause 12 are sound; otherwise, there will be no level playing field across the United Kingdom for state aid. The noble Lord, Lord Kerr, talked about uncertainty, but Invest NI has expressed concerns about the application of this dual regime. We will be at a disadvantage compared to other parts of the UK competing for inward investment. Other parts could be much more attractive as a location for investment as a result of not having to wait for European Commission approvals, for instance. Northern Ireland approvals will take significantly longer than the new timescales envisaged in the Subsidy Control Act for the rest of the United Kingdom. Other areas could have far fewer conditions or restrictions and might well receive greater levels of funding and subsidy than will be possible under the EU regime in Northern Ireland, which prohibits subsidies greater than 50%, whereas under the Act subsidies should be "proportionate", but no maximum is specified.

Indeed, your Lordships' Select Committee on the protocol in Northern Ireland, on which I am honoured to sit, wrote to the noble Lord, Lord Callanan, on this matter. He responded by letter on 22 March 2022, saying that he recognised that

> "in some cases a more flexible approach will be available in Great Britain than in Northern Ireland and that this could affect all subsidies relating to trade in goods."

There are real concerns about the application of EU state aid to Northern Ireland when it is not applicable to the rest of the United Kingdom.

On the issue of what replaces the EU regime for Northern Ireland, I have heard what has been said. That is why I am on record in this House as agreeing with the Opposition Front Bench that we need to see the regulations, and they should be published in good time for your Lordships to consider in detail. It is not enough simply to have broad outlines of policy or indications of where it might go; we need to see the regulations at the same time as the legislation. I fully accept that this should be done, and I said so in a previous debate.

I understand also the very strong opinions, many of which I share, on the idea of giving the Executive more and more power at the expense of the legislature. However, I ask noble Lords to bear in mind the situation we are faced with in Northern Ireland as a result of the protocol. Powers have been taken away in 300 areas of law affecting the economy in Northern Ireland. Powers have been taken away from this House, this Parliament and the Northern Ireland Assembly in Stormont, and handed over to the European Commission in Brussels, which initiates law in all those areas.

Noble Lords have expressed great dissatisfaction with the idea, which is regrettable in many cases, that one of His Majesty's Ministers may be able to sit down with a pen and paper or an iPad and write what comes to mind; but we have a situation where somebody in the European Commission building in Brussels—I do not know who or where they will be, or their name; they are certainly not accountable to anyone here or in Northern Ireland—will write laws for Northern Ireland. It will not be a question of putting them down in statutory instruments, which this House may reject—although we have heard that it hardly ever rejects them. There will be no system of approval or disapproval at all. There will be dynamic alignment of the laws of the European Union with Northern Ireland. Legislators and the people of Northern Ireland will be handed those laws by the European Commission and told: "That's the law you're now operating." Those laws are not necessarily going to be made in the interests of Northern Ireland. They are made by people who have their own interests.

I understand why noble Lords may rail against the delegated powers in this Bill, but why is not the much greater problem of the powers that have been given to Brussels to impose laws directly on part of the United Kingdom in the 21st century a subject for even more outrage? People may say that the Government signed up to this. I agree—they did, against our advice. We voted against it, as did other noble Lords in this House and Members of the other place. But we have this problem and we need to fix it. If it cannot be fixed, we are in serious trouble. I hope that negotiations and the negotiating mandate of the European Union will change to allow these things to be negotiated, but there is no sign of that thus far. If they do not change, this sovereign Parliament must take action to protect the people of Northern Ireland against laws imposed on them. Surely that should have the support of all true democrats in this mother of Parliaments.

Lord Hannan of Kingsclere (Con): My Lords, listening to the noble Lord, Lord Dodds, just then, my mind drifted back a decade or so to a debate in the domed hemicycle in Strasbourg on the issue of state aid in a neighbouring jurisdiction, one that was partially under single market regulation; namely, Switzerland. One after another the MEPs from different groups got up and fulminated against the unfair competition and unfair subsidies that were being carried out in particular Swiss cantons. It became clear as they spoke that what they regarded as unfair subsidies were lower taxes—lower corporation and business taxes, and a lower VAT rate. My point is that what we regard as an objective measure will not necessarily be seen that way in Brussels when it has full control of these things.

[Lord Hannan of Kingsclere]

I did not make the wise life choices that my noble friend Lord Leigh of Hurley did, so I have no idea how efficacious these vehicles are, but surely that is an issue that ought to be determined through our own national democratic mechanisms and procedures, rather than handed to us by people over whom we have no control. It is this point of trade-offs that I think is being missed.

Of course, how could one not be persuaded by the customary wry, terse brilliance of the noble and learned Lord, Lord Judge, in the way he phrases the problem of executive overreach? I think that all of us on all sides recognise the problem. But we are dealing with a world of imperfections, and the alternative is an also unconstrained, and to some degree arbitrary, power where decisions are made, often by middle-ranking European Commissioners who are not accountable to anyone. Inadequate as the statutory instrument is, there is some mechanism of control here. But, as the noble Lord, Lord Dodds, just explained, we will have a situation where the state aid regime in Northern Ireland is being imposed by people who are completely outside the democratic process.

Now, I very much hope that this Bill goes through without these amendments. I realise that I am a very lonely supporter of it in these debates, but I hope that once it has gone through, Northern Ireland can become a bridge between the United Kingdom and the European Union, and a forum for co-operation. But that will be possible only if we live up not only to the Belfast Agreement but to the wider principles on which it rests: above all, representative government and a proper link between taxation, representation and expenditure.

Baroness Ritchie of Downpatrick (Lab): My Lords, there has been much discussion today, and it goes back to the issue of democratic deficit and how we deal with what Northern Ireland's public representatives cannot deal with. There is a very simple solution. Under the Good Friday Agreement and the Northern Ireland Act 1998, amended by the Northern Ireland (St Andrews Agreement) Act 2006, provision was made for the institutions according to a three-stranded approach: the Northern Ireland Executive and Assembly, the North/South Ministerial Council, and the British-Irish Council, with east-west, north-south, and internal to Northern Ireland being addressed.

At the moment, we have no Northern Ireland Assembly, no Northern Ireland Executive and no North/South Ministerial Council that would hold these matters to account and address that democratic deficit. I would say to the DUP: there is a duty and an obligation to ensure, working with all the parties in Northern Ireland and both Governments, that those institutions are up and running. That will allow all of these issues to be adequately addressed by the MLAs who were duly elected in May.

Lord Lilley (Con): My Lords, I rise to support the noble Lord, Lord Leigh, but, before doing so, I repeat what I said the other day: I feel extreme discomfort about the extensive reliance on Henry VIII clauses in this legislation. I sit near enough to the Convenor to almost feel partly convened on the issue of Henry VIII legislation: he and the noble Viscount, Lord Hailsham, did suggest how this particularly egregious example of it could be constrained a little. However, I think neither was here when I posed the question of what the structural alternative was, in the context of negotiations, to relying on Henry VIII legislation. I still await a satisfactory answer to that question.

To return to the point made by the noble Lord, Lord Leigh, I share an interest with him in the EIS, because I was the Secretary of State who introduced them. I had forgotten that I was until he reminded me. Indeed, slightly earlier, when I was invited to speak on the 25th anniversary of their formation, I found that I was the warm-up act for Mike Yarwood at that event. But they are important and have been useful. They, at present, will cease under EU legislation unless that EU legislation ceases to apply in this country.

I want to make a general point, which I made earlier: the protocol is intrinsically temporary under European law. The Europeans themselves said, while we were negotiating the withdrawal agreement, that they could not, under Article 50, enter into a permanent relationship with the United Kingdom. Any arrangements reached under that agreement could only be temporary and transitional. Consequently, the protocol is transitional and temporary and not permanent. Indeed, in Mrs May's protocol, it specifically said in the recital that the withdrawal Act, which is based on Article 50, does not aim to establish a permanent future relationship between the EU and the UK.

5.30 pm

Subsequently, the noble Lord, Lord Pannick, wrote in a letter to the *Times* that

"the Protocol on Ireland/Northern Ireland states that the objective of the withdrawal agreement 'is not to establish a permanent relationship between the Union and the UK'. If, therefore, the UK and the EU were unable to reach an agreement on Northern Ireland/Ireland, despite good faith negotiations … the UK would be entitled to terminate the withdrawal agreement under Article 62 of the Vienna convention on the Law of Treaties."

It may be said that the final version did not include the recital that referred to Article 50. But it is still negotiated under Article 50. It still lacks any legal basis under Article 50. It is still temporary and transitional under Article 50. Therefore, if the noble Lord, Lord Pannick, is to be believed, it can be repudiated if, after good-faith negotiations, we cannot reach a satisfactory alternative.

Moreover, the final treaty omits not only the recital but the phrase that was in the original protocol but is not in the final one, that the provisions of the protocol shall apply

"unless and until they are superseded by a subsequent agreement."

So it no longer contains that claim to permanence which the original protocol negotiated by Mrs May did.

So it is very clear that the original approach laid down in Article 50 was that you could enter into temporary and transitional arrangements which were necessary to ensure that, in case there was no final agreement, no subsequent TCA, there would be some appropriate arrangements for the Northern Ireland border. It was expected that if subsequently they could not enter into negotiations until they had completed the withdrawal agreement under Article 50, under the

TCA that would deal with such things as subsidy arrangements. Largely, it did deal with such things as subsidy arrangements, and they should not be dealt with under a temporary protocol which ceases to have any validity if, after good-faith negotiations, we fail to reach an agreement. We should then repudiate it, accepting the advice of the noble Lord, Lord Pannick.

Lord Pannick (CB): There are many difficulties with that argument, the first being that there are good-faith negotiations that the United Kingdom is involved in. One cannot assume that they will not succeed. We do have a protocol.

The noble Lord, Lord Dodds, made a point which has been made previously in Committee, concerning the democratic deficit in Northern Ireland. There is a provision in the protocol that expressly addresses democratic consent in Northern Ireland: Article 18. It sets out a detailed procedure to ensure that there is democratic consent, and it requires in detail provisions to ensure the consent, in due course, of both communities, the nationalist and the unionist. I am sure that the noble Lord, Lord Dodds, will say that it is far from perfect and that he does not like the detail set out there—but that is what we agreed. It simply cannot be said that the subject of democratic consent has been ignored. It was negotiated and it was agreed.

Lord Dodds of Duncairn (DUP): Does the noble Lord accept that the provisions of Article 18 are contrary to the agreement that was made between the European Union and the UK Government in December 2017? Article 50 of the joint report said that before there could be any regulatory difference between Northern Ireland the rest of the United Kingdom, there had to be the assent of the Northern Ireland Assembly and the Executive. The current arrangements are in breach of an EU-UK agreement and the process for giving consent is deliberately made a non-cross-community vote, contrary to the Belfast agreement.

Lord Pannick (CB): It is elementary as a matter of diplomacy and of international law that a country is perfectly entitled to reach a new agreement in the circumstances as they then exist. That is what happened when the protocol was agreed. Both sides agreed a mechanism in Article 18 for ensuring democratic consent.

Lord Lilley (Con): I am grateful to the noble Lord for effectively giving way. He rightly said, both in his letter to the *Times* and his remarks today, that, as long as there was good faith, fair enough, but if good-faith negotiations failed to reach an agreement—not if there was any lack of good faith, I think—we would be entitled under Article 62 to repudiate the treaty.

Certainly, the EU is showing a lack of fulsome good faith in two respects. First, it is refusing to accept in the current negotiations that any change to the protocol can be made—only to its implementation. Secondly, it is repudiating its original position that it could not enter into a permanent arrangement, which was the whole basis of the negotiations we entered into under Article 50. It is now trying to make something which was intrinsically temporary, and which it said could be only temporary and provisional, into something permanent. I would have thought that, in both respects, had the British Government taken such positions, he and his friendly noble Lords would have denounced it as an appalling demonstration of bad faith.

Lord Pannick (CB): If the noble Lord's position is that the EU is acting in bad faith, the United Kingdom, if it takes that view, is perfectly entitled to use the procedures set out in the protocol of independent arbitration—if it does not like that, it can go to the Court of Justice—to resolve any dispute. What the United Kingdom cannot do is ignore the dispute resolution mechanisms that are set out in the protocol and simply make an assertion that it thinks there is no good faith. Indeed, I had not understood it to be the position of the Government at the moment that there was no good faith. They are about to enter into negotiations.

Baroness Chapman of Darlington (Lab): My Lords, it is certainly my understanding that the negotiations are being undertaken in good faith on both sides, and it would be useful to have that confirmed by Ministers when they reply.

There are a few issues here, but I say first that it is very helpful to have the noble Lord, Lord Dodds, make his contribution on his concerns about chapter 10 of the protocol, because sometimes our discussions can get a little philosophical—that may be the wrong word—and it is very helpful to have them grounded in reality. His view is that he does not want a scheme that is any different to that which exists in the rest of the United Kingdom. That is understood and we know why he thinks that. We may not feel that it is realistic in the circumstances that we find ourselves in after Brexit, but there are most certainly good prospects to negotiate, come to agreement and perhaps find exemptions that would give him close enough to what he needs to be able to move us forward and give clarity and certainty to businesses in Northern Ireland, which is surely what we all want to see.

I am worried about the potential for retaliatory measures should Clause 12 of the Bill come into force. We know that this is something the EU is deeply concerned about. That does not mean that we cannot negotiate a much better position for ourselves, but there is the prospect of some form of retaliatory measure being forthcoming from the EU. I would like to know from the Minister what assessment has been made of the potential for this—although I am not quite sure which Minister to address my gaze to on this.

The Minister of State, Foreign, Commonwealth and Development Office (Lord Ahmad of Wimbledon) (Con): It should be to me.

Baroness Chapman of Darlington (Lab): That is helpful, thank you. What kind of measures do we anticipate, and what would be their impact? It is all very well to play hardball and say, "This is what we will do", but that will always have a consequence and we need to understand what that might be. Not to do so would be deeply irresponsible.

[Baroness Chapman of Darlington]

Then there is the issue of powers. A lot has been said and I agree with pretty much all of it. Clause 12(3), which the noble and learned Lord, Lord Judge, referred to, says

"may, by regulations, make any provision which the Minister considers appropriate in connection with any provision of the … Protocol to which this section relates."

That is incredibly broad and we ask whether it is necessary for it to be so broad. If I have understood the amendment tabled by the noble Lord, Lord Leigh, correctly, he seeks to put some sort of frame around it. We are all very concerned about where those powers might lead us.

The problem is that we have to look at this in conjunction with the Subsidy Control Act, which is itself very broad, has powers for Ministers and lacks clarity about what the UK Government intend for Great Britain's subsidy regime. We are compounding one unknown with another. That is quite a lot for noble Lords to swallow. We have been asked to show a lot of faith in Ministers when really what we need, and what the noble Lord, Lord Dodds, has signalled he would like too, is some more information and draft regulations. We want to know where we are going with all this so that we can assess whether it will be the right approach to benefit businesses in Northern Ireland and answer the challenge made by the DUP. At the moment, I can see a set of circumstances in which it would not.

It is right that these issues are resolvable only by negotiation; we all know that. We have to start accepting that and asking ourselves whether the Bill's approach will assist those negotiations in reaching a positive outcome. My noble friend Lady Ritchie said that this is something where we want the voice of the Northern Ireland Assembly. We want to know what MLAs from all communities have to say. It really matters that we hear from all sides, because this is about solving problems, not making things worse. The Bill really does risk making things worse.

The only other thing I would add is that there is now a different subsidy control regime in Great Britain, but where are this interventionist Conservative Government, who are making use of their new powers up and down the country? Speaking as somebody from the north-east of England, we see lots of tinkering and plenty of things that we could have done whether we were in or outside the EU. I do not particularly see that there will be the massive difference that warrants the kind of tension this is leading to. I suggest that the amendments tabled by the noble Lord, Lord Purvis, and my own are designed to be helpful. These are issues that we will not make progress on through this Bill.

Lord Leigh of Hurley (Con): I agree with the noble Baroness that I was trying to create a framework, in a very amateurish way that is way above my normal pay grade. I take her point that she is trying to do the same thing with her Amendment 18, which is sensible, but does she think removing Clause 12 would weaken or strengthen our hand in the negotiations? If a vote on the clause standing part was to take place, what would be her plans for those people planning EIS investments in the future?

Baroness Chapman of Darlington (Lab): That is a very helpful question. I do not think the situation is about being with or without Clause 12. The Bill places the future of the regime in Northern Ireland in some doubt because nobody is clear about what is to be negotiated, what the outcome will be and what the rules will be. Even with Clause 12 in the Bill, we do not know the answer to those questions. The negotiations need to pick up pace, and they need political leadership as well as technical negotiations at official level. Experience tells us that you need that leadership—that buy-in and that clout—from the Prime Minister down. That is how you get resolution, and that is the approach I would take. I do not think the Bill, or this clause, are the make-or-break questions to resolve this issue.

5.45 pm

Lord Ahmad of Wimbledon (Con): My Lords, I thank all noble Lords who have taken part in this debate and fully acknowledge that there are issues that noble Lords have raised before. In particular, I refer to the noble and learned Lord, Lord Judge, who once again, in his usual forensic and specific way, highlighted with great brevity the main issue of concern. I acknowledge that this has been raised by noble Lords during the passage of the Bill. However, I will revert to the specific amendments and seek to provide answers to some of the questions raised. I caveat that by saying that we will review some of the specific technical questions relating to previous debates—and, indeed, to previous Bills and treaties—and ensure that we provide a comprehensive response.

I thank the noble Lord, Lord Purvis, for acknowledging the letter. I hope that having three Ministers on the Front Bench is better than one. It underlines the importance that we attach to your Lordships' House on the Bill. I also want to say from the outset, on the issue that the noble Lord, Lord Purvis, raised about the extent of the EU mandate, that we shall ask it to change from its earlier negotiating position.

My noble friends Lord Dodds, Lord Lilley and Lord Hannan alluded to the essence of why the Bill is necessary. Of course these things are negotiated. Every contract and treaty is made in good faith. The noble Baroness, Lady Chapman, was right to gaze in my direction. We are of course negotiating in good faith. If we were not, it would be a non-starter—it is as simple as that. I mentioned that I was in the last call that we had with the European Commission. We want to pursue a negotiated settlement because we believe it is in the interests of all parties and, in particular, it takes forward the concerns to which my noble friend Lord Dodds alluded. I agree with the noble Baroness, Lady Chapman, that it is important that we hear a broad debate about all the concerns that exist, particularly among all the communities in Northern Ireland.

Turning to Amendment 16 in the name of the noble Lord, Lord Purvis of Tweed, the power in Clause 12(3), also referred to by the noble and learned Lord, Lord Judge, is in line with those contained elsewhere in the Bill, but it ensures the proper implementation of the regime set out elsewhere in Clause 12, including taking account of any developments that could arise as a result of changes to the subsidy control landscape.

My noble friend Lady McIntosh raised the issue of agriculture. To respond to her, my understanding is that Clause 12 applies to agricultural subsidies. The purpose of Article 10(2) was to provide the flexibility needed to avoid Northern Ireland businesses losing out from leaving the common agricultural and fisheries policies. Clause 12 achieves flexibility by disapplying EU state aid law, rendering the carve-outs unnecessary. Agriculture and fisheries will be dealt with under the domestic regime. The new domestic regime provides a single coherent framework for all sectors. The inclusion of agriculture and fisheries will protect competition and investment in these areas across all parts of the UK, as it does for other sectors.

My noble friend Lord Dodds also talked about the detail of the regulations. Of course, I accept the importance of the need for the regulations. There will be opportunities to look at the regulations and for them to be scrutinised through normal parliamentary procedures. However, I note the points that have been made by my noble friends and other Peers in this respect. As I indicated earlier in respect of the information that we will seek to provide—

Viscount Hailsham (Con): I intervene on a narrow point. Why is my noble friend against the test of necessity being included on the face of the Bill?

Lord Ahmad of Wimbledon (Con): I believe that my noble friend is talking about the ministerial powers that exist here. We have had this debate before as well. We believe that a broader nature is necessary, and that is why "appropriate" is being used: to allow the maximum level of flexibility that the Government believe will be required. Of course, I accept there are differing opinions and views on this. Indeed, in conversations I have had, including with the noble Lord, Lord Pannick, to which I have alluded previously, there have been various Bills that have gone through your Lordships' House where this discussion about "appropriate" and "necessary" has taken place, particularly with regard to the powers of Ministers and how those might be exercised. Of course, I note the point my noble friend is making.

The issue raised by the noble Lord, Lord Purvis, on TCA structures and state aid continues. TCA structures allow disputes to be raised, and the withdrawal agreement also provides structures for consultations as well. That very much remains the case. The noble Lord, Lord Purvis, also asked why the Government concluded that they had to remove state aid requirements from the protocol. The Government have been clear about the problems caused in practice by Article 10 of the protocol. This was first raised in our Command Paper in July 2021.

The noble Baroness, Lady Crawley, talked about a trigger point. Partly, this has been a culmination of the evidence and the practical experience, as was articulated by my noble friend Lord Dodds. The current system of operating two subsidy control systems within one country has created complexity and uncertainty, which is impacting policy across the UK. Irrespective of how noble Lords are approaching this Bill, either in support of or against what the Government are proposing, we all recognise that what needs to be resolved is the situation in Northern Ireland. Article 10 has also placed considerable administrative and legal burdens on businesses; for example, facing detailed questions about their operations from authorities to establish whether subsidies could be in scope of the protocol itself.

I have already referred to the powers. Noble Lords have been very articulate in making their concerns about the powers known but, again, I have underlined the importance of the necessity of these powers. To demonstrate in detail, in the previous day in Committee, we alluded to what this would require if everything was put into primary legislation.

Turning to Amendments 17 and 19, tabled by my noble friend Lord Leigh of Hurley, I am grateful for my noble friend's contribution and for his reaching out to officials before this debate. My noble friend has powerfully illustrated the problems arising from Article 10 of the protocol and how they can arise in unexpected places across the United Kingdom and our economy. Article 10 can lead to uncertainty and delays in the delivery of subsidy schemes in Northern Ireland in comparison with Great Britain. They are exactly the sorts of problems that Clause 12 is seeking and intending to resolve, including to unleash further investment, to which my noble friend alluded, across the whole of the United Kingdom. The concurrent operation of two subsidy control regimes is a fundamental challenge for public authorities and beneficiaries across the UK. The solution put forward in the Bill truly addresses the challenges the Government believe exist, and will provide certainty across the UK.

Baroness Chapman of Darlington (Lab): Can I take from what the Minister said that the intention is that there would be one UK-wide scheme? If that is the case, that surely could go in the Bill.

Lord Ahmad of Wimbledon (Con): I acknowledge what the noble Baroness has said. As I said, what we are looking to do in the basis of the Bill is to provide clarity and simplification in the current procedures.

Baroness Chapman of Darlington (Lab): I do not think we are.

Lord Ahmad of Wimbledon (Con): No, I think we are. That is exactly what we are seeking to do. It is clear that the noble Baroness remains unconvinced.

Turning back to the amendments themselves—

Lord Kerr of Kinlochard (CB): I do not think it is clear; I do not understand. If the wish of the Government is to apply UK state aid laws in Northern Ireland—and that would be the wish of the noble Lord, Lord Dodds—why does the Bill not say that? Why, instead, does it import this uncertainty, which would be continuing far into the future, because the regulations applying in Northern Ireland would depend on the whim of the Minister, as the noble and learned Lord, Lord Judge, pointed out?

Lord Ahmad of Wimbledon (Con): I have listened again to the noble Lord and, if I may, just for clarity, I will ensure that I get a full response to this. I will check with my officials again and provide the added

[Lord Ahmad of Wimbledon]
clarity that the noble Baroness and the noble Lord are seeking. If that needs to be followed up in writing, I will, of course, do so as well. Ultimately, I stand by what I said earlier, that what we are seeking to do here is to address the specific issues that there are in practical terms.

My noble friend's concerns about the scope of the Bill's delegated powers were raised by other noble Lords. I hope that I can reassure my noble friend that the power may already be exercised only to make appropriate provision in connection with the exclusion of Article 10 of the protocol and the domestic provision that Clause 12 places on it. This provides a clear and limited framework for what the power can do; providing further constraints would provide additional uncertainty to businesses and consumers. In this case, it would put off, and potentially circumscribe, the ability to facilitate an effective domestic subsidy control regime that applies to the whole of the UK, leaving Northern Ireland being treated unfairly compared with the rest of the UK.

The Government are aware that regulations with retrospective effect are exceptional. However, it is clear that the continuing application of the state aid acquis in Northern Ireland has led to a sense of disconnection for many people, particularly the unionist parties, and puts the re-establishment of power-sharing arrangements at risk. As the EU state aid acquis is removed, it may be necessary to ensure that actions granted under the regime are appropriately reconciled with the UK regime. Removing Ministers' ability to make retrospective provision, which was mentioned by several noble Lords, could undermine the Government's ability to ensure a single, coherent, domestic subsidy control programme throughout the UK. It would also, in the Government's view, create further uncertainty for businesses in Northern Ireland and across the UK. Any such regulations would already be subject to the higher level of scrutiny in the House. I know that my noble friend is concerned about creating uncertainty for investors, to which he alluded in his contribution. I hope he is reassured by what I have said: that the Government's intention in this case is only to provide certainty. There will be time to examine any subsequent regulations.

The amendment also seeks to ensure that the power can make incidental and transitory provision. I am happy to be able to inform my noble friend that this is already the case by virtue of the operation of Clause 22(2)(e). The amendment also seeks to make necessary regulations subject to annulment by Parliament. We will, of course, debate this further when we reach Clause 22, but the Government's proposition is that this is appropriate when regulations are making retrospective provision or amending an Act of Parliament, but that it would not be the appropriate level of scrutiny for other instruments making what are likely to be smaller or more technical free-standing provisions. I hope, for these reasons, that my noble friend will be minded to not move his amendment.

6 pm

The noble Baroness, Lady Chapman, spoke to Amendment 18. We have had these discussions before, and she will know that the Government's position remains the same; my noble friend also alluded to this a few moments ago. The Government's position remains that "appropriate" gives the correct degree of ministerial discretion, with substantial but constrained powers, which this House ultimately accepted on Acts including the EU withdrawal Act, the withdrawal agreement Act, the Trade Act and the sanctions Act. The use of those powers has shown that appropriateness stands the test and is resilient to the kind of abuse that noble Lords have alluded to and feared. I accept what my noble friend Lord Cormack said about the test for any Minister in government and the powers given by a government Bill to those who may be in power at some future point, but at the same time, as I said, previous Acts have been passed and have stood that test.

I move briefly to Clause 12 standing part of the Bill. Clause 12 provides the basis for a single, UK-wide subsidy control policy—a point on which the noble Baroness sought clarification—rather than two separate regimes, as currently provided for under the Northern Ireland protocol. Once commenced, this clause will provide legal certainty and confidence, on the basis of which businesses can receive subsidies. We believe it provides clarity in domestic law that Article 10 is disapplied. Any subsidies that would have been notifiable under Article 10 will no longer need to be notified to the EU.

The clause also amends Section 48(3) of the Subsidy Control Act so that UK subsidy control requirements apply in Northern Ireland. Clause 12(3) provides powers for a Minister to make appropriate provisions in connection with any part of the Northern Ireland protocol to which the clause relates. The Government believe this clause is vital in facilitating a single domestic subsidy control regime applying throughout the UK, thereby giving businesses in Northern Ireland and across the UK greater certainty, and I therefore recommend that the clause stand part of the Bill.

I know that more general issues have been raised in this debate and previously, and I am sure they will be raised in our future discussions in Committee. I hope I have provided detail, to the extent I can, on some of the questions, issues and concerns raised. Equally, I give the added assurance, as we have in previous Committee stages, that I shall write to the relevant noble Lords if there is further clarity or detail to be provided.

Lord Purvis of Tweed (LD): My Lords, I am very grateful for the Minister's response. He knows that I respect him greatly, but he said the current scheme had complexity and uncertainty and, with great respect, I do not think he added simplicity and clarity regarding the successor scheme.

My lack of a social life will bear witness to the fact that I was in for every day of the Committee and Report stages of the Subsidy Control Bill, as I will be for this Bill. I asked about complexities and uncertainties. The Minister replied to me in February:

"To respond to the concern of the noble Lord, Lord Purvis, that state aid rules would continue to apply even if the UK's negotiating position were accepted, these are specific and limited circumstances. I trust that this will allay the Committee's concerns on this important issue."—[*Official Report*, 2/2/22; col. GC 244.]

The Minister is now saying that those "specific and limited circumstances", which the Government said would result if they were successful in their negotiations,

will be impossible to secure, so they are now seeking sweeping powers. He did not indicate when that policy change happened. It is a major change, and I simply do not know when it happened.

That position is also contradicted. The noble Lord, Lord Dodds, referred to Invest NI. As I did at Second Reading, I will read from the Invest NI website:

"This dual market access position means that Northern Ireland can become a gateway for the sale of goods … This is a unique proposition … These additional benefits".

Invest NI is using dual market access to promote Northern Ireland. The Government may be right that this is now acting to the disbenefit of Northern Ireland, and we have asked for evidence for this. If they are designing a new scheme, the real risk, as the noble Lord, Lord Kerr, indicated, is that uncertainty will have a major chill effect that will bring about the very things the Government say they are concerned about.

I agree with the noble Baroness, Lady Chapman, that we are asked to legislate for unknown unknowns. On Monday I called these "Rumsfeld clauses". The Government are seeking powers for known unknowns, but if they get it wrong in the future—which they do not know about—they want powers to deal with it now. The problem is that none of the powers in this Bill, which is replacing the Subsidy Control Act, has any of the restrictions and requirements of the regulating powers of that Act. The breadth of the powers goes way beyond the Subsidy Control Act, which is now proposed to be a single element.

Supposedly, these powers are simply for what Ministers consider appropriate, but I am not sure that a Minister would ever think their actions inappropriate when they bring forward proposals. It is for the law to say what is not appropriate in regulations; that is our job. The noble Lord, Lord Pannick, is absolutely right: it is not about what just Ministers or even necessarily just opponents on the Opposition Benches might use. It might be their successors as Conservative Ministers—we have had a fair few of them—who completely change policy. This is so broad.

A point of substantial importance is that there is a deep inconsistency in the Bill. The Government seem to think that it is acceptable to have a dual regulatory regime for goods but one route for subsidised goods. I have seen no mechanism that might cover a subsidised good. I really do not know whether that situation is clear.

With the greatest respect to the Minister, I do not think the noble Baroness, Lady McIntosh, received a sufficient response to her question. She will make up her own mind about this, of course. Agricultural subsidies are not included in the Subsidy Control Act—we debated this long and hard—and although the Minister said that this will now be covered in the proposals, I do not know where. The danger is that there is now an enormous black hole in the provision of agricultural subsidies. Given the agricultural support scheme announced earlier this year, I do not think it fair to have these concerns.

I do not think the Minister has satisfied the Committee. I hope that he and his officials will reflect on *Hansard* and provide more of the information we want to see. Unless the Government's proposals are made much clearer, significant doubt will remain. In the meantime, I beg leave to withdraw the amendment.

Amendment 16 withdrawn.

Amendments 17 to 19 not moved.

Clause 12 agreed.

Clause 13: Implementation, application, supervision and enforcement of the Protocol

Amendment 19A not moved.

The Deputy Chairman of Committees (Baroness Henig) (Lab): We come to Amendment 20. If this amendment is agreed to, I cannot call Amendments 21, 21A or 21C on grounds of pre-emption.

Amendment 20

Moved by ***Lord Purvis of Tweed***

20: Clause 13, page 7, line 27, leave out subsection (4)

Member's explanatory statement

This is part of a series of amendments based on recommendations from the Delegated Powers and Regulatory Reform Committee which states that a number of subsections in the Bill "contain inappropriate delegations of power and should be removed from the Bill."

Lord Purvis of Tweed: My Lords, Amendment 20 is, in many ways, connected and therefore I need not be as long about this

Let me quote from the Delegated Powers and Regulatory Reform Committee on Clause 13:

"Parliament has no knowledge of the Government's plans but is meanwhile expected to rubber stamp all the regulation-making arrangements."

That surely is not a means by which we make good legislation. The committee is highlighting Clause 13(1), which states that

"Any provision of … the EU withdrawal agreement, is excluded provision so far as it confers jurisdiction on the European Court in relation to … the EU withdrawal agreement".

As highlighted by the DPRRC and others, it is a stretch to say that the invocation of the defence of necessity would permit the extending to all parts of the exclusion of the European court. I should be grateful if the Minister could state in clear terms why the Government's legal position, which does not clarify this, states so.

There is a policy concern, which was aired so well by Stephen Farry MP when this was considered in Committee in the Commons. If, as seems to be the Government's position, there will still be Northern Ireland direct interaction with the EU single market—with north-south trade as a major part of the Northern Ireland economy—without the European court having application, it puts at risk what that genuine market access is for Northern Ireland. He made that point in clear terms and I need not add to it, because the case is very strong. The policy paper *The UK's Solution*, when it highlighted the problems, did not suggest the removal of the court altogether either. So is this a red line in the talks for the Government?

[Lord Purvis of Tweed]

Secondly, concern has been raised about human rights consideration. The Northern Ireland Human Rights Commission has highlighted the fact that the breadth of the powers in

"Clause 13 of the Bill would restrict the CJEU's interpretive role in disputes relevant to Protocol Article 2".

We discussed on Monday the need for that to be dynamic in relation to the obligations under Article 2, and its potential removal will create concern. I hope that the Minister is able to be clear, in response to the Northern Ireland Human Rights Commission, that there would be no diminution of rights.

Given that the Government have not made the case, and given the concerns about the impact on the operation of the single market and Northern Ireland's position within that, as well as the human rights concern, I beg to move.

Lord Judge (CB): My Lords, I shall not repeat myself, but I shall draw attention to the fact that, in the debate on the previous group, the Minister kept telling us that the word "appropriate" had been used in circumstances like these, as if that was something to be greeted with joy. Each of those pieces of legislation was a dreadful abdication by Parliament of its responsibilities. Even if the Minister is right—I am not challenging his veracity or judgment; let us assume he is right—that so far none of them has caused any problems, it would be nice to know that and I take it from the Minister that none has, but that does not mean that they may not cause huge problems in the future, or that when we have a change of Government, which we may have, that will not cause problems when their Ministers decide that they are going to apply these regulations. I really find that argument "It has been done before; therefore it is a precedent"—and I am a lawyer—but I do not think all precedents are wise and that one is a particularly unwise one.

I know I am trespassing back on to the previous debate, but I have another concern. During his reply, the Minister offered a number of reasons why this regulatory-making power was needed. Fine, but why are they not then put in the legislation, so that we can have a look at what these regulatory powers, at any rate at the moment, are designed to address? For the purposes of this group, if there are matters which the Government have in mind which they think can be served by a regulatory-making power, fine, but let us see what the primary legislation should contain.

6.15 pm

Finally, can we not address the question of some diminution in this wide-ranging power? We really ought to find a way. I find it astonishing that across all sides of the House there is concern about these powers. I know that the noble Lord, Lord Dodds, is approaching the issue from his concern about the fact that the EU has these wide-ranging powers. Speaking for myself—I am only speaking for myself—I do not think we should have given those powers to the EU, but it was a consequence of signing in. I also think that, having given those powers to the EU and having been obliged to pass the necessary legislation when the EU said so, we have become habituated to passing all sorts of secondary legislation without proper analysis. I think it has contributed to the habitual way we behave. With great respect, we are concerned here with whether this Bill should give this Minister, or that Minister or the Ministers to come these wide-ranging powers. For my part, I do not think they should.

Lord Hain (Lab): My Lords, I speak to Amendments 21B, 21C, 23B and 23C, in my name and the names of my noble friends Lady Ritchie of Downpatrick and Lady Goudie. I am grateful for their support.

On Amendment 21B, Clause 13(1) removes the jurisdiction of the EU's Court of Justice altogether, but the Court of Justice jurisdiction is essential to the operation of the single electricity market to keep the lights on in Northern Ireland, which the UK Government have said they wish to see remaining unaffected. This amendment ensures that there will be no inadvertent disruption to the single electricity market through the coming into force of this clause. Surely the Government should accept that.

On Amendment 21C, Clauses 13(4) and (5) allow a Minister of the Crown to make regulation in relation to any provision of the protocol relevant to the jurisdiction of the Court of Justice or the application, supervision and enforcement of the protocol. There is a possibility that this could inadvertently affect the operation of the single electricity market. This amendment requires the Minister to make and publish an impact assessment prior to regulating under this clause in order to prevent such a risk to the single electricity market. I do not see what the problem with my amendment might be; it seems to me entirely reasonable.

On Amendment 23B, the operation of the single electricity market on the island of Ireland comes under the jurisdiction of the Court of Justice of the European Union and is required to be interpreted in the light of case law of the CJEU. The scope of Clause 14 makes this impossible. This amendment would ensure that Ministers regulating in this area under Clause 14(4) would have to make and publish an impact assessment, prior to the regulation, in order to consider its possible negative implications on other aspects of the protocol that the Government wish to protect, including the single electricity market. Again, I cannot see what objection there might be to Amendment 23B.

On Amendment 23C, the operation of the single electricity market on the island of Ireland comes under the jurisdiction of the Court of Justice of the EU and is required to be interpreted in the light of its case law. The scope of Clause 14 makes this impossible and puts Article 9, on the single electricity market, at risk of being excluded from the protocol by accident, even though the Government say they wish to protect it. This amendment would ensure that the functioning of the single electricity market is specifically protected from the scope of this clause to maintain its operation, which is necessary for the electricity supply in Northern Ireland. Again, surely this is a no-brainer for all of us, including government Ministers.

By way of background, a wholesale electricity market is where electricity is bought and sold before being delivered to consumers. Market arrangements require generators and wholesale suppliers of electricity to forecast their generation and consumption and to bid

at the price at which they are prepared to buy and sell. Competition between suppliers with equal access to a grid system should ensure value for customers, with a market price based on the minimisation of production cost.

Power markets have been evolving across Europe since the early 1990s. Since the entry into force of the Lisbon treaty in late 2009, the EU gained formal competences in energy and embarked on electricity market reform. A core part of this was the so-called third energy package. To enable cross-border trade in electricity and gas, each coupled market adopts a common set of rules and standardised wholesale trading arrangements so that system operators can work together to allocate cross-border capacity and optimise cross-border flows. This is what is at work in the integrated single electricity market on the island of Ireland.

The SEM is a cross-jurisdictional wholesale electricity market that came into being in 2007. It allows generators and suppliers to trade electricity in a single market across the island of Ireland. Fundamentally, it helps ensure that there is sufficient capacity to meet electricity demand at all times in both Ireland and Northern Ireland. Being part of an all-island market brings benefits to electricity customers in Northern Ireland by reducing electricity prices and increasing the security of supply. It was further cemented in 2018 with the integrated pan-European market design of the third energy package.

An intergovernmental UK-Ireland memorandum of understanding co-ordinates non-mandated market arrangements, but the SEM functions through an overarching European Union-mandated convergence of energy policy and market structures, as governed by certain parts of the European Union acquis. The Ireland/Northern Ireland protocol to the withdrawal agreement provides the basis for the continued operation of the single electricity market after Brexit by including the minimal amount necessary of EU laws on energy markets.

To do this, Article 9 states:

"The provisions of Union law governing wholesale electricity markets listed in Annex 4 to this Protocol shall apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland."

Annexe 4 then lists seven Acts that apply to the

"generation, transmission, distribution, and supply of electricity, trading in wholesale electricity or cross-border exchanges in electricity."

These key elements of European energy law applying in Northern Ireland are, notably, largely in devolved competences. For example, the EU's regulation on energy market integrity and transparency—REMIT—prohibits insider trading and energy market manipulation and makes provision for the monitoring of the market by regulators. REMIT continues to apply in Northern Ireland through the protocol.

The application of these Acts entails circumscribed participation in the EU market, which requires acceptance of EU governance. In practice, this means that the ultimate arbiter of EU law is the Court of Justice of the European Union. An essential criterion for transposing EU law into single electricity market rules is that single market rules cannot be differentiated across jurisdictions and alignment must be guaranteed for the future.

Article 13 of the protocol states that

"the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union."

This includes the provisions listed under Annexe 4. This is to secure the governance of the internal energy market, as it covers the single electricity market. This is removed by the Northern Ireland Protocol Bill, Clause 13(1) of which sets out:

"Any provision of the Northern Ireland Protocol, or … the EU withdrawal agreement, is excluded … so far as it confers jurisdiction on the European Court in relation to … the Northern Ireland Protocol".

The Explanatory Notes underline:

"That is the case whether the CJEU jurisdiction relates to excluded provisions or any other matter."

With the removal of the CJEU and no means of referencing its case law or jurisprudence, the governance of the single electricity market is put in jeopardy and, thus, the continued functioning of the all-island market is as well. This is happening at a time when the pricing of electricity, security of supply and balancing supply and demand are at an almost unprecedented level of concern to consumers this winter on the island of Ireland and elsewhere in the world, including Great Britain.

A lot of concern has rightly been expressed about the unknowable consequences of the Bill, given that so much of its effect will come through powers that are neither clearly demarcated nor spelled out—the noble Lord, Lord Purvis of Tweed, has spoken at length on this. However, I draw to noble Lords' attention the dangers in what we do know about the Bill's actual, if unintended, effects. On coming into force, even this skeleton Bill will be powerful enough to undermine the foundations of the protocol completely, with direct, immediate and practical consequences for Northern Ireland. This is primarily because the Bill removes the Court of Justice of the EU from having a role in the oversight of the protocol. Clause 13(1) sets out that any provision of the Northern Ireland protocol or withdrawal agreement is excluded so far as it confers jurisdiction on the Court of Justice,

"whether the jurisdiction relates to excluded provision or any other matter".

As such, Court of Justice jurisdiction is removed altogether. Furthermore, Clause 20 means that domestic courts and tribunals cannot refer any matter to the Court of Justice in relation to the Northern Ireland protocol, and that they will not be required to follow the jurisprudence of the CJEU from the day the Act comes into force.

This is not merely a theological matter. Article 12(4) of the protocol spells out what the Court of Justice of the European Union has been given jurisdiction over for Northern Ireland. This includes customs and the movement of goods entering Northern Ireland and technical regulations and certification for goods, but it also includes the single electricity market. In addition, Article 13 states that the implementation and application of the protocol provisions referring to union law, concepts or provisions should be

"interpreted in conformity with the relevant case law of the Court of Justice of the European Union."

[Lord Hain]
The EU has been absolutely clear that Northern Ireland's free access to the EU single market is contingent on the jurisdiction and jurisprudence of the Court of Justice of the EU.

I am sorry that I am speaking at some length on this, but it is quite complex and important. To change the position of the Court of Justice as proposed in the Bill would immediately erode the basis for an open Irish border. It is either naive or disingenuous of the Government to claim that the single electricity market will be unaffected by the Bill: the position of the Court of Justice is absolutely essential to its operation. The prospect of the collapse of the single electricity market at one point led UK officials to consider putting generators on barges in the Irish Sea in the event of a no-deal Brexit, which tells us that this is deadly serious.

I remind the Government, keen as they are to claim sovereignty over Northern Ireland, that it is their duty, not the European Union's, to keep the lights on in Northern Ireland. If the EU decides to prevent the continued free flow of goods and electricity across the Irish border because of the removal of the CJEU from the protocol, it would be not a sign of its malintent but rather a well-flagged consequence of the wanton recklessness of the Government in writing the Bill in this way.

I will refer to another skeleton analogy: the Government are trying to claim that the benefits of the standing, walking protocol can be retained at the same time as cutting off its head and removing several of its major bones. Equipping the Government to fashion new plastic limbs over time to fix the problems that the Bill is deliberately inflicting on the protocol is one thing, but removing the head, in the form of Court of Justice jurisdiction, will of course mean that the protocol simply cannot function, and thus neither can things that it sustains, such as the open border and the single electricity market.

6.30 pm

I am not arguing that there could not conceivably be a situation in which Articles 12 and 13 of the protocol are adjusted to allow for some finessing of the Court of Justice's position, but this would have to come through negotiation and agreement between the UK and the EU—and, for this, trust between them will need to be built. However, by its very existence, this Bill does quite the opposite: it destroys trust. By amending the Bill to avoid the removal of the Court of Justice's jurisdiction having unintended consequences for the operation of the single electricity market—which the Government have been clear they wish to see kept fully functioning—we would at least ensure no disruption to electricity supplies in Northern Ireland, even if it loses free access to the EU's single market for goods.

Finally, I appeal to Ministers to look again at the drafting of these amendments. If there are some technical issues, I am happy to discuss them. However, I do not see why they cannot accept the principle behind them, which is to keep the single electricity market functioning smoothly.

Lord Deben (Con): My Lords, in declaring an interest as chairman of the Climate Change Committee, I wish to follow on from what has just been said. As the Democratic Unionist Party knows, we have reached out to Northern Ireland particularly because of the difficulties the economics of that part of the United Kingdom have in meeting the climate change requirements. Indeed, I found myself in what my noble friends might well feel are the unusual circumstances of defending the Northern Irish Government against an assault by Sinn Féin and the Greens, demanding answers in Northern Ireland that were, in our view, not possible. The Climate Change Committee is clear that we do not ask of people things they cannot do. Therefore, Northern Ireland has a much more limited demand on it: to reach something like 85% of the 100% we want for net zero in 2050. That means that the rest of the United Kingdom must do better to make this possible.

I beg my noble friends the Ministers to recognise that, although they know that I am deeply opposed to this Bill in every aspect, I am asking for their help on this because the Bill presents a peculiar and particular difficulty: the single electricity market in Ireland is crucial to trying to meet the requirements that we place before it. First of all, it is crucial to keep the lights on Northern Ireland—I ask noble Lords to forget climate change for a moment because this is absolutely vital, and this is why it is set up in this way. I know this because I had to understand it to do the work that we did to help the DUP present its case to the Northern Ireland Assembly for not doing what most of us would love the Assembly to do: to reach the net-zero target that we have as a United Kingdom by 2050.

I beg the Minister to take this very seriously indeed, and to think of it differently from the way he wishes to think about the rest of the Bill. There will be issues if we interfere with the single electricity market; I cannot even see how we keep the lights on now. We must make enormous changes to meet the net-zero target, which the Prime Minister reaffirmed today as essential for our economic future as a United Kingdom. So if we are talking about the protection of the United Kingdom —the union—this is crucial to get right. This is not just about keeping the lights on; it is about ensuring that we can go on keeping the lights on without costing the earth. That is going to be very difficult for Northern Ireland to do—I recognise that. We have had extremely good conversations about how we might do it, but we will not be able to do it if we throw this bit of co-operation into debate or dispute, because Ireland as a whole—as an island—must meet this target together.

Indeed, one of the arguments properly put by the DUP when we were discussing all this was that the Republic of Ireland has not explained how it is going to meet its targets—we accepted that. We said that this does not excuse us from being detailed about meeting our targets. Instead, it means that we must recognise that those targets are not going to be met on a north of Ireland basis; they will have to be met by Northern Ireland within the context of the whole of Ireland meeting them.

The detailed examination of this, as put forward by the noble Lord, Lord Hain, is crucial in debating the Bill. In a sense, I wish that I liked the Bill, because that would enable my noble friend the Minister to see that I am being specific about this issue, wholly separately

from the fact that I think the Bill gives the Government powers they should never have. The noble and learned Lord, Lord Judge, again pointed out that, every time we discuss any of these things, the big problem is that we are uncertain as to how these powers would be used. The problem here is not that, but rather, without excluding the single electricity market, we explicitly say that neither the European Court of Justice nor its previous decisions can be used in these circumstances. There is no way that the single electricity market can be run unless we maintain and protect the mechanisms which have in fact proven perfectly reasonable ever since they were put in place. Consequently, unless we maintain those mechanisms, there is no way we can keep the lights on because there is no way we can make that mechanism work.

Similarly, to those of us who are passionate about the serious issue we have so short a time to fight—climate change, the biggest physical threat to our society—I say that we are now throwing into doubt, maybe for years, the mechanisms without which we cannot do that job in Northern Ireland or Ireland as a whole. I plead with my noble friend the Minister to forget all the other arguments and recognise that there is something here that the Government must change in passing this Bill, whatever else happens. The Government know perfectly well that I hope the Bill will not pass and that I will do anything in my power to stop it passing, because it is a very bad Bill. However, this is so disruptive that it must be looked at, even by those who believe in the Bill.

If the Government want the co-operation they are hoping to get through this Bill, I hope the Democratic Unionist Party will explain to them why they must protect the electricity supplies. There is no way of doing that—or of ensuring that we fight climate change in Ireland—unless we accept that the electricity system be excluded from the operations of this Bill.

The Earl of Kinnoull (CB): My Lords, I continue to be worried by the interrelationship between the trade and co-operation agreement and the withdrawal agreement. I mentioned this before in Committee on Monday, but I did not develop the point at all. The trade and co-operation agreement is 1,246 pages long. If you get to Part 7, "Final Provisions", on page 402, you find a provision called "Relationship with other agreements". I will just read it out because I think it is critical; we have been talking about Rumsfeld problems, but I think this is a kryptonite problem. It says:

"This Agreement and any supplementing agreement apply without prejudice to any earlier bilateral agreement between the United Kingdom of the one part and the Union and the European Atomic Energy Community of the other part. The Parties reaffirm their obligations to implement any such Agreement."

This provision has been the topic of quite a debate around the place in articles, conferences and things, but it is an interlinking provision between the critical trade and co-operation agreement and the withdrawal agreement. As an interlinking provision, it means that, if something happens to the withdrawal agreement, that in turn—so goes the argument—could come back and torpedo part of, in some way, the trade and co-operation agreement, which, as I have said, is such a critical piece of our trade with our largest trading partner.

I feel that it is very important to consider that. First, I would like to ask the Minister—I am not sure who is answering this section; I now know it is the noble Lord, Lord Ahmad—whether he accepts that this an extremely important thing to consider. If by doing something to the Northern Ireland protocol and the withdrawal agreement you are causing damage to the trade and co-operation agreement, that could be very serious. Certainly, as you sought to make a change to the protocol, you would need to come back to a parliamentary process. You would need to stop and think very carefully about what would happen. That is why, when I look at Clause 13(4), naturally I agree with everything that the noble and learned Lord the Convenor said earlier about this, but I have an additional worry that any old Minister of the Crown could rush into making some regulations and not remember page 402 of the trade and co-operation agreement.

Lord Cormack (Con): My Lords, I want to make yet another appeal to my noble friends on the Front Bench to pause this ridiculous Bill. We heard a very powerful speech from my noble friend Lord Deben, following another powerful speech from the noble Lord, Lord Hain. Although I understand what both of them said and endorse what both of them said, nothing that they said can make this Bill any better than it is—and it is useless.

In fact, it is worse than useless because on the one hand the Government are saying to us, "We prefer and want to have a negotiated settlement". Amen to that. But how can you have proper negotiations if at the same time you are obliging Parliament to put you in a straitjacket—one that also confers on you frankly uninhibited powers. The whole thing is contradictory in so many ways.

Yes, we accept that the protocol is not perfect, although it was thrust on us by the Government and willingly entered into by them. Every amendment that comes before us shows that, yes, you can tinker here, you can tinker there, but you cannot make this Bill a good Bill. All the scrutiny from all the learned minds, including that of my noble and learned friend Lord Judge, cannot make this pig's ear into a silk purse. It is impossible. If we are going to have unfettered negotiations, then for goodness' sake let us pause the Bill and, as I said the other day, not continue, frankly, to waste Parliament's time.

6.45 pm

I strongly urge my noble friends to accept the good sense of this proposition. Yes, negotiate. You say you want to negotiate. Well, negotiate. Negotiate without tying your own hands or obliging others to tie them, and go forward in a spirit of genuine desire for reconciliation and agreement. My noble friend Lord Deben just pointed out that, in this one vital area of climate change, the supply of electricity to the island of Ireland, the lifeblood that it needs and without which it cannot survive, is something that this Bill can only make more difficult and make the whole situation one that becomes increasingly impossible to overcome. To quote those famous words, we have "sat too long" on this one and it is time we moved on.

Lord Kerr of Kinlochard (CB): I keep hoping that the noble Lord, Lord Cormack, will say something with which I can disagree—but he keeps on letting me down. I strongly support Amendment 20, of course, for the obvious reasons that I need not repeat. I also support Amendment 21B, put forward by the noble Lord, Lord Hain, and strongly supported by the noble Lord, Lord Deben.

I ought to declare an ex-interest. I used to be a director of a power company and, if I remember right, Northern Ireland is a net importer of electricity but a large net exporter to the Republic. The trade with the Republic is less than the trade that comes in from Scotland on the interconnector. It follows that, if the Bill goes through in the form it is in now, unamended by the noble Lord, Lord Hain, the collapse of the common electricity market will do very grave damage to the Republic as well as to Northern Ireland. For Northern Ireland, it is important for security of supply and to keep costs down; in the Republic, it is much more important because the Republic is a net importer; it is very short of generating capacity.

So I say to the Minister that I really hope he will buy Amendment 21B from the noble Lord, Lord Hain —I cannot see any reason why he should not. If he does not buy it, would the Government please produce before Report a clear statement of the discussions they will by then have had, if they have not already had them, with the Government in Dublin about how the crisis that this would create for the Government in Dublin is to be avoided or mitigated.

I will also add a word on the very important point made by the noble Earl, Lord Kinnoull. He made it very gently. There is no doubt that the European Union means what it says when it says that, if we put this Bill in its present form on our statute book, the TCA bets are off. We are heading for a trade war if we do this. I hope the DUP will bear that point in mind because, although the trade war would be acutely damaging to the whole United Kingdom, it would do particular damage to the economy of Northern Ireland.

Baroness Hoey (Non-Afl): I understand what the noble Lord is saying—that the European Union would likely invoke some kind of trade war—but does he understand that, for many people in Northern Ireland, this Bill is the only thing that is giving them some hope that there will be real change? A trade war is very worrying, but there are also very worrying signs in Northern Ireland of deep unrest, concern and instability. That is why the suggestion from the noble Lord, Lord Cormack, that we should get rid of this Bill would be deeply damaging to relations in Northern Ireland.

Lord Kerr of Kinlochard (CB): With great respect to the noble Baroness, that is not what the public opinion polls are telling us. At present, they seem to be telling us that what a majority of people in Northern Ireland, and a great majority of younger people in Northern Ireland, are looking for is certainty, and they are reasonably content with the protocol.

Baroness Hoey (Non-Afl): The opinion polls told us that remain was going to win the referendum—they were very wrong.

Lord Kerr of Kinlochard (CB): I have no expertise to match that of the noble Baroness. But I do think we need to remember that, in the last Northern Ireland election, the voting for the DUP was about one in five of those who voted—and, since the turnout was about 60%, it was a pretty low proportion of the electorate. It is worrying, or at least curious, that the DUP, which constitutes, on its voting last time around, 0.4% of the UK electorate, should be able, it seems, to wag the dog. It is a very small tail that is wagging the dog—and, if we all end up in a trade war with the European Union, it will be the tail that gets the most pain.

Lord Deben (Con): Will my noble friend accept this, just to get the two noble Lords together—if I may put it like that? The fact is that nobody in Northern Ireland is going to accept measures that turn the lights off. Most people in Northern Ireland actually want to do something about climate change; the polls are absolutely clear about that. This Bill will mean that we will not be able to fight climate change properly, and the lights are certainly in danger—and, if the lights went off, I do not think that people would thank the DUP for that.

Baroness Ritchie of Downpatrick (Lab): My Lords, I rise to support Amendments 21B, 21C and 23C in the name of my noble friend Lord Hain. It is a pleasure to follow him as well as the noble Lord, Lord Deben, the noble Earl, Lord Kinnoull, and the noble Lord, Lord Kerr.

I am in absolutely no doubt, and all the research indicates, that the protocol is essential to allowing the lights to stay on in Northern Ireland and on the island of Ireland—because we have been in a single electricity market since 2007. The evidence is there to suggest the support of young people for ending political and economic uncertainty, plus their support for action on climate change. I declare an interest as a member of your Lordships' protocol committee; we took evidence in Northern Ireland and from community groups, and the most important issue to them was not the protocol: it was addressing the cost of living crisis and the cost of doing business crisis.

The noble Baroness, Lady Hoey, referred to the fact that a significant proportion of people are opposed to the protocol. I acknowledge that there is unionist opposition to the protocol, but I also acknowledge that a large majority of Members of the Northern Ireland Assembly who wrote to the then Prime Minister, Boris Johnson, indicated their support for the protocol—and, in so doing, indicated their support for an end to that political and economic uncertainty. One way in which we can have economic certainty in Northern Ireland is through the continuation of the single electricity market, which deals with issues to do with decarbonisation and climate change. It is essential that the lights keep functioning, but it is fundamental to our businesses on the island of Ireland.

It is worth noting that the protocol provisions addressing the single electricity market on the island seek to ensure the continued operation of that wholesale electricity market from the end of the transition period. That is to be achieved by Northern Ireland continuing to align with a number of European Union directives

on wholesale electricity. A report from the House of Commons some years ago indicated that Article 9 of the protocol, alongside Annexe 4, secures the continuation of Northern Ireland's participation in the single electricity market on the island of Ireland. In that 2017 parliamentary report on Brexit and energy security, the parliamentary committee expressed its support for the preservation of the single electricity market, noting that it benefited Northern Ireland in energy security, decarbonisation and energy prices.

For those reasons, I make a special plea, as a resident in Northern Ireland, to support the amendments proposed by my noble friend Lord Hain. I urge the Government to accept them, because it is vitally important that there is a means to prevent unintentional and indirect negative consequences of excluding the jurisdiction of ECG on the functioning of the single electricity market. In that respect, I look forward to the Minister's response.

The noble Baroness, Lady Hoey, referred to a large section of the population not supporting the protocol. We took evidence this morning from Peter Sheridan, the chief executive of Co-operation Ireland—and I freely admit that I am a member of that board. It was excellent evidence that clearly highlighted the fact that yesterday he was talking to loyalists and, in their evidence, they did not highlight any particular issues about any return to violence. He had a very constructive meeting with them, from what he told us. So things are not as acrimonious or about to tip into violence as some would suggest.

I urge support for the amendments and, in so doing, support to underpin the single electricity market, which has been an excellent product since 2007.

Baroness Butler-Sloss (CB): My Lords, I wonder whether we should stop and think for a moment. The electricity issue that has just been raised is the most serious—but not the only—disastrous situation that will occur if this Bill is passed in its present form. Since we appear to be having the opportunity for constructive discussions between the United Kingdom—or parts of it—and Ireland and the EU, rather than killing the Bill, which I would like to do, perhaps we might look pragmatically at what might be achieved. Perhaps the Government would seriously consider not proceeding with the Bill until they can see whether the current constructive discussions are bearing fruit. If they do not bear fruit, perhaps they could bring the Bill back in a considerably altered form.

I will add one small point to the splendid speech of the noble and learned Lord, Lord Judge, about necessity or appropriateness. It may just be that the Government could think about whether they could not require "appropriateness" in every single clause. There must be some clauses where "necessity" would be the reason for changing. I understand why we do not have a Bill with a great deal of information, because it might cut across the negotiations that are being made—but, while they think about how they could improve the Bill, if they were prepared to pause it, they could look at this point about why much of what they are asking by way of regulation could not be by necessity and not appropriateness.

7 pm

Lord Pannick (CB): As always, the noble and learned Baroness speaks great sense. I shall address very briefly a point that is not about electricity, although I hope it may spark some general interest.

Noble Lords: Oh!

Lord Pannick (CB): It is getting late—we are almost at dinnertime, I hope. The point is about international law. Clause 13 would exclude the jurisdiction of the Court of Justice of the European Union, which is conferred by the protocol. The test of necessity under international law requires consideration of the necessity for resiling from the protocol by reference to each individual provision: we do not look at it as a whole, we ask whether there is a necessity for this or that. My question to the Minister is: what is the necessity in international law for excluding the jurisdiction of the European Court of Justice? What is it about the European Court of Justice that so concerns Ministers?

We have debated at some length, and I agree with all the speeches that have been made on the subject, the difference between "appropriate" and "necessary", but the test in international law is necessity. Ministers may well think it is appropriate, for political reasons, to exclude the jurisdiction of the European Court of Justice—I well understand why that may be the case—but can the Minister please tell me how it satisfies the test of necessity to exclude that jurisdiction?

Lord McCrea of Magherafelt and Cookstown (DUP): My Lords, this is the third day we have been debating the Northern Ireland protocol and I know Members may be tired or exhausted, but it seems from a unionist point of view that a lot of Members of this House are either tone deaf or totally blind—because they desire to be—about the reality of the situation with the protocol. I do not know how many times Members have to be told that the protocol is totally unacceptable to any unionist elected representative, any unionist within the Northern Ireland Assembly, or indeed any unionist Member who sits in either of the Houses here. That seems to have been just cast aside.

A few moments ago, we listened to the noble Baroness, Lady Ritchie, who stressed how important it is that the protocol is not just re-established but is put fully into operation. Then she stressed how important it is that the Northern Ireland Assembly is given its place to support this protocol. I say gently to the noble Baroness, for whom I have a personal respect, having known her for many years in the other place and in the Northern Ireland Assembly, that maybe she has forgotten that majority rule is no longer in existence in Northern Ireland. In fact, the behest of her community, and indeed the marches on the streets and other activities by others she would not necessarily associate herself with, ensured that majority rule was no longer in existence in Northern Ireland. She is basing her remarks upon the acceptance of the Northern Ireland Assembly, debating and then supporting the protocol with Sinn Féin, the SDLP, the Alliance, the Greens and a few other parties, but not one unionist.

[Lord McCrea of Magherafelt and Cookstown]

Maybe the Committee needs to learn this fact: the very basis of the Belfast agreement was predicated upon cross-community support, not majority rule. That was decided, and indeed lauded and applauded, by every part of this House. We are also constantly reminded that nothing, but nothing, must be done to undermine the Belfast agreement. I noticed that when the noble Lord, Lord Kerr, was speaking, he mentioned the polls and what the polls are saying. I suggest we should be very careful about what the polls are saying, because they certainly got it wrong on Brexit and it seems that they got it wrong on the election in Israel just yesterday. I suggest that, since we listened to the Secretary of State say that Northern Ireland is heading to the polls, rather than telling us what the polls are saying, when the people of Northern Ireland speak we will find out what the unionist community believes about the Northern Ireland protocol.

It may surprise noble Lords, but there is a party in this House that when it takes a manifesto to the people, actually stands by its manifesto. I know that is a novel thing for the Government Benches over the years, but it is not novel for the Democratic Unionist Party. I suggest that noble Lords refrain from telling us, because to be honest, I am fed up with people telling us what the people of Northern Ireland want. Let the electorate speak. The Minister, or rather the deputy at the Northern Ireland Office, has told us that we will shortly hear the date of the Northern Ireland election. Therefore, the Northern Ireland protocol will be put to the electorate and we will see what the unionist population believes concerning that protocol.

I note, before I finish, that on a previous occasion when I was speaking the noble Lord, Lord Kerr, said that it was novel for us to support or base our opinions on the Belfast agreement when we opposed that agreement. I remind him why we opposed it. It was because the Belfast agreement was putting unreconstructed terrorists into government who would not support the police or law and order. In fact, it took another agreement, the St Andrews agreement, to bring them to the place where they had to say that they would give up their weapons, that the IRA weapons would have to go and that they would actually support the police and call upon their community. So, when noble Lords mention that we did not support the Belfast agreement, that was on the basis of the Belfast agreement at that time bringing in unreconstructed terrorists.

As one who suffered from those terrorists, I say without apology to the noble Lord and to the Committee that I did not agree at that time, but I am also long enough in public life to know that the Belfast agreement is an international agreement and therefore this House has constantly told us that we must do nothing to undermine that agreement. I can tell the Committee clearly that, day by day, those who say that the protocol must continue are undermining the Belfast agreement within the unionist community. I trust and pray that the Government will wisely accept that the Bill is not perfect, but it is certainly better than anything I have heard anyone else suggest we should move forward on.

Lord Ponsonby of Shulbrede (Lab): My Lords, this group of amendments brings us to the role of the European Court of Justice, with Clause 13 classifying any provision of the protocol or withdrawal agreement that confers jurisdiction on the ECJ as "excluded provision". When the Government negotiated and signed the withdrawal agreement, they agreed to a limited role for the ECJ in certain cases. This clause ends ECJ jurisdiction, even when it does not directly relate to excluded provision, and there is a question mark about whether the Government are acting in bad faith on this matter.

Subsections (4) and (5) have been included, according to the Explanatory Notes, to allow Ministers to make arrangements for the sharing of relevant information with the EU. Can the Minister say more about this? To our knowledge, the UK has still not given the EU access to real-time customs data, as required under the withdrawal agreement.

The scope of the power in Clause 13 is very wide. The DPRRC said:

> "Parliament has no knowledge of the Government's plan but is meanwhile expected to rubberstamp all the regulation-making arrangements."

This point has been made by a number of noble Lords, not least the noble and learned Lord, Lord Judge.

Amendments 21B to 23C, tabled by my noble friend Lord Hain and the noble Baroness, Lady Ritchie, on the potential consequences for the operation of the single electricity market, are very important. I hope the Minister will be able to clarify the legal position. I also hope he will rise to the challenge put to him that the UK Government have every intention of maintaining an all-Ireland electricity market. I look forward to the Minister's response.

Lord Ahmad of Wimbledon (Con): My Lords, I thank again all noble Lords who have spoken on this issue. I will approach the question on the single market in electricity, and I am grateful to the noble Lord, Lord Hain, for tabling his amendments in this respect. I will start with Amendment 20, in the name of the noble Lord, Lord Tweed of Purvis.

Lord Purvis of Tweed (LD): Lord Purvis of Tweed.

Lord Ahmad of Wimbledon (Con): Did I say "Lord Tweed of Purvis"? It is written in my notes as "Tweed of Purvis". It is getting late. I am picking up on the noble Lord, Lord Campbell—it is catching. Maybe there is a suggestion in there—I would be the noble Lord, Lord Wimbledon of Ahmad. My apologies to the noble Lord.

The Government have references to the potential use of powers in Clause 13(4), which several noble Lords mentioned. In short, these would ensure an effective assurance and enforcement regime that could give confidence in the protection of the UK and EU markets. This includes fulfilling our ongoing commitment to provide data to, and to co-operate with, the EU, an intrinsic part of the overall model. The noble Lord, Lord Ponsonby, also raised the issue of data sharing and I will come to that in a moment.

The noble Lord, Lord Purvis, rightly raised the protection of Article 2. I assure the noble Lord—I believe I said this on one of the previous Committee days and my noble friend Lord Caine also answered on this—that my noble friend Lady Altmann and I

have discussed this, and we have made sure that the response is fully integrated. The UK is committed to ensuring that rights and equality protections continue to be upheld in Northern Ireland, in line with the provisions of Article 2 of the protocol. That is why Article 2, as my noble friend Lord Caine also made clear, is explicitly protected from being made an excluded provision in Clause 15. My noble friend discussed this with and responded to the noble Baroness, Lady Ritchie, and I know from exchanges between the two departments that we will respond in writing to the noble Baroness, as promised. We will share that with noble Lords, placing a copy in the Library. I assure noble Lords that this point is not lost. As I have said, where further clarity can be provided during the passage of the Bill, my colleagues and I will seek to provide it.

7.15 pm

I thank the noble Earl, Lord Kinnoull, for pointing out the importance of one treaty and its relation to the others. He has drawn attention to an important point, particularly when it comes to the TCA. If I may, I will write to confirm that fact specifically. To my mind, it is necessary that when we bring forward legislation we reflect on its importance and its impact on existing treaties, particularly those with key partners. The point is well understood and I will confirm in writing to the noble Earl.

As set out in the Northern Ireland protocol, the UK's solution is to put in place a trusted trader scheme and share data on its operation and data from relevant customs systems. This is an integral part of providing assurance, the need for which I understand, to the European Union on the operation of the new regime and the protection of its single market, while recognising that arrangements within the United Kingdom should be a matter for the UK Government. If I heard correctly, the noble Lord, Lord Hain, who speaks with great insight and experience, said that the British Government were seeking sovereignty. That is the crux. Northern Ireland is an integral part of the United Kingdom and the concerns raised about the protocol and its operation are exactly why the Government are seeking to act in the way that the Bill would introduce. At the same time, we understand that we must work constructively with the European Union, which is why I have alluded previously—and do so again—to the constructive nature of our engagement with EU partners. I accept that these are highly complex arrangements that will require sufficiently flexible powers to be effective, as technology and our relationship with the EU evolve.

I turn now to Amendment 21, in the name of the noble Baroness, Lady Chapman of Darlington. I think we have covered this but, at the risk of repeating myself, the Government have made their position very clear, although I look to the noble and learned Lord, Lord Judge, on this issue. I heard what he said about its importance and I take on board the fact that previous Bills may have passed and may also be working. The point is understood about the nature of the debate we have had, and will continue to have, over "necessary" and "appropriate". However, the Government feel that to allow maximum flexibility, "necessary" is the avenue they are pursuing.

I turn now to Amendments 21B and 23C in the name of the noble Lord, Lord Hain. I am grateful to the noble Lord for bringing this important issue before the Committee. Let me put on record that the Government have always been clear that we want to cement the provisions in the protocol that are working. I heard very clearly the passionate remarks and insights of my noble friend Lord Deben about the importance of the single electricity market. Irrespective of where we are sitting or what perspectives we have, no one would disagree with the noble Lord, Lord Hain, about the benefits the single electricity market provides to all citizens across the island of Ireland including, importantly, citizens in Northern Ireland. It is precisely for this reason that we assure my noble friend Lord Deben, the noble Lord, Lord Hain, and all noble Lords, that the Bill does not seek to exclude Article 9 or Annexe 4 of the protocol, which would maintain the single electricity market.

It is the Government's view that it is inappropriate for the CJEU to be the final arbiter of certain disputes between the UK and EU law under the protocol. The Bill removes the effect in domestic law of the jurisdiction of the CJEU in enforcing or interpreting law that applies in Northern Ireland. The Government are confident—notwithstanding the remarks made by the noble Lord, Lord Pannick, which ignited my response, if I may continue with the bad jokes at this hour—in the ability of UK courts to interpret the law which applies in Northern Ireland. But, of course, the powers in the Bill enable the Government to deal with any issues that might arise in relation to the interpretation of EU law underpinning—

Lord Pannick (CB): The noble Lord said that the Government take the view that it is inappropriate for the court of justice to retain jurisdiction, but why is it necessary—that is the test in international law—to exclude its jurisdiction?

Lord Ahmad of Wimbledon (Con): I have given the Government's position, and I am going to totally digress at this point from my speaking notes. I am reminded of something my noble friend Lord Howard, who is not in his place, said to me during my introduction back in 2011, regard people's various insights. This also relates to the point made by the noble Lord, Lord Kerr. I remember a debate on the withdrawal Bill, taken by my noble friend Lord Callanan, during which certain specific issues were discussed and we talked about the case against the Government at that time. I remember the interventions that were made as I sat next to my noble friend. One was in reference to the actual case. The noble Lord, Lord Pannick, corrected the Minister, saying that, actually, as lead counsel on the case, perhaps he could provide an insight. As my noble friend fought the defence of Article 50, the noble Lord, Lord Kerr, stood up and suggested, "What would I know? After all, I only wrote Article 50". So, on this issue, where I am testing a principle of law, I repeat what the Government's position is but I take note of what the noble Lord has said in this respect.

Lord Pannick (CB): Very helpful.

Lord Ahmad of Wimbledon (Con): I am glad to be of service to the noble Lord.

Lord Hain (Lab): The Minister has been very generous and kind in saying that he was grateful that I raised the single electricity market, but he has not addressed any of the issues I put to him. If he is not going to do so in his closing speech, could he write to me and say in what way, apart from seeking not to jeopardise the single electricity market, which nobody wants to do, obviously, he is going to prevent it being jeopardised, for the reasons I enunciated?

Lord Ahmad of Wimbledon (Con): I do not know if I disappoint or please by saying that there are several more pages in my speaking notes which may address in part what the noble Lord, Lord Hain, said, and this relates also to his amendments on the issue of assessments on non-excluded provisions. To make a general point, whether it is the perspective of the Government in introducing the Bill or the sentiments we have heard from our noble friends, including those within the DUP, and the noble Baroness, Lady Hoey, I think we are all coming at this with the end objective of ensuring that the benefits there have been from the market should be protected. I am quite happy to discuss the specifics with the noble Lord, together with officials, after the debate to see if there is a specific insight we perhaps have not picked up on in respect of these amendments, and how we can have a further discussion in this respect. I fully accept the key principle—I think we all do—regarding the protections that have been afforded and the gains that have been made. Of course, no one wants any lights going off anywhere.

It is the Government's view that Amendments 21C and 23B, in the name of the noble Lord, Lord Hain, would prevent any regulation being made under the powers in Clauses 13 and 14 before an impact assessment had been carried out with regard to the regulation's effect on non-excluded provisions of the protocol. Regulations under Clauses 13 and 14 should not be presumed to have any impact on non-excluded provisions of the protocol. They are not excluded and will continue to apply—indeed, they will continue to attract the benefit of the EU law principle of supremacy.

However, if the noble Lord is simply after a more general economic impact assessment—this is where I am saying that a discussion may be helpful—I am not sure that these amendments are required either. Regulations under the specified clauses could be highly technical, with little economic impact. For example, Clause 13(5) specifies that regulations under Clause 13(4) may make provision about arrangements with the EU relating to the operation of the Northern Ireland protocol, including information sharing. As such, the Government could be forced to provide an impact assessment on, for example, a data-sharing system between two competent authorities, which has little or no impact on wider parts of the protocol or economic operators—or, indeed, any impact outside of government at all.

I assure noble Lords that the House will have the opportunity to scrutinise any regulations in the usual fashion, and that the Government will provide all the usual accompanying material under the normal parliamentary procedures, including economic impacts where relevant. However, it is the Government's view that mandating by statute that impact assessments must be provided for every single regulation under Clauses 13 and 14 would be overburdensome, and it does not tally with the standard principles for impact assessments. To add to the point I made earlier, on the specifics that have not been covered in my concluding remarks, I will write to the noble Lord, Lord Hain. As I said, I believe that there is a common cause to be had here, so if time allows, I am quite happy for us to schedule a discussion on this as well.

Clause 13 outlines the exclusions that seek to redress the feeling that a democratic deficit is created by the arrangements for the implementation and enforcement of the protocol. First, via subsection (1), it provides that any provision of the protocol which confers jurisdiction on the CJEU over the arrangements in Northern Ireland is an excluded provision. This means that CJEU decisions, including infractions, will no longer have effect in domestic law across the entire protocol. Secondly, via subsections (2) and (3), it assists in restoring the Government's sole oversight of arrangements on the ground in Northern Ireland, providing that the provisions relating to the powers and presence of EU representatives are excluded. Finally, to address the point raised by the noble Lord, Lord Ponsonby, via subsections (4) and (5) it allows for the establishment of replacement arrangements, which provide the ability to put in place new supervisory and data-sharing arrangements with the European Union. This will support assurance processes to protect both the UK and EU markets and facilitate co-operation between UK and EU authorities. That is why we believe that the clause should stand part of the Bill.

Again, I am grateful for the discussions and debate on this group. While I am not suggesting that all noble Lords will have been fully satisfied by my response, I hope that they will be minded not to press their amendments at this time.

Lord Purvis of Tweed (LD): My Lords, I am grateful for the Minister's response. I reassure him that I am not precious either about my name or my title. My former constituency was Tweeddale, Ettrick and Lauderdale, and I was once introduced to the Massachusetts state assembly by the Speaker as, "Jimmy Purve from Twiddle, Ettick and Louder". He managed to get every single word wrong, and then he kept asking, "So, where is Twiddle, Jimmy?"

I am grateful to all noble Lords who have taken part in this debate and for the Minister's remarks on Article 2 rights. The point stressed by the Northern Ireland Human Rights Commission was that the rights are only ongoing rights if they can be both interpretive and dynamic. If you remove the court of justice's ability to do that, they stop being rights. We are obliged to make sure that they are "ongoing interpretive", but the power in the Bill puts that at risk. It would be quite straightforward to simply say that that can carry on.

7.30 pm

I am grateful to the noble Lord, Lord Hain, for outlining the second aspect regarding the electricity market in very clear detail. The point that has been

stressed is that the electricity market is of such significance that it is probably—I am happy to be corrected—an issue of consensus among the political parties in Northern Ireland that it carries on, and that it should carry on in a seamless, undisturbed manner. I do not want to fall foul of the warning from the noble Lord, Lord McCrea, that there are things I am not aware of, but that is my understanding.

For these Benches, it would be helpful if the Minister could write to the noble Lord, Lord Hain, and put the correspondence in the Library, rather than just having a dialogue, so that we are able to test it. If he does that, I would be grateful if he could outline what formal contact the Government have had with the SEM Committee, which operates the wholesale market for the regulator in Northern Ireland and the regulator in Dublin. That body is tasked with regulating that market and the Government must have consulted it; it would be an astonishing admission of failure if they have not formally consulted the regulatory body that operates this.

We know that the Europeans are concerned—this is linked to the previous group on subsidy—that if a GB-subsidised electricity company wishes to enter the wholesale market, that puts at risk the operation of that market. This is now potentially at risk because of the Government's removal of the court's competence in these areas. It is of the most significant importance, alongside the issue raised by the noble Earl, Lord Kinnoull, on interconnectedness—I am glad I am not the only one who reaches for page 402 when I read documents.

We have reached some very significant and important issues in the consideration of this Bill. I hear what the noble Lord, Lord Cormack, and the noble and learned Baroness, Lady Butler-Sloss, said about pausing it. I do not know whether we should put this Bill into limbo or purgatory. I would rather pause it before it goes to hell than have it going to heaven. In the meantime, before it goes to either limbo or purgatory, I beg leave to withdraw the amendment. However, I hope the responses from the Minister to these very important points will be substantial and thorough.

Amendment 20 withdrawn.

Amendments 21 to 21C not moved.

Clause 13 agreed.

Viscount Younger of Leckie (Con): My Lords, I hope we can make slightly faster progress on the Bill after dinner, having completed only two groups so far.

House resumed. Committee to begin again not before 8.18 pm.

Merchant Shipping (Safety Standards for Passenger Ships on Domestic Voyages) (Miscellaneous Amendments) Regulations 2022

Motion to Approve

7.34 pm

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

That the draft Regulations laid before the House on 11 July be approved.

Relevant document: 10th Report from the Secondary Legislation Scrutiny Committee

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Vere of Norbiton) (Con): My Lords, these draft regulations will be made under powers conferred by the Merchant Shipping Act 1992. These regulations are not EU related and are caught by Schedule 8 to the European Union (Withdrawal) Act 2018 only by virtue of the fact that they amend a definition which was previously amended using Section 2(2) of the European Communities Act 1972. The term in question is "approved", the meaning of which is currently limited to meaning approved under the Merchant Shipping (Marine Equipment) Regulations 2016, but these regulations broaden its meaning and that is why they are caught.

The regulations are the last of several measures which have been introduced over many years following the "Marchioness" tragedy in 1989, when 51 lives were lost—a figure which could so easily have been higher. Since that disaster, we have seen published Lord Justice Clarke's Thames Safety Inquiry into that incident, a Marine Accident Investigation Branch report on the same and a more general formal safety assessment study into domestic passenger ship safety. These reports and their recommendations have driven a raft of measures to improve safety in this area. The recommendations covered a wide variety of situations and have resulted in a significant number of safety improvements between then and now, culminating in the regulations covering older ships under consideration today.

Early safety developments following the "Marchioness" tragedy covered the categorisation of inland and inshore waters according to risk, the creation of the boatmaster's licence and qualifications, and higher bridge-visibility standards to make navigation safer. Some enhanced stability standards, which aid survivability, were introduced in 1992 and standards for modern domestic passenger ships were introduced in 2010 for ships built from that year onwards, but applying similar standards for existing, pre-2010, and particularly pre-1992, vessels was more challenging. These standards have now been developed in conjunction with industry through the Government's domestic passenger ship safety group and are set out in these regulations.

The Government have undertaken extensive and almost unprecedented engagement on these regulations. They were developed within the main government and industry safety group and also benefited from two public consultations and five interactive workshops with industry, conducted by the Maritime and Coastguard Agency—MCA. The regulations have also been discussed in other meetings with industry over a period of several years and Ministers have engaged with stakeholders on these matters. I believe that this engagement was crucial, despite the inevitable additional delays that have arisen because of it.

Every person, whether native or tourist, using passenger transport in the UK has a right to expect—and I believe does expect—that whichever vessel they choose to carry them will meet consistent standards fit for the 21st century. If we do not grasp the nettle and improve the standards, certain vessels will be allowed to remain in the last century indefinitely. These regulations increase the life jacket carriage requirements and life raft capacity

[Baroness Vere of Norbiton]
for ships operating in all but the safest waters. We believe that the assumption of passengers is that there are enough life jackets for everyone on board and likewise enough space in life rafts for all, but this is currently not the case for many vessels.

While these regulations cover a number of safety areas, including fire-protection measures, life-saving appliances, bilge pumping and warnings, one of the most important aspects of the standards for applicable ships is damage stability, perhaps more easily understood as survivability, which must be sufficient to keep the ship afloat for long enough for passengers and crew to escape in an emergency.

Some have argued that older ships should not have to meet modern safety standards because of historic interest. Some have said that this is an attack on Dunkirk "little ships", although the overwhelming majority of them are unaffected by the regulations. I am not against the preservation of older ships which are of genuine historic interest, but I argue that government has a responsibility to ensure that all passenger transport meets modern safety standards, including those on vessel stability, or survivability.

Some older ships, if holed below the waterline, can sink in seconds. Those on board would not have time to ascend to the upper decks, let alone put on life jackets. In this type of situation, there is barely time to make a call to the emergency services, let alone wait for them to arrive. We must ensure that these vessels stay afloat long enough so that people are not trapped inside a submerged vessel or cast into fast-flowing water.

I hope I have highlighted the importance of these regulations. They fulfil our duty as government to ensure that appropriate maritime transport safety standards are in place. I beg to move.

Amendment to the Motion
Moved by ***Lord Berkeley***

At the end insert "but that this House regrets the delay of up to 20 years in the introduction by His Majesty's Government of these Regulations, which affect just over 600 vessels requiring safety related changes to fire protection equipment, life raft and lifejacket requirements."

Lord Berkeley (Lab): My Lords, I thank the Minister for a very comprehensive and, I thought, excellent explanation of why these regulations are necessary. She has given some very good reasons for them. My concern tonight is, first of all, to express concern at the delay—it is over 30 years now since the "Marchioness" accident—and to explore a little bit further what changes are covered by these regulations and where they apply. I note that, even at this late stage, the sister ship of the "Marchioness" is still sailing around, I believe, without some of the protection that the Minister has outlined and which I shall come to. I was pleased to hear her emphasise the need that the first stage must be to protect human life and to ensure that there is nothing in these lovely historical old ships that will excuse the provision of proper life-saving equipment and other things. I also congratulate the Minister on the documentation that has come with this SI, which is very impressive and detailed. I am also pleased that there has been a lot of quite good consultation—I have met some of the people who have been involved in some of it, and I think that it is really good that we have got to this stage.

As the Minister said, this standard covers life rafts, lifejackets, lifejacket lights, the fitting of fire detection and extinguishing equipment, bilge-pumping arrangements, bilge alarms for alerting of water ingress, and vessel stability. I find it extraordinary that this has not been a requirement for ships for many years. I am very pleased, of course, that it is in today, but the idea that you did not have to have enough life-raft capacity for all passengers on board is quite extraordinary. Whether we are talking about the upper River Thames, the tidal Thames or, in the other extreme, out to the Solent or something, the expectation from passengers must be that there is proper equipment and everything aboard. I think it is very good that the things we do not see in a ship, like fire detection, machinery failures, and bilge pumping—we discussed bilge pumps a few years ago in your Lordships' House—are all here.

I want to ask the Minister a few questions about this damage stability issue. It is clearly important. In simple terms, in the event of a collision, will the boat fill up and sink? What is the risk of the collision happening, and what is the risk of it sinking or being damaged after the collision? I think that this is mainly to do with ships covered in these regulations in class C. I was also interested in her statement about the number of ships involved. Paragraph 7.7 of the Explanatory Memorandum talks about "mitigating factors" for some ships which the MCA and Ministers will allow to continue to operate, because they have presumably taken the risk assessment which says that their existing design is satisfactory under the new regulations. The figure quoted is 120 vessels. It would be good to know the sort of areas where these vessels operate, whether they operate at day or night, and how big they are, et cetera.

But I think what is probably even more important is how many vessels are not covered by the mitigating factors, and who will have to actually go through the process of compliance, which may involve quite a few internal works, a lot of dry-docking and things like that. In certain circumstances, as is alluded to in the Explanatory Memorandum, it may be uneconomic for these vessels to continue the way they are.

7.45 pm

It would be very good to know why these vessels in particular cannot pass the new safety test. I am a bit worried about compliance. In paragraph 6.3 of the Explanatory Memorandum, it says that compliance will be required to be

"achieved by the date of the first survey after the second anniversary of the date on which these Regulations come into force"—

so probably at least two years after they come into force—

"unless the Secretary of State grants an exemption from the requirements."

Could the Minister explain the circumstances and reasons for any exemption?

I worry that the wording has obviously been written very carefully here, intending that if there is a survey and it does not work, the owner can agree with the surveyor that they will do the work later. There is a quote at the end of paragraph 6.3, which refers to an implementation plan being

"in place to ensure later compliance with the updated requirements."

Knowing some of the people and owners involved, I can see them trying to persuade the surveyor, the MCA and finally the Minister that it will be all right and they will do it next year. I hope the Minister can give us comfort that that will not be the case, and that there will be absolute clarity as to what is needed and not needed. If one or two of the ships end up like the "Cutty Sark"; in a lovely place in Greenwich, but not able to go to sea and with no risk to passenger lives, then I think that is really important. I am pleased that the Explanatory Memorandum says that

"the impact on public safety is an enhancement of passenger safety on older vessels which is more in line with the levels of passenger safety on more modern vessels."

If we stick to that, I think that we are there.

I have one final question for the Minister: does this apply to foreign-flagged vessels operating within UK waters? I do not mean going across to other countries; will it apply if they are able to operate from Dover to Portsmouth or something, or will there be similar regulations to which they have to apply?

My final "final question" is—and I hope that the answer from the Minister is no—whether this and all the other regulations she mentioned will be part of the bonfire of EC regulations referred to by her right honourable friend, Mr Rees-Mogg, a few weeks ago. I hope that the answer is no.

Lord Hodgson of Astley Abbotts (Con): My Lords, I will not detain the House for more than a moment. I pick up a thread raised by the noble Lord, Lord Berkeley, about the time that this has taken since the "Marchioness" disaster. The Minister will be aware that the Secondary Legislation Scrutiny Committee that I chair has been concerned about the backlog of regulations that await promulgation by her department. The then Minister, Robert Courts, came to talk to us and gave a very impressive report on how action would be taken to close this gap, bring forward the regulations and make sure that we are up to date in all respects.

I am not asking my noble friend to give an answer now; that would be unfair. However, it would be helpful if she could go back to her department and let noble Lords who have participated in this debate know what progress has been made in bringing the department up to date. It has been a—if I may use the police phrase—"serial offender" in this regard. I am not asking her to tell us now, because it is not part of the issue tonight, but it would be helpful for us to know what progress is being made.

Baroness Randerson (LD): My Lords, I thank the noble Lord, Lord Berkeley, for drawing our attention and concern to the situation behind these regulations. I thank the Minister for her introduction and for an excellent impact assessment, which I know her department will have been working on for a long time. I also draw attention to the report of the Secondary Legislation Scrutiny Committee, which expressed our deep concern very effectively and succinctly.

As the noble Lord, Lord Berkeley, made clear, this all relates to—perhaps we should say "was sparked by"—events 33 years ago: the "Marchioness" disaster in 1989. There were 130 people on board, of whom 51 died. It is a source of national disgrace that it has taken this long to get to this point. I lay no blame at the Minister's door. We are at last getting to the end of this horrendous saga, but the fact that there was no inquiry in 2000, and that it has taken 22 years since then to get to this final stage, should be a source of concern to all of us. This relates to very old ships that predate 26 May 1965—which, if I can be personal for a moment, was my 17th birthday. That gives your Lordships a perspective on how old the ships are that are affected by these regulations.

The interesting thing that is revealed by the Secondary Legislation Scrutiny Committee's report is that there are still large numbers of these ships being used. Some 600 vessels will be required to make changes to their fire protection equipment, 285 will need to comply with life raft requirements, and 86 will need to comply with life jacket requirements. Those numbers are significant. As a nation, we have a fascination for old vessels. I live in south Wales and we are endlessly interested in the paddle steamer trips between south Wales and north Devon. I see the noble Lord, Lord Davies, nodding because he is well aware of that.

We are all familiar with the details of the tragedy of the "Titanic". I realise that it would not have been affected because it was not in inland waters. However, the point I am making is that what horrifies us about that disaster are the details—and one detail that everyone picks up on is that there were not enough life rafts for the number of people on that ship. If the people who enjoy trips on historic vessels nowadays realised that they do not need to have life jackets for everyone on board, I am sure that they would be horrified, and probably it would reduce the number of customers they have. So I say to the Minister, "Be strong in the face of opposition to this". To those people who think that they cannot afford to do it, I say, "You can't afford not to". They must provide modern and effective means of saving lives.

Of course we all support this, but I will finish very briefly by echoing the concerns of the noble Lord, Lord Berkeley. I am worried that even more time will elapse before this has to be introduced. We have had 33 years to think about this. The idea that it will take even longer to be done worries me considerably. I urge the Minister to ensure that there is no question of the Secretary of State's discretion being brought into play to delay it even further. I cannot envisage why anyone owning a ship such as this and using it should not be prepared to make what seem to be fairly limited adjustments and modifications to bring it up to modern safety standards. So I support this entirely.

Lord Tunnicliffe (Lab): My Lords, I thank the Minister for presenting this SI, my noble friend Lord Berkeley for his amendment, and all Peers who have taken part in this discussion.

[Lord Tunnicliffe]

This instrument, to apply safety requirements to certain passenger vessels built before 1965, has my full support, but my noble friend is right to ask why it has not been brought forward until now. These are important requirements relating to fire safety, bilge alarms, lifeboats, lights and life jackets, which have been called for over recent decades. I hope that the Minister will explain why they have not been introduced sooner. Until now, the regulations have applied only to vessels built since 2010, which has left over 600 vessels not meeting the standard.

I hope that the Minister can account for the delay and confirm whether the department has received reports of any safety incidents which may have otherwise been prevented had this instrument been brought forward sooner. Can the Minister also confirm whether any further vessels are in any way exempt? Finally, what steps will the department take to monitor compliance with these regulations?

Baroness Vere of Norbiton (Con): I am grateful to all noble Lords for this short debate and am relieved and delighted that all noble Lords agree that these regulations are necessary. All noble Lords—including the Minister—agree that they have potentially taken too long. That should concern all noble Lords and I will start by addressing the timeline.

I mentioned in opening that there has been an inordinate amount of engagement on this, because the types of vessels and ships that we are covering in these regulations are hugely diverse. They operate in very different categories of water. The Government received an enormous amount of pressure and representation from Members of your Lordships' house, from Members of Parliament and from local elected officials—and, of course, they are all absolutely right to bring these matters to our attention. However, it caused some delay in reaching the right balance, which I believe we have got to today.

We had two public consultations, which was good, and five workshops between 2016 and 2019. Since then, we have focused on some of the more challenging vessels, where safety was not necessarily 100% proven and there was a case to be made, which is why we ended up taking so long on these regulations. However, we are where we are, and we have to play on the pitch we are on. We are now putting them in front of your Lordships' House, and I hope they will be passed today.

8 pm

The noble Lord, Lord Berkeley, raised the matter of the types of vessels. Again, these regulations are about two things: first, the type of vessel, and secondly, the category of water that they tend to operate in. During the course of the discussions, reference was made to 120 class VI vessels, all of which have the new stability requirements disapplied to them—it is not an exemption but a disapplication of part of the regulations. Class VI vessels are seagoing passenger ships which have a lot of operational restrictions placed on them anyway, in that they operate only in the summer and only in favourable weather, and therefore an assessment was made such that the stability requirements would not apply to that entire group of vessels.

The noble Lord, Lord Tunnicliffe, the noble Baroness, Lady Randerson, and others mentioned exemptions. I want to be absolutely clear that there is clarity in these regulations, but I would be remiss if I did not raise the fact that there is a very limited—I reiterate that—facility for exemption from the new stability requirements, which are the most challenging aspect of the regulations to implement. However, we expect the successful use of any exemption to be extremely rare. It would be in quite unique circumstances and would relate to operators on the tidal category C waters, places such as the Thames, where we receive the most challenge from representatives and other people within the system.

Getting any sort of exemption would involve a detailed risk assessment. I am happy to write to noble Lords about what that would look like. It would have to satisfy the MCA that the exemption in question is one of lower operational risk. I put on record now that it is not our intention to create a category of a large number of exempted vessels in these circumstances; it is very much about specific circumstances where it would seem reasonable and, dare I say it, right that they receive a certain exemption. However, obviously, we expect the vast majority of the vessels to comply, and if they cannot they will have to stop sailing as passenger transport. It is as simple as that.

It is quite surprising how many incidents there are on our waters. For example, there are more than 100 every year, on average, on the Thames alone. In a serious incident in 2014 the "Millennium Time" sustained structural damage to its bow in a collision. In 2011 the "Moon Clipper" hit the Tower Millennium Pier and was breached both above and below the water line. The engine room of "Millennium City" was flooded after a collision with Westminster Bridge in 2008. None of these were older vessels but, of course, it is simply a matter of time before an older vessel is involved. Although the risk of occurrence is considered to be medium, the potential severity of the outcome of an incident is high and it could lead to a significant loss of life. That makes the risk unacceptable. I am not aware of any incidents involving older vessels, but as I say, we need to make sure that we do not leave a loophole and the possibility of a risky outcome.

Turning to compliance and enforcement, as ever, with all maritime matters we look to the wonderful people at the Maritime and Coastguard Agency, because they have responsibility for doing the annual surveys for ships. Compliance with these regulations will be checked. As noted, there is a two-year phase-in period, but the industry has known that this is coming for a very long time, and I would expect it to make sure that it is well ready, if it has not done so already, because as I said earlier, exemptions will be very few and far between. I can say that because I am the new Maritime Minister and I intend to stay in my post for as long as possible, so I will ensure that we do not do the wrong thing in that regard.

Finally, I want to try to make my noble friend Lord Hodgson happy. First, I intend to continue the fine work of Robert Courts, who was a superb Maritime Minister. We will continue to fight the backlog. These regulations are not in the backlog; they are slightly separate, but I know that we are making good progress,

and my noble friend will have seen a couple of SIs go through recently. Nine statutory instruments remain out of the total of 13; two have been approved by Parliament and will be made shortly, and another has been laid in draft. We are getting there, and I again commit to him that we will get there by the end of 2023. We will clear the maritime backlog where those regulations relate to the International Maritime Organization's III instruments. We will then be in the SLSC's good books and I, for one, will be very grateful. I beg to move.

Lord Berkeley (Lab): My Lords, I am very grateful to the Minister for her response. She has given me a lot of confidence that in her new role, on which I congratulate her, she will be robust in ensuring that there is no backsliding on these new regulations. As she has alluded to, collision is of course one of the greatest risks, and it happens on the Thames and on other major rivers, but there are probably more passenger services on the Thames than on many others.

I hope I understood her correctly in saying that the let-out that it was too expensive to make changes, for example, would not be acceptable. I am afraid I got the impression that the commercial side would have to give way to safety whenever there was a debate as to which was more important. I think she also said that whatever changes are possible for the 120 or so, everybody would still be required to comply with the new rules on lifejackets, bilge and life rafts, and all the other rules that apply across the board.

I look forward to the Minister writing to us about anything else that she has not covered, and I congratulate her again. I beg leave to withdraw my amendment.

Amendment withdrawn.

Motion agreed.

8.07 pm

Sitting suspended.

Northern Ireland Protocol Bill

Committee (3rd Day) (Continued)

8.18 pm

Clause 14: Provision of the Protocol etc applying to other exclusions

Amendment 22

Moved by ***Lord Purvis of Tweed***

22: Clause 14, page 8, line 22, leave out subsection (4)

Member's explanatory statement

This is part of a series of amendments based on recommendations from the Delegated Powers and Regulatory Reform Committee which states that a number of subsections in the Bill "contain inappropriate delegations of power and should be removed from the Bill."

Lord Purvis of Tweed (LD): My Lords, this is a very short group. I will be quick, because to some extent the case has been made—well, the arguments have been presented. I believe that the case has been made; the Advocate-General might consider it not proven, however, for the Scottish reference.

This is another area where it would be helpful if the Government could give some examples of where they seek these very broad powers. The Delegated Powers and Regulatory Reform Committee again has stressed that what is to replace the protocol has not been determined yet because the underlying policy has not been formulated. This is an opportunity to provide some examples and to say why, if there is the defence of necessity, it extends to this clause. I simply do not understand.

If Article 13 of the protocol is to be an excluded provision, it would also be helpful to know the mechanism to supersede it if the Government secure an agreement, or indeed any subsequent agreement, because that is a necessary element within Article 13 that would be removed.

The final point I want to ask concerns Clause 14(3)(a) and (b). I do not know what powers the Government envisage will be necessary to manage the red lane—the EU lane—because that is presumably under EU laws and procedures, and obviously not under a dynamic mechanism. I do not know how the Government envisage the responsibility of managing that process under the EU rules.

My query about paragraph (b) is that I fear that considerable doubt will be raised over how the EU position in the single market will be able to be considered by Northern Ireland Ministers, of whatever Administration. I do not know what the consequences of paragraphs (a) and (b) will be. As I understand the Bill—the noble and learned Lord, Lord Judge, might know if he has had an opportunity to look at this—regulations made under Clause 13(5) could reverse primary legislation that has been removed in Clause 14. We could be in a position where regulations can reverse elements in another clause of the Bill. I think the Government are tripping over themselves.

If the Advocate-General is responding to this, can he give some examples of these areas? That would go some way towards reassuring the Delegated Powers and Regulatory Reform Committee and me. I beg to move.

Lord Judge (CB): I shall not help the noble Lord, Lord Purvis, out, but I will say that the next time we come to this Bill, I think we will find that Clause 22 is the most devastating of all the Henry VIII powers. As to this amendment, I hope the Committee will excuse me if I do not keep repeating what I have said and would go on saying. I thought of giving the Minister a sheet of paper for him to write on, but then I thought I had better take it away as he might keep it and write on it. That is my point.

Lord Browne of Belmont (DUP): I rise to speak to Amendment 22 and, indeed, all the other amendments. I am conscious that this amendment and others like it have been developed in response to concerns raised by the Delegated Powers and Regulatory Reform Committee's report and, as such, are informed by growing concern about the Executive's use of delegated legislation. In the context of the legislative challenges posed by Brexit and Covid-19, there has been increased use of delegated powers, which has concerned the Delegated Powers and Regulatory Reform Committee

[Lord Browne of Belmont]
and the Secondary Legislation Scrutiny Committee and given rise to two important reports, *Democracy Denied?* and *Government by Diktat*.

The basic thesis of these reports is that there is a growing democratic deficit arising from the fact that delegated legislation does not afford the same opportunity as primary legislation for parliamentarians to scrutinise its development. The point is not that the delegated legislation is always wrong but that to avoid creating a democratic deficit, wherein the representatives of the people in the legislature are afforded less opportunity to shape legislation than in primary legislation, the use of delegated legislation must be limited.

As a democrat, I applaud this general approach and believe it is imperative in a functioning democracy that the opportunities for people to shape legislation through their parliamentarians in the legislature are maximised. Of course, there are ways in which a democratic deficit has been felt in our politics other than overreliance on delegated decision. In truth, the reason we are considering the Bill at all is the concern about the democratic deficit at the heart of the EU project, which was undoubtedly one of the key drivers of Brexit.

Brexit has been applied in England, Scotland and Wales with the effect that the democratic deficit arising from EU membership has been fixed in those parts of the United Kingdom. Laws are now made for Great Britain by Great Britain, but the democratic deficit in Northern Ireland has not been fixed. It has not been alleviated, it has not even been left untouched and it has not been allowed simply to deteriorate. The underlying difficulties have instead been allowed to become total, such that rather than amounting to a widening of the deficit—a democratic shortfall—that shortfall has been replaced by something much more radical: the complete negation of democracy in relation to the development of 300 areas of law to which we are subject.

The protocol that Parliament imposed on Northern Ireland against the clear wishes of its unionist representatives was one that, rather than addressing the principal difficulty with EU membership for anyone raised in the Westminster political tradition, has made it infinitely worse. In this context, the significance of Amendment 22—and, indeed, all the amendments debated tonight—is that it introduces not a regulation-making power that is part of a process that represents a step backwards, but one that is a step forward.

Finally, to unpack this problem, rather than using my words, I will use some very powerful words of a man living in Northern Ireland who wrote to my noble friend Lord Morrow, who unfortunately is unable to be in his place tonight due to a family illness. This man expressed his dismay at the actions of some parliamentarians from outside Northern Ireland towards our problems. I will be quick and quote just a few passages from his letter.

He writes: "I am deeply concerned about the approach adopted by some Peers who are seeking to remove the regulation-making powers from the Northern Ireland protocol rendering it ineffective." He goes on, very powerfully, "Anyone who does not understand what a significant, democratic step forward that will be for us in Northern Ireland is completely detached from the reality in which we live and clearly has no idea what it feels like to have your votes slashed, as ours have been. I find it shocking that some Peers seem so absorbed in their Westminster bubble battle against delegated legislation, supposedly in the name of concern for democracy, that they should have completely lost their sense of perspective such that they cannot see how inappropriate it is to oppose these regulations in the name of opposing a democratic deficit. If they wanted to have a fight about delegated legislation out of regard for a concern for democracy, this was the last context in which to do so. It is so striking that the democratically elected House did not pick this fight on this. I would urge you to call Peers to recognise how these regulation-making powers will help restore some much-needed parliamentary democracy in places where it has been completely taken from us and help restore what was promised in the Belfast agreement, namely our right 'to pursue democratically national and political aspirations'. That right has been taken from us in the 300 areas of lawmaking. These regulation-making powers represent a first step in their restoration. Rather than opposing them in the name of democracy, Peers should examine these powers in context and celebrate them for what they are, a critical step in restoring democracy to Northern Ireland."

By all means, declare war on regulation-making powers that reduce democratic scrutiny but, please, do not declare war on these regulation-making powers, which take a first, crucial step in its restoration.

8.30 pm

Baroness Chapman of Darlington (Lab): My Lords, many of us are worried about the powers to regulate, but it is not just about democracy. I have time for the concerns expressed in the email that was just read out—of course I do. I just point out, however, that the situation that we are in that is so objectionable to the noble Lord's colleague in Northern Ireland came about because of the actions, decisions and agreements made by their elected Government. Sometimes that is how it works, too. The problem that I have with the powers is not just the issues that we have heard expressed extremely well by those far more qualified to do so than I am; it is that we do not know what Ministers intend to do with those powers. There is a circumstance in which the gentleman who wrote the email might find himself doubly aggrieved, because we do not yet know what it is that Ministers will do to resolve the problem that the noble Lord has, or whether the actions of the Government in the future would actually be ones that would satisfy that grievance. That is where I am coming from. It is because there is a lack of clarity, and uncertainty; there is an option to negotiate that is not being taken. I am now repeating myself, and using yet another set of clauses to make exactly the same general points.

I am not going to repeat what has already been said, but I want to make a wider point about the approach to law-making that the Government are getting increasingly fond of. We see some extreme examples of it in this Bill. The noble Lord, Lord Purvis, when he introduced this set of amendments, said that he could not actually be clear about how Clause 14 would be used by the Government, because, in the words of the DPRRC,

the memorandum has so little to say about this broadly worded power. Nothing is said about the sort of provision that could be made under it.

Clause 14 tells us—in case we did not know—that overriding parts of the protocol is going to require a whole host of consequential changes elsewhere, and that is what I will talk about this time when we are talking about powers. We have been here before. Noble Lords will remember that as we approached the end of the transition period, departments rushed to make various changes to the operability of retained EU law. In a worryingly high number of cases during that process, as I remember, the Government made mistakes and further, correcting regulations then needed to be brought forward. This exercise is no simpler than that. If anything—because this Bill is highly contentious and because of the wider context—it is even more complicated than that previous exercise.

We need to be mindful of how these things are going to work in practice. If the Government get their Bill, how is this really going to work? Have they actually considered this? Given the difficulties that the Government had with revoking things such as the duty to post reports to the European Commission, how confident can we really be that an as yet unclear policy direction can even be delivered in a way that is in any sense timely and accurate? That really will matter to the correspondent of the noble Lord opposite. What I am saying is, putting aside my dislike for the Bill, this is not a good way for us to be making law or for the Government to put their policy into practice.

Just imagine that this Clause 14 is available to Ministers—and I hope this does not happen, but suppose it did—can we have some kind of indication from the Minister of how long this process is going to take? How many SIs does he think are going to be needed; how will the Government sequence this workload? The lack of planning around some of this in previous endeavours has really caused problems, and we do not want to be in that place again. I still think this is a bad Bill in principle, but I am afraid that its implementation is likely to render it completely unworkable in practice.

The Advocate-General for Scotland (Lord Stewart of Dirleton) (Con): My Lords, I thank all noble Lords who have participated in this debate, which was short because, as the noble Lord, Lord Purvis of Tweed, recognised in introducing it, much of the material has been covered before. Noble Lords will, I hope, forgive me if, brevitatis causa, I do not go over all the arguments already deployed and will accept, that, because they have not been deployed, we understand where they apply in the context of this clause, and will bear them in mind when considering our responses.

Amendment 22, in the name of the noble Lord, Lord Purvis, removes the power in Clause 14(4). Clause 14 prevents those necessarily more broad and conceptual provisions from being relied upon, in the different legal context that will prevail under the Bill, to undermine the legal regime that the Government are putting in place for traders. The power in Clause 14(4) is important because it will allow Ministers to ensure, subject to the appropriate parliamentary scrutiny, that the exclusions made under the Bill are coherent. It may, for example, be necessary to make alternative provision where any other provision of the withdrawal agreement or protocol so far as it applies or relates to those exclusions is excluded. It could also be used to provide clarity as to how the horizontal exclusions referred to in Clause 14(1) interact with other exclusions in domestic law.

The noble Lord, Lord Purvis, and the noble Baroness, Lady Chapman of Darlington, sought examples of how it would work out in practice. I ask the Committee to bear in mind that the position in which we are at present is one of anticipation of what will be required in relation to a dynamic situation.

The powers to make secondary legislation allow us to flesh out the precise technical or administrative details of the new regime. The powers also need to be broad to ensure that the Bill can address issues that will arise in future as EU rules continue to change. The Government submit that the powers are both necessary for the legislation to be operable and have been appropriately limited prior to their implementation. As I said earlier, I do hear the criticism in relation to breadth offered by various noble Lords in the debate today and at other stages.

The noble Lord, Lord Browne of Belmont, made points reminding the Committee of the context in which the Government bring forward this legislation, and I am grateful to him for his qualified support. The points he made were no less powerful for having been made before, in the course of various debates we have had at earlier stages.

The noble Baroness, Lady Chapman of Darlington, from the Opposition Front Bench, refers to the way in which more and more laws appear to be being cast in this fashion, with more and more use of delegated powers. I invite the Committee to consider that, in the case of this Bill, the Government are seeking to legislate in such a vital area, as the noble Lord, Lord Browne of Belmont, reminds us.

The noble Baroness speaking from the Opposition Front Bench posed a number of technical questions. The questions she posed perhaps require an answer in more detail than I am able to give from the Dispatch Box, and perhaps than would be desirable to the whole Committee—but, if she will grant me forbearance, I will write to her.

I have not yet addressed the question of Clause 14 standing part of the Bill. It will support the coherent functioning of the Bill. It is important to ensure clarity in relation to the interaction between excluded provision and any wider provisions in the protocol or withdrawal agreement to which such provision relates. Subsection (1) gives effect to this by confirming that any provision of the protocol or withdrawal agreement is excluded provision to the extent that it would apply in relation to any other excluded provision. Subsections (2) and (3) set out further the kind of ancillary provision that may be excluded.

I discussed subsection (4) in addressing the amendment proposed by the noble Lord, Lord Purvis of Tweed, but I provide further assurance that the Bill seeks to establish a coherent domestic regime and that regulations can be made under it in connection with any provision of the protocol or withdrawal agreement to which this clause relates. The Government's position is that the clause is important to insulate fully any excluded

[Lord Stewart of Dirleton]
provision from being subject to obligations arising from other provisions of the protocol and withdrawal agreement.

I think I am following the mood of the Committee by not expressing myself in as much detail as my noble predecessor, my noble friend Lord Ahmad of Wimbledon —or Wimbledon of Ahmad, as he was prepared to style himself earlier—dealt in, but the Committee as a whole will recognise that this provision is tied up with its predecessor.

I hope that, at least at this stage, I have said enough to persuade noble Lords not to press their amendments.

Lord Purvis of Tweed (LD): My Lords, I am grateful to the Advocate-General and I will be brief. I welcome his offer to write to the noble Baroness and those who have taken part in the Committee. The extremely pertinent question that was asked about the Government's estimate of the number of regulations under the Bill that may be necessary to bring about a new regime is really important, so it would be helpful if the Minister could include it in his response.

I found it very interesting when he said that part of the reason these powers needed to be so extensive was that they needed to be sufficiently flexible for the Government to bring forward regulations when the EU changes its rules. I do not know how that brings about a response to the democratic deficit. Under the dual regulatory regime that will be put in place, we will be in the almost farcical situation that whenever the EU changes any of its rules, Ministers will bring to this Chamber negative instruments that will then be nodded through. There may be a fig leaf because it has the Crown on top of it, but it is not necessarily meaningfully different as far as people having an input.

My final element is perhaps for the correspondent of the noble Lord, Lord Browne. I understand and appreciate the frustration, and perhaps our considerations in Committee are long and tedious, but I have the liberty of putting forward amendments. They may frustrate or bore Ministers, but I am lucky to have that liberty. We cannot do that with statutory instruments, which are unamendable, so we do not have the opportunity to ask questions, tease out, challenge and maybe get concessions or further clarifications. If that is the case for framing an entire new system, that is really problematic.

However, on the basis of the Minister's welcome commitment to write, in the meantime I beg leave to withdraw.

Amendment 22 withdrawn.

Amendments 23 to 23C not moved.

Clause 14 agreed.

The Deputy Chairman of Committees (Lord Lexden) (Con): In Clause 15, Amendment 24, just for a change, Lord Purvis of Tweed.

Clause 15: Changes to, and exceptions from, excluded provision

Amendment 24

Moved by ***Lord Purvis of Tweed***

24: Clause 15, page 9, line 1, leave out subsection (2)

Member's explanatory statement

This amendment would remove the Minister's power to treat as excluded provision for a permitted purpose any provision of the Northern Ireland Protocol or any related provision of the EU Withdrawal Agreement.

Lord Purvis of Tweed (LD): This is a variation on a theme, but this one goes even further—I can be even briefer. The DPRRC reserved its most withering comment for Clause 15. I quote from paragraph 56 of its report:

"Clause 15 contains a power of the sort we rarely see—a power that in essence allows Ministers to rip up and rewrite an Act of Parliament"

and then to retain powers, if any of those new primary legislative functions are, in the Minister's view, not operating as they should, not to return to Parliament for new primary legislation but to bring forward further regulations. This also completely rips up the entire concept of post-legislative scrutiny, whereby we learn from elements and seek amendments. This is important because, under Article 15(3), three areas of the protocol are not excluded but all the others are, including processes in a joint procedure of dispute resolution, monitoring, evaluation, classification of goods and joint mechanisms designed to be under a process. If it fails, there are mechanisms under Article 16 for safeguarding and rebalancing mechanisms. These are all gone and we do not know what will be in their place.

I understand the arguments presented that anything will be better than what there is at the moment, which is one of the themes. We just cannot be sure, however, because there is nothing in here that offers that reassurance. The breadth of this power, which provides the ability to make primary legislation and then to effect primary legislation again, is really egregious. On that basis, I beg to move.

8.45 pm

Lord Bew (CB): My Lords, the noble Lord, Lord Purvis, has again referred to the issues raised in the eloquent letter read out by the noble Lord, Lord Browne. First, I want to say something directly to his constituent on behalf of the House. This is what the House of Lords does. We have a big thing about Henry VIII powers and would do this with any Bill. I fully expected that and nothing I have heard has been the remotest surprise in several days of debate on the Bill. There has been not even the slightest tincture of originality. However, the problem is that the Bill, unlike the other Bills the House deals with, is not quite being dealt with in the normal way. This is part of a three-dimensional strategy of the Government. The other dimension is negotiations with the European Union. When I said weeks ago in this Chamber that these negotiations would proceed and would clearly not be badly affected by the existence of the Bill, I was greeted with howls of disapproval. In fact, we all know that they are proceeding and they have not been affected by the Bill. That is one dimension and the reality.

The other point is that this is related to a strategy that may very well fail to get the institutions of the Good Friday agreement up and running before the 25th anniversary of that agreement. This strategy may well fail, but anybody who thinks that the immediate dropping of the Bill now would help with the return of the Good Friday agreement and that strategy is also wrong. The UK Government are acting under the international agreement—Article 1(5)—which permits the Government with sovereign power to address the alienation of one or other community, as we did over the Irish language a few weeks ago and as we are now trying to do with this issue, because there is significant alienation in the unionist community over the cause of the protocol.

I simply want to make the point that, although I have been slightly cold in response to the noble Lord's constituent's resentment, I understand it—but this is what the House of Lords does. It will do its thing about regulatory powers, delegated powers and so on, and it ought to do that thing. What we and the noble Lord's constituent are entitled to ask is that it should take some account of the fact that we are involved in a three-part process. The Bill is not quite just a thing in this way. It coexists with other key elements: the negotiation with the European Union, which the House now accepts, somewhat grimly, is going on unaffected by the Bill and is by far the best outcome; and the need to act under our international obligations to address the alienation of one community. I simply suggest that it would be less irritating to the noble Lord's constituent if those points were at least acknowledged.

Lord Hannay of Chiswick (CB): My Lords, I will briefly follow the noble Lord, Lord Bew, because he raised a point of great importance: we are breaking our teeth on a problem with three parts. At the moment, the Government are giving us absolutely nothing in terms of reporting on what is going on in Brussels. It is simply described as a "running commentary", as if that were answer to the problem—well, it is not.

I lived through the last time the United Kingdom negotiated with the European Union as a third country, known as our accession negotiations. The process of the negotiations was reported on regularly to both Houses of Parliament by the Heath Government. No one said that was a running commentary or the wrong thing to do. We cannot go on like this, without the slightest idea of what is going on in Brussels, because it very much affects what we are discussing here. As the noble Lord, Lord Bew, rightly said, there is not the slightest sign to show whether our discussion here, and the Government pushing this absurd legislation through in an untimely manner, are either helping or hindering what is going on in Brussels.

I plead with the Minister to programme a moment at which the Government will give both Houses a progress report—not of everything going on in Brussels, but so that we have some idea of how that piece fits in with the others.

Lord Ponsonby of Shulbrede (Lab): My Lords, Clause 15 contains what the DPRRC called the "most arresting" powers in the Bill, allowing Ministers to rip up and rewrite an Act of Parliament by granting the power to classify parts of the protocol as excluded provision or to tweak the precise nature of that classification, with virtually no parliamentary oversight.

The Minister will argue that the Government have constrained themselves by listing nine permitted purposes for which changes can be made to the application of the protocol, but that list changes very little. The DPRRC describes it as

"a very broad set of circumstances".

Unlike SIs made under the EU withdrawal Act 2018, which must be accompanied by a declaration of the good reasons for them, the DPRRC says that there is no obligation for a Minister to include a statement setting out why the regulations are being made.

The DPRRC report does not take issue with Clause 16, although this also confers very broad powers on Ministers: they can make any additional provision that they like in relation to additional excluded provision. Once again, we need the Government to publish indicative regulations: we currently have no idea how the use of these powers would look or how often they would be used. We are told that the tearing up of the protocol is to bring stability and predictability to trade across the Irish Sea, yet these powers theoretically allow Ministers fundamentally to alter trading arrangements at short notice, with no reasoning, consultation or formal scrutiny. As with Clause 14, the provisions appear unworkable, and granting such discretion to Ministers is likely to increase uncertainty and instability.

The Minister of State, Foreign, Commonwealth and Development Office (Lord Ahmad of Wimbledon) (Con): My Lords, I thank all noble Lords for their contributions. I hear what the noble Lord, Lord Hannay, said, and I will take that back to the department. As I have said, where we can, we will certainly seek to update noble Lords on our current engagement, negotiations and discussions with our partners in the EU. From our perspective, the end objective is that the protocol must work for all communities in Northern Ireland, as I have said repeatedly. Clearly, it is not.

I turn specifically and briefly to Amendment 24, in the name of the noble Lord, Lord Purvis of Tweed. I will take this together with Clause 15 as a whole, as he did in introducing this group. This amendment would effectively entirely remove the ability for Clause 15 to operate. From the Government's perspective, Clause 15 is important to ensure that the Bill is flexible enough to tackle any unintended consequences or future issues that may arise and that threaten the objectives of the Bill, particularly considering the importance of the issues the Bill is intended to address. This means that Ministers can make regulations to adjust how the Bill interacts with the protocol, and to reflect which elements are disapplied.

I fully understand that there is concern about the breadth of the powers under this clause; we have had debates on this, and the noble and learned Lord, Lord Judge, has raised this repeatedly. I reassure noble Lords that the power is limited to a closed list of specified purposes set out in Clause 15(1)—the noble Lord, Lord Ponsonby, alluded to this—for example, to ensure

"the effective flow of trade between Northern Ireland and another part of the United Kingdom".

[Lord Ahmad of Wimbledon]
We have also applied the stronger standard of necessity to this clause, given its content. This is clearly an area where Ministers should be asked to reach a higher bar and have less discretion, a point we have debated extensively already. Additionally, as has already been discussed—and just to reassure the noble Baroness, Lady Ritchie, on her amendments relating to Article 2—Clause 15(3) provides that this power cannot be used to terminate the "rights of individuals", the "common travel area" and

"other areas of North-South co-operation"

in the protocol. Of course, these are not the only areas of the protocol left unchanged by the Bill, but they are specifically defined here to provide particular reassurance on these very sensitive matters. I hope noble Lords are therefore reassured that Clause 15 will be used only in the event that it is absolutely necessary to address the Bill's core objective of preserving political stability in Northern Ireland, an objective that I know all Members of your Lordships' House share.

I turn briefly to Amendment 32 in the name of the noble Baroness, Lady Chapman of Darlington. We have already talked about the terms "appropriate" and "necessary", and I put on record that we believe there is an appropriate level of discretion for Ministers in this respect.

I turn to Clause 16, which supports the functioning of the Bill by granting the power to make new arrangements in any cases where it becomes necessary to use the powers contained in Clause 15. This means that new law can be made via regulations, if appropriate to do so, in relation to any element of the protocol or the withdrawal agreement that has been the subject of the powers in Clause 15. This clause can therefore be understood as the equivalent of Clause 15 to the other domain-specific powers provided in other clauses of the Bill.

From the Government's perspective, it is vital to ensure the functioning of the Bill and to prevent any gaps in the underpinning arrangements. Without it, there is a risk that any new issues arising from protocol provisions would not be properly addressed due to an inability satisfactorily to make replacement arrangements. I therefore recommend that this clause stand part of the Bill.

Lord Purvis of Tweed (LD): My Lords, I am grateful for the Minister's response and for those of everyone who has contributed to this short debate. There is a fundamental disagreement of principle with the Government, in that, if they are seeking powers such as this, it should be as a result of agreement. These powers should be powers to implement anything that is agreed.

I say to the noble Lord, Lord Bew, that we should be legislating to implement the results of the negotiations. Legislation should not be tactical: that is not the point of legislation, and it will never be good if it is. Therefore, this is really quite important to bear in mind. If formal mechanisms have been exhausted, we legislate—but only after agreement or exhaustion of it. The noble Lord seems very confident that negotiations are taking place, but I agree with the noble Lord, Lord Hannay: we have not heard the Government say that they are negotiating; they are describing them as "technical talks". These include the "technical talks" about the application of the protocol. Do noble Lords remember "to fix it, not mix it" and "to mend it, not end it"? They are not my words but Ministers' words. So negotiations are not taking place; "technical talks" are taking place. Yet Parliament is being asked to give Ministers powers to make primary law under regulations as a result of "technical talks"; that is jarring.

9 pm

The Minister said that the protocol must work for all people in Northern Ireland. I agree. He then said, it is clearly not. Part of the challenge that has to be squared, of course, is that it seems as if the protocol is clearly not working for some people but is for others. How you square that should not be through very broad order-making powers for Ministers. We should come back to trying to build consensus and agreement to make these sustainable. It is the lack of sustainability that we on these Benches fear. We will, of course, return to these issues later but in the meantime, I beg leave to withdraw the amendment.

Amendment 24 withdrawn.

Amendment 25

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

25: Clause 15, page 9, line 15, at end insert—

"(d) Article 18 (democratic consent in Northern Ireland)"

Member's explanatory statement

This amendment adds Article 18 (Democratic Consent in Northern Ireland) of the Northern Ireland Protocol to the list of articles that a Minister of the Crown cannot exercise powers conferred by subsection (2) to provide cease to have effect in the United Kingdom to any extent.

Baroness Ritchie of Downpatrick (Lab): My Lords, Amendment 25 is in my name and that of the noble Baroness, Lady Suttie. The purpose of this amendment is to prevent Ministers using powers in the Bill to make Article 18 of the protocol excluded provision. Article 18 sets out a democratic consent mechanism that provides for votes to be held in the Northern Ireland Assembly on whether Articles 5 to 10 of the protocol can apply to Northern Ireland. We have already had considerable debate tonight, in the previous two sessions and during Second Reading about the issue of democratic consent. My only regret is that at the moment, we do not have the facility of the Assembly, the Executive and the institutions to provide that necessary democracy to the people of Northern Ireland.

Through this amendment I want to ensure that the wishes of people in Northern Ireland will be respected. I would also like to address the issue of the difference between the protocol and the Belfast/Good Friday agreement. There is a variation of the false assertion that the protocol can be sustained only if it enjoys cross-community support in Northern Ireland. While the Good Friday agreement provides for cross-community support on certain key decisions within the devolved competence of the Assembly or Executive, the protocol as an excepted matter is outside that scope and therefore no such requirement arises.

We must not forget that it was the UK Government, along with the EU, who negotiated this. I would like the Minister to explain how democratic consent as prescribed in Article 18 will be protected. I beg to move.

Baroness Suttie (LD): My Lords, I also speak in support of Amendment 25, to which I have added my name. The noble Baroness, Lady Ritchie of Downpatrick, has clearly set out the importance of Article 18 of the protocol in allowing the democratically elected Northern Ireland Assembly to give its consent on whether to continue with the protocol in a vote in 2024. I will not repeat the many powerful arguments that she has used, but it is deeply concerning that Clause 15(2) as drafted provides potentially sweeping powers for a Minister of the Crown to remove this right by regulations. It is worth repeating the view of the Constitution Committee, which set out in its report on the Bill that Clause 15

"undermines the rule of law for the UK Government to invite Parliament to pass legislation in breach of the UK's international obligations. Enabling ministers to do this through secondary legislation, particularly via the negative resolution procedure, is even less constitutionally acceptable."

To refer to a discussion on an earlier amendment, I understand the frustration of the constituent of the noble Lord, Lord Browne, with what sounds like procedural issues. However, my noble friend Lord Purvis gave a powerful explanation as to why what seem like procedural niceties really matter, because they make a difference in the end to people's lives if we get them wrong. It is not true to say that we have ignored them; in fairness, in every single debate I have said that I understood the strength of feeling of the unionist community. I have said that in every single contribution that I have made on this Bill. I understand that it is something that people feel extremely strongly about.

Lord Browne of Belmont (DUP): In fairness to my constituent, I quoted only a very short paragraph. Before that, he went on in quite a lot of detail about what has been discussed here. So, in fairness to my constituent, it was a much fuller letter that we received from him.

Baroness Suttie (LD): I thank the noble Lord for that clarification. However, probably lots of people out there would regard statutory instruments and secondary legislation, and such phrases, as sounding rather technical—but the point that my noble friend was making is that they are important. If we get the laws wrong, they will directly impact on the people of Northern Ireland, who have gone through a difficult situation since the passing of Brexit.

The effect of Amendment 25 would be to safeguard Article 18 of the protocol and allow the democratically elected Northern Ireland Assembly to have its say. I think the noble Lord, Lord Caine, is going to respond, as he is sitting in the middle of the three noble Lords. I would be very interested to hear, for the record, whether he considers that there are circumstances under which he could imagine using the powers granted under Clause 15(2) of this Bill to remove Article 18 of the protocol and remove the right of the Assembly to have that vote in 2024. If that possibility exists, can he imagine that it would ever actually be used?

On a second issue, in an article in June this year, Tony Connelly of RTÉ raised an interesting question about which version of the protocol would be voted on in 2024 by MLAs. Would it be the original EU version of the protocol, or the version as amended by this Bill, if it were to be passed and enacted? It is an interesting question, and I would like to know the Minister's view on it. Tony Connelly says that those parties that want the protocol to stay

"will have a very strong case to say in 2024 they are being denied a democratic vote that has been mandated by international law."

Lord Dodds of Duncairn (DUP): I shall just intervene briefly in this interesting debate on the amendment proposed by the noble Baroness, Lady Ritchie. Just to follow on on what the noble Baroness, Lady Suttie, has said about which form of the protocol will be voted on, I do not mean this in a trite or trivial way, but I suspect that, if it were the original form of the protocol, it is unlikely that there would be a meeting of the Assembly to vote on it. That is just the reality. As the noble Lord, Lord Bew, said, it brings us back time and again to the fundamental reasons why this Bill is before your Lordships' House.

I listened to the noble Baroness, Lady Ritchie, say that the protocol is not subject to cross-community consent because it is a reserved matter and does not fall within the purview of the devolved institution. There are a couple of answers to that; the first one is that the idea that we can dismiss the issue of unionist dissent from the protocol on that technical ground is complete political nonsense. It just will not work. We are in a dire situation politically in Northern Ireland, and to use a technical argument is not going to persuade anyone; it is not a good argument to use.

On the actual position, if we believe that the protocol is a reserved matter, then the decision is for this House and this Parliament. However, the Government, by agreement with the EU, decided that there should be some kind of consent mechanism and a vote in the Northern Ireland Assembly. Then they decided to change the rules of the Belfast agreement and the consent mechanisms within strand 1, the Assembly, having given the decision to that Assembly, by taking away the cross-community element of the vote and saying that it had to be by a majority vote. I have said this before: this is the only single major issue in Northern Ireland that can be decided by a majority vote. Everything else is subject to either cross-community agreement or susceptible to being turned into a cross-community vote by a petition of concern. Why did that happen? In order to prevent unionist dissent from derailing the protocol.

When the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020 were debated in Grand Committee on 1 December 2020—the statutory instrument brought in to implement Article 18—the noble Lord, Lord Empey, and the late Lord Trimble were both present and indicated their strong concerns, as architects of the original Belfast agreement, about how this drove a coach and horses through the consent principle of the Belfast agreement. People in Northern Ireland are mystified, continually, by people who stand up and say, "We are protecting the Belfast agreement; this is all about protecting the

[Lord Dodds of Duncairn]
Belfast agreement", and then they want to change the rules of the Belfast agreement when it does not suit them. They cannot have it both ways.

The fact is that Article 18 of the protocol is a vote four years after the event, four years after Northern Ireland is brought under the auspices of the protocol, four years after there has been dynamic alignment with EU law and four years after gradual separation between regulations and laws in Great Britain and the rest of the United Kingdom, in Northern Ireland. We will have had four years during which trade continues to diversify and so on, where laws are being made with no say, and then the Northern Ireland Assembly is to be given a vote, but not on a cross-community basis. No one says, "Are unionists happy? Are nationalists happy? Is there an overall majority?", which is what the cross-community voting mechanism is. No, it is to be a straight majority vote.

All this is obvious to unionists in Northern Ireland. This is why we have the problems we do. Anyone who tries to pretend, without addressing these matters, without fixing these problems, that we are going to get anywhere is living in cloud-cuckoo-land. We are not going to get devolution restored, because unionists—not just the DUP—will not accept it. I respect greatly what the noble Lord, Lord Purvis, has said on the issue of delegated legislation and Henry VIII clauses. I understand all that and the noble Lord, Lord Bew, made that point. He talks about this draconian power to rip up Acts of Parliament and all the rest of it, but the protocol itself allows, in 300 areas, for EU law to rip up statute. It also provides for the addition of annexes to new EU legislation within the scope of the protocol, in addition to the 300 areas where we dynamically align. That can rip up Acts of Parliament.

So, I accept the problems that have been highlighted by some about giving Ministers sweeping powers, but we have to fix the problems that are there. We have to do it, acknowledging that if we do not, there is real damage being done to the Belfast agreement, as amended by the St Andrews agreement. That should be the priority. Articles 1 and 2 of the protocol make it clear that the Belfast agreement, as amended, is the key overriding objective. If people believe in that, then they should be prepared to consider carefully what we are saying, and they should therefore accept the rules of consent within the Northern Ireland Assembly itself. I look to the noble Baroness, Lady Ritchie, to uphold this. It is ironic, given the changes that were made by St Andrews, that somehow there is now a drawing away from that consent principle.

9.15 pm

Lord Hannay of Chiswick (CB): Although the noble Lord, Lord Dodds, has developed his argument with great eloquence, and at considerable length, he has not yet explained to my satisfaction why it was that his party did not object to the holding of a referendum that took Northern Ireland out of the European Union against its expressed wish as being a breach of the Good Friday agreement?

Baroness Ritchie of Downpatrick (Lab): My Lords—

Lord Dodds of Duncairn (DUP): With respect, I will answer the noble Lord's question first. We had a UK-wide referendum. Northern Ireland is part of the United Kingdom, as provided for under the Belfast agreement. The United Kingdom is the sovereign Government. Therefore, it is not that Northern Ireland is some kind of hybrid or special joint condominium with the Irish Republic, and it can go its own way if the rest of the United Kingdom is doing something else. It was a UK-wide referendum and, just as in Scotland, where people voted a different way, so in Northern Ireland—but we had to respect the outcome of the UK referendum.

Baroness Ritchie of Downpatrick (Lab): I thank the noble Lord, Lord Dodds, for giving way. Further to the point made by the noble Lord, Lord Hannay, would the noble Lord, Lord Dodds, accept that around 56% of the people of Northern Ireland voted to remain within the EU, and we did not give our consent to Brexit. While it may have been a UK vote, and the noble Lord and I will remember well the debates in the other place on this specific matter in terms of the post-referendum Bill and the arrangements thereof, would he accept that the 56% who voted to remain did not give their consent to Brexit and to leaving the European Union?

Lord Dodds of Duncairn (DUP): The 44% who voted to come out was a much higher figure than people had expected—but I accept what the noble Baroness says. But we are part of the United Kingdom and, just as Scotland and London and other parts of England voted in a certain way, we had to respect the overall vote. And if every single person in Northern Ireland had voted to remain—never forget—there would still have been a majority for Brexit and Northern Ireland would still have left the European Union, because we are part of the United Kingdom. The Belfast agreement did not create a hybrid situation in Northern Ireland. The sovereign UK Government are the responsible Government. We are United Kingdom citizens. Special arrangements were made for governance, but not for sovereignty, and that needs always to be borne in mind by those who try to conflate the two things. I think I have said enough on the specific detail.

Lord Purvis of Tweed (LD): Before the noble Lord sits down, I am grateful. I understand his arguments. It is not a question with regards to the result of the referendum. My question is in the context of having scrutinised many trade agreements and treaties, and the deficiencies in the CRaG process. I agree with the noble Lord that there are challenges when it comes to agreements made by the Executive under their prerogative power to negotiate, and then what ability do we have, even quasi-representatives in an unelected Chamber such as this, to raise issues? I get that entirely. But, if the Government secure agreement as a result of these talks, has the noble Lord given any thought to the mechanism for seeking consent for what the Government bring forward?

Lord Dodds of Duncairn (DUP): Well, there are a lot of "ifs" there. If I understand the noble Lord, he is asking, "If there's an agreement, what should the Government do in terms of getting an endorsement

of it?" I presume they would come to both Houses of Parliament and consult with the parties in Northern Ireland. As we learned from the original Brexit negotiations, the Government would be very wise to consult with the parties in Northern Ireland before any final arrangements are entered into.

I have a lot of sympathy with the view expressed by the noble Lord, Lord Hannay, that there is a lot of secrecy around the negotiations. Nobody is quite sure what is going on—technical talks, negotiations or whatever. However, I remember living through one particular week when the UK Government went off to Brussels and then came back again because they had not consulted properly. I would not like to see that happen again, because the whole objective here is to ensure that we can get arrangements which allow the devolved Government to get up and running again, with the support of nationalists and of unionists. So, before we came to any formal vote, I suspect that there would need to be quite considerable discussions and consultations with the parties in Northern Ireland.

Baroness Chapman of Darlington (Lab): I would expect that, too, and I think it is regrettable that we have got to where we are. I was one of those people in the other place who very regularly got up and asked Ministers about Northern Ireland and what the plan was, because there were obviously going to be these issues. There were other solutions; we could have had a customs union or some kind of single market arrangement that would have maybe dealt with this in a slightly different way. I remember talking to one of the noble Lord's colleagues who said, "Well, we don't mind what it is as long as we're all treated the same within the United Kingdom". Ministers cannot be surprised that we are still having these discussions now.

I want to talk a little bit about this issue of cross-community consent; I am just reflecting on the speech made by my noble friend Lady Ritchie on Monday. It seems clear that the intention of Ministers is to protect the Article 2 rights of individuals, the Article 3 common travel area and the north-south co-operation in Article 11. We have debated the protection of the rights of individuals before, but what we really need is some sort of assurance from the Government that those intentions are reflected throughout the Bill in a consistent and watertight way. So can the Minister confirm that there is no prohibition on the overriding of Article 18 of the protocol, which deals with cross-community consent? We have rightly heard a great deal about this issue, and I would like the Minister to address it to make sure that I have understood it correctly.

The Parliamentary Under-Secretary of State, Northern Ireland Office (Lord Caine) (Con): My Lords, I am very grateful, as ever, to the noble Baroness, Lady Ritchie of Downpatrick, for moving Amendment 25. Much to my astonishment, the debate has veered away somewhat from the strict terms of her amendment. However, let me say at the outset, as I have said before, that I very much share the noble Baroness's frustration at the lack of a sitting and functioning Northern Ireland Executive and Assembly. Of course, one of the motivations behind this legislation is to try to facilitate a situation in which those institutions might be restored. It is sensible that we always go back to why we are doing this and why we are legislating.

I can also sympathise with the intention behind the noble Baroness's amendment, but the Government's view is that it is unnecessary. To answer the noble Baroness, Lady Suttie, and I think to some extent the noble Baroness, Lady Chapman of Darlington, the Government have absolutely no intention whatever to use the powers in Clause 15 to alter the operation of the democratic consent mechanism in Article 18.

I appreciate that there are different views on the mechanism itself; they were aired to some extent a few moments ago. They have been debated extensively in this House, and I seem to recall that they even managed to make their way into the debate on the Ministers, elections and petitions of concern Bill at the end of last year and the beginning of this one—so, if my noble friend Lord Dodds of Duncairn will forgive me, I do not really wish to reopen that whole debate again at this late hour of the evening.

To answer the further question from the noble Baroness, the vote in the Assembly will be on Articles 5 to 10 of the protocol.

Baroness Suttie (LD): Is that the protocol as amended, or the original?

Lord Caine (Con): The vote will be on Articles 5 to 10, regardless of any changes in domestic law made by this Bill.

The noble Baroness, Lady Ritchie, will recall that securing the consent mechanism was, in the view of the Government at the time, one of the key measures which paved the way for them to agree to the revised Northern Ireland protocol in the autumn of 2019. It follows therefore that it would make no sense for the Government subsequently to remove what was seen at the time as a key part of the protocol. It is perhaps because this point is so self-evident to the Government that we did not see the need to protect this element of the protocol under Clause 15(1). The clause is not intended to provide an exhaustive list of every single article of the protocol that we do not intend to alter and therefore we have not listed other articles which we have no intention to amend.

For the avoidance of doubt, I can confirm to the noble Baroness that the democratic consent process remains an integral part of the Northern Ireland protocol. The protocol should not, and indeed cannot, continue unless it retains the support of a majority of Members voting in the Northern Ireland Assembly. Again, I hear the points made by my noble friend Lord Dodds of Duncairn in that respect, but I am just setting out the position as it stands.

I hope that this reassures the noble Baronesses, Lady Chapman, Lady Suttie and Lady Ritchie of Downpatrick, that we have no intention of using the powers to alter in any way the mechanism in Article 18.

Lord Hannay of Chiswick (CB): The Minister gave a reply to the question about what the basis of the consent vote in 2024 would be, but I really did not

[Lord Hannay of Chiswick]
understand what he said. Surely the vote in 2024 will take place on the Northern Ireland protocol and its arrangements for implementation as they stand at the time of the review, not as they are now and not as they would be if the Government unilaterally changed the protocol and destroyed it in the process—then there would not be a review at all. The answer is surely quite simple. It cannot be said with precision, because we do not know what the provisions of the protocol and those for its implementation might be at the time the vote takes place, but that is what it will be on.

Lord Caine (Con): The noble Lord is right that it is probably not fruitful to speculate on what the circumstances might be in 2024. Our first objective is to have an Assembly in place that would be able to consider these matters and take the decision.

In conclusion, I hope I have provided some assurance to noble Lords about our intentions in respect of the powers in Clause 15, Article 18 of the protocol and the consent mechanism. I therefore urge the noble Baroness to withdraw her amendment.

Baroness Ritchie of Downpatrick (Lab): My Lords, I thank the Minister for his detailed explanation of the Government's position. I also thank the noble Baroness, Lady Suttie, my noble friend Lady Chapman and the noble Lords, Lord Hannay and Lord Dodds, for their interventions. This has been a very useful debate underpinning the principle of democratic consent. Irrespective of our differing views on this, I think we all believe in the value of democracy and people making decisions.

I would hope that we could have those institutions up and running in the short term, so that the democratic wishes of the people of Northern Ireland could be protected. I will further examine what Ministers have to say in relation to the protection of Article 18. If I have any further issues, I will write to the Minister, under separate cover, so to speak, and I reserve the right to further examine this on Report if required.

Amendment 25 withdrawn.

9.30 pm

Amendment 26

Moved by ***Lord Purvis of Tweed***

26: Clause 15, page 9, line 15, at end insert—

"(3A) A Minister of the Crown may not exercise the power conferred by subsection (2) before full consultations have been conducted on any proposed changes with—

(a) the Northern Ireland Human Rights Commission,

(b) the Equality Commission for Northern Ireland, and

(c) the Joint Committee of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission,

and the Minister has published the outcome of such consultations."

Member's explanatory statement

This amendment requires a Minister to consult with a number of human rights and equalities bodies before using the powers in subsection (2) of Clause 15 in relation to excluded provision.

Lord Purvis of Tweed (LD): I rise to move the amendment in the name of my noble friend Baroness Ludford, to which I have also added my name. The brevity of my contribution should not be seen as representing any lack of seriousness in the intent behind them. It really is to seek assurance from the Minister at the Dispatch Box that the regulation-making powers in Clause 15(2) would not be exercised unless there has been consultation with the human rights bodies outlined in Amendment 26, and similarly that regulations will not be put forward under other elements of the Bill without similar consultation of the human rights bodies. I need not make the case as to why that is so important. It is simply a case of seeking reassurance from the Minister that, at the very least, consultation with these bodies will have been carried out before the Government bring forward any orders. On that basis, I beg to move.

Lord Caine (Con): My Lords, I am very grateful to the noble Lord, Lord Purvis of Tweed—as opposed to Twiddle—for being very brief. I think that this is probably the shortest debate by far that we have had throughout this Committee.

I will address the two amendments together, if that pleases the Committee. As the noble Lord set out, these amendments would require Ministers to consult both the Northern Ireland and the Irish human rights and equalities institutions before making regulations under the powers in the Bill. As I set out—I hope fairly clearly—on Monday evening when I was addressing the amendments in the name of the noble Baroness, Lady Ritchie of Downpatrick, the UK remains fully committed to ensuring that rights and equality protections continue to be fully upheld in Northern Ireland, in line with the provisions of Article 2 of the protocol. I think that on Monday I referred to the fact that, given my own experience over many years in Northern Ireland, I completely recognise the importance of those human rights protections. I often cite them when I am defending and supporting the Belfast agreement, as one of the key pillars of that agreement. I hope that the noble Lord will accept that assurance.

This is why Article 2 is explicitly protected from being made an excluded provision in Clause 15. The institutions mentioned in Amendments 26 and 47 are, as I have just stressed, important and respected institutions, established by the Belfast agreement and the Northern Ireland Act 1998. They therefore deserve—at the risk of repeating myself—our full and strong support. They undertake important duties and any change to their remit should, of course, not occur arbitrarily.

I will try to assure the noble Lord: the Government do engage regularly with these commissions. I last met the Northern Ireland Human Rights Commission on 8 August. It has powers to provide advice to the Government on issues arising from Article 2 of the protocol, as things stand. Officials have already had meetings with the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland regarding a number of these powers. I believe that a further meeting is being scheduled very shortly.

More broadly, the Government have engaged extensively on the issues created by the protocol with stakeholder groups across business and civic society,

in Northern Ireland, the rest of the UK and elsewhere, and we continue to do so. This amendment would compel the Government to do what in many cases they already are doing and intend to continue doing. However, the situation in Northern Ireland is pressing. Therefore, it is essential that in certain circumstances powers might need to be used quickly. In normal cases, the Government would of course engage with stakeholder groups in Northern Ireland, but there may be occasions when we have to move very swiftly.

In that context, the requirements set out in the two amendments to engage with the Equality Commission and the Northern Ireland Human Rights Commission before making any changes to how the Bill operates or using any of the powers in the Bill—even though most areas of the protocol do not touch on the commissions' remit—would be disproportionately burdensome and risk delaying the implementation of solutions for people and businesses in Northern Ireland.

However, I cannot emphasise enough the extent to which the Government are committed to no diminution whatever in human rights protections in Northern Ireland, an integral part of the Belfast agreement. As such, I invite the noble Lord to withdraw the amendment.

Lord Purvis of Tweed (LD): My Lords, I welcome the Minister's commitment. I hope he sees very clearly that we do not doubt his commitment or his work in this area. The challenge we all have is that there may be a situation where he is no longer the Minister. We hope he will have as long a ministerial life as his noble friend Lord Ahmad of Wimbledon next to him, but that is not guaranteed in this world, so this is about having statutory protections, which we will reflect on. We are considering the question because it does not necessarily delay, nor is it burdensome, to consult human rights organisations before bringing forward amendments.

On the basis of the Minister's commitment, we will reflect on this. However, in the meantime, I beg leave to withdraw this amendment.

Amendment 26 withdrawn.

Amendment 27

Moved by ***Lord Purvis of Tweed***

27: Clause 15, page 9, line 15, at end insert—

"(3A) A Minister of the Crown may not exercise the power conferred by subsection (2) before full consultations have been conducted on any proposed changes with—

(a) the Northern Ireland Chamber of Commerce and Industry,

(b) the Confederation of British Industry Northern Ireland,

(c) the Federation of Small Businesses Northern Ireland,

(d) Trade NI, and

(e) any other persons whom the Minister considers appropriate as representatives of business, trade and economic interests in Northern Ireland,

and the Minister has published the outcome of such consultations."

Member's explanatory statement

This amendment requires a Minister to consult with a number of trade and industry bodies in Northern Ireland before using the powers in subsection (2) of Clause 15 in relation to excluded provision.

Lord Purvis of Tweed (LD): My Lords, we will build up a fair canter with the next couple of groups because their principles are similar.

Part of the thrust of the argument is that we should be considering how we approach a new regime regarding Northern Ireland as we would for all other parts of the UK. The amendments in this group would do exactly that. They would adopt commitments provided by the Government in other legislation for the implementation of other agreements, including trade agreements, the operation of the single market and consideration of how that market will operate.

For example, Amendment 31 seeks that when the Government wish to operate the framework, they do so informed by the statutory bodies that Parliament has placed in legislation that would operate for all other parts of the UK single market. They should therefore, similarly, consult the Trade and Agriculture Commission, a statutory body tasked with looking at what Governments propose for the operation across the whole United Kingdom, and the Competition and Markets Authority, in relation to the operation of the UK internal market.

These have not been considered burdensome or lacking in timeliness, since these are all provisions in other pieces of legislation. If the thrust of the argument is that there should be consistency in operation for these, surely the Government would want to put in place the consultation of the statutory bodies to inform and advise, on the same statutory basis as in the other pieces of legislation. These amendments should not be too troublesome for the Minister to accept. I beg to move.

Lord Dodds of Duncairn (DUP): My Lords, as the noble Lord, Lord Purvis, said, I hope we are speeding up a little. I will speak very briefly to Amendments 27 and 28 in this group, in his name and that of the noble Baroness, Lady Ludford.

In relation to consultation with various organisations —not statutory bodies—such as the chamber of commerce, the CBI, the Federation of Small Businesses, Trade NI, and, as mentioned in Amendment 28, the UFU, Food NI and the Northern Ireland Food and Drink Association, I wonder why those ones were chosen. If you are a member of Hospitality Ulster, you might be feeling a bit left out. If we are putting this in statute, why are certain groups put into statute and others left out?

Also, picking up on concerns raised earlier—I listened very carefully—proposed new subsection (3A)(e) talks about

"any other persons whom the Minister considers appropriate as representatives of business, trade and economic interests".

The Government could be consulting for a very long time. Is the noble Lord not concerned that that could give a very open-ended power to the Minister, and would maybe provide him with too much discretion? I am very concerned about anything given to Ministers that allows them an open-ended process. Surely that would be of concern. I agree with the necessity of consultation with bodies such as this, and statutory bodies and so on, but I do not think it is necessary to put it in statute.

Lord Bew (CB): My Lords, I thank the noble Lord for introducing these amendments and for the focus on food and agriculture for the first time in our discussions. I understand the reasons behind the amendment, but there is a context here that has a particular sensitivity for the Government, which is that the obvious thing about the protocol is that, under the Good Friday, agreement we already have food safety and animal health bodies. Those institutions are not mentioned in this amendment, but when the Good Friday agreement was functioning it was agreed very early on that they were in play.

We have working arrangements to deal with major animal health problems and so on, and the protocol implies a totally different set of arrangements from those that any casual reader of the Good Friday agreement would say we have made no use of. We already had north/south bodies in place to handle difficulties of animal health, food safety and so on, which will now be reappearing in Brussels.

The difficulty for the Government is that they are well aware that they have to find some way to redress that, and the noble Lord, Lord Purvis, has therefore raised a serious area of concern that requires widespread consultation. However, we will not get any real progress here without returning to the Good Friday agreement and without getting to the idea that Europe extracts powers to deal with veterinary health and food matters and lays down the law.

We already have in place north/south bodies where these things are dealt with extremely well—and have been for a long time. There is a reason why there is a problem here for the Government but, of course, the noble Lord, Lord Purvis, is quite right to raise this general issue of consultation. It is very pertinent, and I am indebted to him that, for the first time in these many days of debate, we are talking about food safety, animal health and what needs to be done. If we act under the principles of the Good Friday agreement, something that is currently very controversial—such as the veterinary clauses of the protocol—could be put into a calmer place acceptable to both communities.

9.45 pm

Baroness Chapman of Darlington (Lab): Very briefly, I very much welcome these amendments for many of the reasons that have been said. We favour a veterinary agreement with the EU to assist us in resolving some of the issues brought about by the protocol.

I use this opportunity to say that I agree wholeheartedly with what the noble Lord, Lord Purvis, said, but remind Ministers of the amendment on consultation and impact assessments that we tabled at the beginning of this process, which we will come back to and want to see addressed either at the end of this process or at the very beginning of Report, if the Government bring the Bill back. That has not gone away and, much as we have engaged with this Committee process, those asks that we had of the Government remain on the table.

Lord Caine (Con): I am extremely grateful again to the noble Lord, Lord Purvis of Tweed, for proceeding at a canter. To some extent, as he said, we are, to borrow a line from "Wish You Were Here", going over the same old ground—Pink Floyd, for the uninitiated.

I will address the amendments in the names of the noble Baroness, Lady Ludford, and the noble Lord together. Again, I will try to reassure noble Lords that the Government have engaged very broadly on the issues created by the protocol with groups across business and civic society in Northern Ireland, the rest of the UK and internationally. I remind the Committee of something that I think was raised on Monday: over the summer, in addition to routine engagement the Government held 100 bespoke sessions with more than 250 businesses, business representative organisations and regulators.

Within my department, Northern Ireland Office Ministers held discussions with a wide range of businesses and organisations, including a number of those not actually named in the amendments tabled by the noble Lord and his colleague, such as the Dairy Council, Hospitality Ulster, as mentioned by my noble friend Lord Dodds of Duncairn, the Northern Ireland Grain Trade Association, the Northern Ireland Meat Exporters Association and the Northern Ireland Poultry Federation, either individually or as part of the Northern Ireland Business Brexit Working Group. In fact, the noble Lord might or might not be aware that most Northern Ireland food and drink representative bodies—although not one of those listed in his amendment, Food NI—are members of the Northern Ireland Business Brexit Working Group, with which we engage regularly, as are the Federation of Small Businesses in Northern Ireland, the Northern Ireland Retail Consortium, the Northern Ireland Chamber of Commerce and Industry, and the CBI in Northern Ireland.

Alongside this engagement, we have made visits to a number of individual businesses. I reminded the Committee on Monday about a farm I visited between Newry and Armagh during the summer, where senior representatives of the Ulster Farmers Union were indeed present, and where we discussed a number of issues relating to the operation of the Northern Ireland protocol in respect of the dairy sector. So the Government have already been conducting a detailed programme of engagement to inform the specific design of the regime in Northern Ireland that will be created by this Bill, and I give every assurance that we will continue to do so.

The noble Lord's amendments would compel Ministers to engage in consultation with specific organisations as set out in the amendment, but as I said, there are many others that we are in discussions with that are not mentioned in those amendments. In many cases, the consultations that would be set out in statute would not necessarily be pertinent or proportionate to the regulations themselves and would lead only to further delays in implementing solutions. For example, I think the Committee would agree that the Northern Ireland Food and Drink Association might not necessarily need to be consulted on VAT applied to domestic energy saving materials.

However, the powers in the Bill might need to be used quickly, and while in normal cases the Government would seek to engage with stakeholder groups, there may be occasions on which the urgency of a situation would make that unnecessary and therefore it should not be compulsory. Given the extent of the consultation

we are already carrying out with business organisations and others in Northern Ireland, this amendment would risk tying the Government's hands behind their back.

Regarding the publication of consultations, it is vital that we be able to have free and frank discussions in confidence with as many groups and organisations as possible, in which they can freely express their views to government, sometimes in forthright terms. I am sure the noble Lord would not want them to be constrained in so doing, but the amendment might well inhibit that. Of course, the outcome of our engagement will be considered and reflected in the final regulations, which the House, as has been mentioned in earlier debates, will have an opportunity to consider and scrutinise under the normal procedures. In our view, we do not need a statutory obligation to do something we are already doing with a far larger number of organisations and bodies than the amendment would have us commit to. In that spirit, I ask the noble Lord to withdraw the amendment.

On the government impact assessment set out in Amendment 74, I understand completely and sympathise with the desire for an assessment of the arrangements under the new regime. I will try to reassure noble Lords that while the Bill does not at present have an impact assessment, the full details of any new regime will be set out in regulations alongside and under the Bill, including the economic impact where appropriate. We do not, however, believe it would be appropriate to mandate by statute that the Government must in all circumstances produce an economic impact assessment before the Bill can be brought into full force. Conducting an impact assessment, while important, is not and never has been a statutory bar to making legislation, and for that reason I invite the noble Lord not to move Amendment 74.

Lord Purvis of Tweed (LD): I am grateful for the Minister's response and I am not entirely surprised by it. I mean no disrespect by that. There is a distinction between engagement—I welcome the engagement that is taking place—in how the Government are informed about the operation of the framework, and the regulations in the two parts: first, to change the exclusion areas, to alter them, to expand them and to diminish them; and, secondly, to bring forward regulations. When we in Parliament are then asked to approve them, our knowing that consultation has been carried out is an important factor when we are scrutinising them.

The second issue is consultation with the Trade and Agriculture Commission and the Competitions and Markets Authority. I will not labour the point, but it is certainly not tying hands behind Ministers' backs to consult those organisations before bringing forward regulations, because that is a statutory duty in other legislative areas for the functioning of the UK single market. But I hear what the Minister has said, and I understand the engagement. It is reassuring that that engagement will carry on. I will, of course, reflect on the Minister's comments in more detail, but in the meantime, I beg leave to withdraw the amendment.

Amendment 27 withdrawn.

Amendment 28 not moved.

Amendment 29

Moved by ***Lord Purvis of Tweed***

29: Clause 15, page 9, line 15, at end insert—

"(3A) A Minister of the Crown may not exercise the power conferred by subsection (2) before full consultations have been conducted on any proposed changes with the relevant Northern Ireland departments, including the Department for the Economy, and the Minister has published the outcome of such consultations."

Member's explanatory statement

This amendment requires a Minister to consult with relevant Departments in the Northern Ireland Executive before using the powers in subsection (2) of Clause 15 in relation to excluded provision.

Lord Purvis of Tweed (LD): The amendments in this group are slightly different. It is striking that, of the information provided since the protocol was first agreed and then more recently, the most robust has been from the statistics authority of Northern Ireland and the Northern Ireland Department for the Economy. HMRC, BEIS and others have been catching up in trying to find information about the functioning of the internal market. It is interesting, after all these years, how little data has been captured about the internal market, presumably because we have never really needed to do it. That was exposed, to some extent, when we considered the now enacted United Kingdom Internal Market Bill.

The amendments in this group are similar to the extent of seeking the transparency that the devolved Administration have been formally consulted and asked for reports on the likely impact on the functioning economy of Northern Ireland. The reason we would put forward the argument that this is of value is that, if we are going to be—as the Government intend—operating in a dual regulatory regime, the necessity of having the Northern Ireland Executive and officials within the relevant departments in the Northern Ireland Executive having published information as to what the impact will be of how that will operate, will be very important.

If the Government are sincere that they want to have a sustainable solution to some of these challenges, we need better data. Therefore, the best organisations to provide that data would be the ones listed in these amendments, in partnership with the CMA and the Office for the Internal Market. If the desire of the noble Lord, Lord Dodds, and others is that this is much more rationalised into the internal market processes, the regulatory-making power under this Bill should basically be brought into the operation of the UK Internal Market Act. At the very least, more transparency, openness and involvement of the relevant departments of the Northern Ireland Executive would, I hope, be constructive. These are probing amendments, again seeking reassurance from the Minister at the Dispatch Box. I hope that they are seen in a positive manner. I beg to move.

Lord Ponsonby of Shulbrede (Lab): My Lords, the continued absence of a formal budget for the coming year is a pressing problem. While there may be a draft budget, departments are unable to plan ahead, and this undermines both consumer and business confidence

[Lord Ponsonby of Shulbrede]
at the worst time. As-yet unspecified changes to the protocol are a risk to the Northern Ireland economy, which is one of the reasons why we, and many business organisations, would like to see a detailed impact assessment from the Government, alongside indicative regulations. Engaging with those departments in the weeks and months ahead is very important, as they know the Northern Ireland economy far better than any Minister in Whitehall. Can the Minister outline how frequently these discussions are taking place in Northern Ireland? Have the Government shared detailed proposals with their Northern Ireland counterparts? If they have, why should not Parliament see what those plans are as well?

Lord Caine (Con): My Lords, once again I am very grateful to the noble Lord, Lord Purvis of Tweed, for speaking to Amendments 29 and 30, which I will address together. I will try to be very brief in this response, because the answers are actually very similar to the ones I gave in response to the last group. That is, the UK Government, since this Bill was introduced, have engaged extensively across Northern Ireland on the use of the powers in the Bill, including with the Northern Ireland Executive, with Ministers in the Executive when Ministers were in place, and with Northern Ireland departments. The expertise of officials in the Northern Ireland departments, to whom the noble Lord has just referred, is absolutely invaluable and crucial, and I take his point about budgets. Obviously, there are ongoing discussions about how that issue needs to be addressed in the absence of a functioning Executive and Assembly—but I cannot really go much beyond saying that this evening.

As of a minute past midnight on 29 October, we have no Ministers. The views of civil servants are obviously constrained by their positions, but the engagement with them is absolutely invaluable. Once again, the amendments from the noble Lord, Lord Purvis of Tweed, seek to place on a statutory footing things that we are already doing. He has my assurance that we will continue to engage as widely and comprehensively as possible, including with the bodies to which he refers in his amendments. On that basis, I do not think I need to say a great deal more. We are committed to continuing that dialogue with all the relevant departments and bodies, so I invite the noble Lord to withdraw his amendment.

10 pm

Lord Purvis of Tweed (LD): My Lords, it is a similar issue. I think we are approaching the same issue from the wrong angle. My point is that, if the Government are putting this forward as their framework, it is important that the framework and the regulations—which will not be just in one go; there may well be a constant churn—are informed in a transparent and public way, as the noble Lord, Lord Ponsonby, said with regard to judging what impact there might be. In order for us to scrutinise them, we should have a view from the Northern Ireland statistical department of what the long-term impact will be. It is not a case of engaging, which is what government should do anyway—and I welcome the clarity with which the Minister is doing it.

No doubt we will return to these issues when it comes to further pressing on what should be in the Bill about the expectations of who is consulted, how, and how we know they have been consulted. In the meantime, I beg leave to withdraw.

Amendment 29 withdrawn.

Amendments 30 to 31A not moved.

Clause 15 agreed.

Clause 16: Additional excluded provision: new law

Amendment 32 not moved.

Clause 16 agreed.

Clause 17: Value added tax, excise duties and other taxes: new law

The Deputy Chairman of Committees (Lord Young of Cookham) (Con): If Amendment 33 is agreed, I cannot call Amendment 34 by reason of pre-emption.

Amendment 33

Moved by ***Lord Purvis of Tweed***

33: Clause 17, page 9, line 34, leave out subsection (1)

Member's explanatory statement

This is part of a series of amendments based on recommendations from the Delegated Powers and Regulatory Reform Committee which states that a number of subsections in the Bill "contain inappropriate delegations of power and should be removed from the Bill."

Lord Purvis of Tweed (LD): My Lords, I have a 25-minute speech on VAT and tax, but I might just summarise it for the benefit of the Committee. Again, the Delegated Powers and Regulatory Reform Committee has highlighted an inappropriately wide delegation of power. Here, it is on what would genuinely be an extremely controversial and sensitive issue of tax powers, excise and tax policy. The Government have said it is "not possible" to make such provisions in the Bill. I am just testing why it is not possible to state what a framework would be for provision of taxes, VAT and excise duties.

Everywhere else, what the framework would be is in the Bill—and for good reason. People need to know what the tax powers are and who holds them, and of course it is of controversy that the protocol has these linked elements. So I am simply seeking for the Government to fill in the gaps, state in clear terms why it is not possible and give a bit more information about what they consider to be their proposed framework when they move away from the protocol in these areas. This is the first attempt to get some more information from the Government—because the memorandum was not clear—in order for us to consider it, review it and perhaps return to this issue.

I would be happy for the Minister to write to me on my final point, rather than answer at this stage, because it is genuinely a probing question. Noble Lords may well recall that there had been successful attempts to amend the cross-border trade Act in Section 54, which is the prohibition on the collection of certain taxes or duties on behalf of country or territory without reciprocity.

That includes in Section 54(2) that it shall be unlawful for HMRC to account for any duty or customs or VAT or excise duty collected by HMRC to the Government of the country outside the United Kingdom unless reciprocal.

The Government seem to be proposing a breach of Section 54, because the regime that they seem to be proposing is that we would be accounting to the European Union for taxes which we have set ourselves. I am happy to be contradicted about that and similarly happy if the Minister wishes to write on that point. I beg to move.

Lord Dodds of Duncairn (DUP): My Lords, I rise to speak to Amendment 35A in my name on VAT and excise. I do not wish to prolong the debate at this hour. Very briefly, noble Lords will remember back in March when the then Chancellor Rishi Sunak announced measures in the fiscal event—mini-budget, estimate, whatever it was—that there was a zero VAT cut for households installing energy-efficiency measures, which would apply throughout Great Britain, but not to installation in homes in Northern Ireland of materials such as solar panels, insulation or heat pumps.

Consumers in Northern Ireland could not benefit from that VAT cut because of the protocol. Something that was warmly welcomed across the rest of the United Kingdom provoked concern and outrage across the communities in Northern Ireland. Mr Sunak announced that there would be extra money provided by way of Barnett consequentials to make up for it, but, as people with experience of the operation of the Executive know, sometimes the direct tax cut is the most effective and efficient way of getting these things done.

I have tabled this amendment to explore and seek the Government's reasoning on their approach to the VAT issue. They have not gone down the route that they have in relation to state aid in Clause 12 of excluding Article 10 and annexes 5 and 6 of the protocol. They have not decided to exclude the relevant article of the protocol which applies the VAT rules. Instead, they have adopted the approach of saying there are large areas where we simply disapply that article and we can make provision by regulations in relation to the VAT excise duties and other taxes.

It is more akin to the situation that we find ourselves in with the protocol itself in relation to customs: Northern Ireland is nominally within the UK customs regime, but all the rules of the EU apply. What is the impact of the Government taking this approach in relation to VAT? Why are they not taking the same kind of approach to VAT as they have to state aid? What are the implications? It says clearly in the subsections what steps can be taken in relation to differences in VAT and making sure that the situation that we saw in March may not arise in the future, but what are the implications of not taking out the relevant article in the protocol completely?

Baroness Chapman of Darlington (Lab): I was wondering pretty much the same thing. This is a slightly odd clause, because it says a lot but actually leaves the door open to not doing anything at all. It gives Ministers the right to change

"any other tax (including imposing or varying the incidence of any tax), which they consider appropriate".

That is fine, but they might not consider anything appropriate and might not do anything.

Subsection (2) says:

"The regulations may, in particular, make any provision"

to bring closer together, or reduce differences between, various taxes in Northern Ireland and Great Britain. I am sure that that is how the Government want to signal their intention, but the Bill does not do that—it leaves it open to Ministers to do nothing at all, or even to create greater variance in the situation. So I was curious about why the Bill says that, rather than saying, "We will make the situation in Northern Ireland the same as it is in the rest of the UK, notwithstanding the various revenue-raising powers that there are in devolved Administrations."

Lord Ahmad of Wimbledon (Con): My Lords, I am grateful to all noble Lords. Debating the nice light subject of taxation for our last group is exactly what the doctor ordered. But I am extremely grateful for the brevity shown, and I will seek the same in my response.

I will respond to Amendment 33, in the name of the noble Lord, Lord Purvis of Tweed. Clause 17(1) is drafted to enable Ministers to make provision about VAT, excise duty and other taxes in connection with the Northern Ireland protocol when they consider it appropriate. The Bill maintains the current baseline of EU rules in this area. The clause is required to enable the Government to make changes that, for example, lessen or eliminate ensuing tax discrepancies between Northern Ireland and Great Britain, support frictionless trade on the island of Ireland and preserve the essential state function.

As EU tax rules are dynamic, it is impossible to specify every circumstance where the Government may need to take such steps, and it will also not be possible to anticipate the precise nature of those steps for all possible scenarios. However, we have already set out some examples, such as alcohol duty and the tax treatment of energy-saving materials, where Northern Ireland cannot benefit from the same policies as the rest of the UK, despite these policies posing no risk to north-south trade.

The noble Lord asked about Section 54 of the cross-border trade Act—that is my favourite subject. But, in all seriousness, I will write on the specific nature of the question that the noble Lord posed to ensure that he gets a complete answer. Of course, I will share that letter with noble Lords and make sure that it is in the Library.

I turn fleetingly to Amendments 34 and 35 in the name of the noble Baroness, Lady Chapman. We have covered the government position on this before, but I add that we feel that appropriate discretion is a necessity if the Government are able to facilitate consistent VAT, excise and other relevant tax policies between Northern Ireland and Great Britain. It would be inappropriate to leave the people of Northern Ireland unable to benefit from the support available to those elsewhere in the UK.

I turn briefly to Amendment 35A, in the name of the noble Lord, Lord Dodds, which would make Article 8 of, and Annexe 3 to, the Northern Ireland protocol excluded provision. I am sympathetic to the amendment's intentions. It would disapply relevant EU VAT and

[Lord Ahmad of Wimbledon]
excise rules in domestic law, allowing a new VAT and excise regime to be implemented in its place. However, the Government's view is that a blanket removal of EU VAT and excise rules is not the intention in this area. Instead, the Bill maintains the current baseline of EU rules but introduces Clause 17, in conjunction with Clause 15, to grant Ministers the power to disapply or override any restrictive EU VAT and excise laws that apply in Northern Ireland. I briefly explained why we believe that this is necessary.

10.15 pm

Continuing to reflect some elements of EU VAT and excise laws protects the EU single market by helping to avoid the risk of economic distortion on the island of Ireland. It also ensures continued access to shared IT systems and cross-border VAT and excise processes, which are important in protecting Northern Ireland consumers and businesses against the risk of fraud. Finally, it also gives Northern Ireland traders who trade with businesses and consumers in Ireland access to EU VAT and excise simplifications and accounting mechanisms. This approach, in our view, ensures that Northern Ireland businesses and consumers can benefit from the same tax policies as those in the rest of the UK, while also guaranteeing stability and an open border on the island of Ireland.

I can see why the noble Lord, Lord Dodds, tabled this amendment, but it is the Government's view that it will not improve our ability to align VAT and excise duties in the UK. Compared to the current approach, it would risk distorting trade on the island of Ireland. That is why I hope my noble friend will be able to withdraw his amendment.

Briefly, I turn to the question of whether Clause 17 stand part of the Bill, which is included in this group of amendments—

Baroness Chapman of Darlington (Lab): I know that it is late and we all want to go home, but the Minister does not have to respond only to the amendments tabled. We are in Committee, and I would appreciate it if he answered my question about the drafting. It leaves a lot of scope, which may not necessarily address the concerns of the noble Lords behind him.

Lord Ahmad of Wimbledon (Con): I think that I have answered that question. I am sure that when the noble Baroness reviews the debate, she will find that I have sought to give a specific reason why the Government have a different approach in this respect. However, if she has further specific questions, I am of course happy to discuss them with her.

In conclusion, as I have said, I have justified Clause 17 to the Committee. In short, it provides Ministers with the ability to ensure that VAT, excise and other relevant policies are aligned across the whole of the UK, including in Northern Ireland. We believe that this clause is imperative in lessening—or indeed eliminating—the unacceptable tax discrepancies that exist between Northern Ireland and Great Britain, and I recommend that it stand part of the Bill.

Lord Purvis of Tweed (LD): I am grateful for both the Minister's response and the probing questions. In a way, it is a shame that this is the last group of amendments this evening, because we will need to return to this issue due to its significance.

The Minister said that it is the Government's position that people in one part of the United Kingdom will still be using a foreign power's tax regime. The Government propose that the difference is that, unlike at the moment, where that is directly enforced under the protocol, they are seeking powers under the Bill for us to bring forward orders to do it. But the net difference is zero. I fear that this will just build up more resentment and more concern, because there will be the expectation of the correspondent of the noble Lord, Lord Browne, that we have power over this now. Instead, as the Minister said, the Government will still be applying EU VAT rules in Northern Ireland for—as some will see it—a very justified reason, because it prevents the need for hard checks on the border with the Republic of Ireland. We are almost back to square one as far as the consideration is concerned, and there is little elucidation for it.

The former Foreign Secretary, Liz Truss, said that the UK should never have to notify another power—that is, the European Commission—on any decision about setting tax. Yet the Minister has said that that is going to carry on, even after the "technical talks" and this legislation. We will be returning to this issue, because what the Minister has said worries me. I hope that at some stage, he might be able to provide the information the noble Baroness, Lady Chapman, requested and clarify what the framework will be, because the democratic deficit could be compounded rather than resolved. In the meantime, however, I beg leave to withdraw the amendment.

Amendment 33 withdrawn.

Amendments 34 and 35 not moved.

Clause 17 agreed.

Amendment 35A not moved.

House resumed.

House adjourned at 10.20 pm.

Grand Committee

Wednesday 2 November 2022

Arrangement of Business

Announcement

4.15 pm

The Deputy Chairman of Committees (Lord Duncan of Springbank) (Con): My Lords, if there is a Division in the Chamber while we are sitting, this Committee will adjourn as soon as the Division Bells ring and resume after 10 minutes.

Higher Education (Freedom of Speech) Bill

Committee (2nd Day)

4.15 pm

Relevant document: 3rd Report from the Constitution Committee

Clause 1: Duties of registered higher education providers

Debate on Amendment 12 resumed.

Earl Howe (Con): My Lords, as the Committee will be aware, our debate on Monday on academic freedom and associated issues was paused following the contribution of the noble Baroness, Lady Thornton. I should now like to pick up the various strands of that debate and respond to questions and points raised by noble Lords.

Amendment 12 from my noble friend Lord Sandhurst and the noble Baroness, Lady Fox, seeks to ensure that the academic freedom of visiting speakers is protected under this Bill, and that academic staff suffer no detriment because they have exercised their academic freedom.

First, on visiting speakers who are academic staff elsewhere, I assure the Committee that the Bill as drafted already protects such individuals, but as visiting speakers, rather than as academic staff. The protection of academic staff in new Section A1(7) makes clear that the protection is from losing their jobs or privileges at the provider, or from the likelihood of their securing promotion or different jobs at the provider being reduced. In other words, it is effectively dealing with an employment situation. Such protection would not make sense in the context of an academic speaker who works at another institution. This does not mean that the protection is less for such a visiting speaker, but it is different in nature because of the different relationship of the speaker to the university.

As for prohibiting detriment, the amendment would not allow for any circumstance in which the exercise of academic freedom could result in detriment imposed by the provider. It should be noted here that academic freedom enjoys a special status, reflecting the high level of importance that the courts have consistently placed upon it in the context of the right to freedom of expression under Article 10. However, an outright prohibition of detriment against an academic because they have exercised their academic freedom can be right, as there may be circumstances that mean that action by the provider including dismissal is the right response. If an academic has breached their employment contract or broken the law in some way, they cannot rely on a claim of academic freedom to avoid all consequences.

Amendments 14 and 17 seek to amend the definition of academic freedom in new Section A1 specifically to protect an academic's freedom to criticise an institute at which they work and other activities included in the UNESCO recommendation of 1997. The UNESCO recommendation refers to

"the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies".

Let me make it clear that the definition of academic freedom as currently drafted already covers the questioning and testing of received wisdom, and the putting forward of new ideas and controversial or unpopular opinions. This speech is not limited to particular subjects, so it would include speech concerning the institute at which an academic works.

I turn to the UNESCO definition. The Bill as drafted also protects the right to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, as I have already said, and freedom from institutional censorship. However, as for freedom to participate in professional or representative academic bodies, academic freedom as defined in the Bill is a specific element of freedom of speech overall. The Bill covers verbal speech and written material but does not cover the act of affiliating with or joining an organisation. I was already aware that this is an issue that the noble Baroness, Lady Falkner of Margravine, was interested in as chair of the Equality and Human Rights Commission, so I am glad to be able to put that on the record.

Amendment 15, tabled by the noble Lord, Lord Wallace of Saltaire, and spoken to by the noble Baroness, Lady Smith, distinguishes between freedom of academic speech within the academic context and freedom of speech for academics and other citizens within the wider public sphere. It is important to state first of all that academic speech is protected under the Bill as part of freedom of speech more generally. The protection is the same for academic staff as compared to other staff and students, but the Bill makes clear that academics should not be at risk of losing their jobs or privileges or of damaging their career prospects because of their speech.

The amendment is similar to a previous provision in the Bill that set out that academic freedom under the Bill meant freedom of academic staff within the law and within their field of expertise. The Government listened carefully to the issues raised during the passage of the Bill in the other place, noting the concern that the definition of academic freedom was too narrow. In fact, the provision was a reflection of Strasbourg case

[Earl Howe]
law, and we were clear that it should be interpreted broadly, but we wanted to avoid any perception of such a limitation. We therefore decided that it would be appropriate to remove the "field of expertise" provision, which I think was a widely appreciated outcome. I hope the Committee will appreciate that explanation of how the definition of academic freedom in the Bill has developed.

Amendment 16 seeks to remove from the definition of academic freedom the reference to "controversial or unpopular opinions". The purpose is to understand whether, where such opinions are not based on evidence, they should be included in the protection of academic freedom. The Bill builds upon the definition of academic freedom that already exists within the Higher Education and Research Act 2017. That definition goes back at least as far as the Education Reform Act 1988, so it is a long-standing one, and it includes the freedom to put forward controversial or unpopular opinions. Academic staff in our universities should feel safe to put forward controversial or unpopular opinions and ideas, whether or not they are based on evidence.

As I said at Second Reading, free speech is the lifeblood of a university, allowing students and staff to explore a spectrum of views, engage in robust debate and pursue their quest for knowledge. Limiting freedom of speech to areas that are not controversial or unpopular would make the definition of academic freedom in this context anodyne and narrow. Equally, limiting freedom of speech to areas that are only supported by evidence would unnecessarily narrow the scope of academic freedom under which academic staff should be free to roam the full spectrum of knowledge and ideas.

Amendment 18 seeks to ensure that an academic is fully protected from adverse consequences to their job, privileges and career prospects. The current drafting of new Section A1(6) refers to the risk of being adversely affected. This covers both the risk of adverse effect and the actual adverse effect, since in the latter case the academic must first have suffered the threat before the occurrence. Accordingly, should a member of academic staff find themselves actually adversely affected as a result of exercising their freedom of speech—having lost their job, for example—they would be covered by the academic freedom provisions of the Bill.

Amendment 19 seeks to add further protection for academic staff from the risk of losing responsibilities or opportunities. I assure noble Lords that the Bill as drafted would already protect an academic from such a risk. First, in addition to the wording relating to privileges, there is already reference to the risk of losing one's job or the likelihood of securing promotion or a different job being reduced. More importantly, I want to be clear that academic freedom for the purpose of the Bill is considered to be a subset of freedom of speech—a distinct element with particular considerations, within that broader concept—so the main duty to take reasonably practicable steps to secure freedom of speech includes the duty to secure academic freedom. If a person suffers loss as a result, whether because of their academic freedom or freedom of speech more widely, then they can seek recompense through the new complaints scheme or, as we shall discuss later, using the tort.

Amendments 20 and 23 in the name of the noble Lord, Lord Wallace of Saltaire, are, as was explained, intended to probe the practicality and appropriateness of the intrusion of the Bill into university promotion and appointment processes. It is important that the Bill's definition of academic freedom goes beyond referring to the risk of losing one's job or privileges and that it should also cover applications for promotion or another job at an institution. This is not currently covered by the existing legislative definition of academic freedom. An academic should not be held back from progressing their career within a university because they have questioned or tested the received wisdom, or put forward new and unpopular or controversial ideas. It is vital that academics can research and teach on subjects and issues that may test the boundaries, otherwise our higher education system would wrongly be limiting itself, which would disadvantage everyone.

Equally, this protection should not be limited to jobs within a university, otherwise academics may find it hard to progress their careers by moving to another institution. That is why we are applying a similar measure of protection to external applicants for academic appointments. The Government believe that freedom of speech in the context of higher education is so important that the provisions set out in the Bill that will apply to the promotion and appointments process are indeed appropriate and necessary.

Amendment 21 seeks to protect academic freedom under the Bill, regardless of the potential consequences for the reputation of the provider. The approach taken in the Bill is to impose a duty on providers to take reasonably practicable steps to secure freedom of speech within the law, including academic speech. A new aspect of this duty is that they must have particular regard to the importance of freedom of speech when considering what steps are reasonably practicable. The requirement to have "particular regard" to the importance of freedom of speech could, in a particular case, prompt a provider to prioritise freedom of speech over another right. However, this would remain subject to its assessment of what is reasonably practicable, and would need to be lawful. This test emphasises the significance of freedom of speech within the law and the need to protect it, where it is reasonably practicable to do so.

I come back to a point I made on an earlier group. Nothing in the Bill prevents a provider looking at the statements or utterances of an academic and considering whether that individual has adhered to their employment contract, whether he or she is upholding accepted academic standards and/or the values and reputation of the department and the university. Again, the reasonably practicable test allows for case-by-case decisions to be made, taking account of all the relevant factors. But it is important to recognise that a provider in this context is an employer, as I said, and that will give them the right to go through the deliberative processes that I have just outlined.

In conclusion, I hope my remarks have provided noble Lords with reassurance that the Bill, as drafted, is sufficient to protect academic staff in exercising their academic freedom

4.30 pm

Lord Sandhurst (Con): My Lords, I am grateful for the Minister's observations. I listened to his assurances and the issues he raised with interest. I would like to consider them carefully before Report. For now, I beg leave to withdraw the amendment.

Amendment 12 withdrawn.

Amendments 13 to 28 not moved.

Amendment 29

Moved by ***Lord Mann***

29: Clause 1, page 3, line 13, at end insert—

"(ca) an explanation of how to guarantee freedom of speech while fulfilling the provider's duty of care for all students, academics and staff,"

Lord Mann (Non-Afl): My Lords, in moving Amendment 29 I shall speak to the three amendments in my name; they are identical in wording and impact but are in different parts of the Bill. I do so having personally met, on this related issue, the majority of university vice-chancellors across the United Kingdom over the past two years in advance of the Government's decision, made by the then Education Secretary, to write to universities asking them to adopt the internationally recognised definition of anti-Semitism and build it into their workings. I have been delivering on that successfully across the vast majority of universities across the UK; that work continues.

I want to highlight some examples of why a duty of care is an essential element of strengthening free speech, not as a balance but as an addition. The principle behind it is very straightforward. I referenced the international definition of anti-Semitism because the argument falsely put by a number of people against it was that it aimed to restrict academic freedom and what people said, particularly in relation to Israel. That is factually and practically untrue. There are no examples of where that has happened. It is neither designed nor written to do so. The reason I have needed to meet so many vice-chancellors, and others at the top of universities, is to ensure that they understand what it means and what it does not mean so that they can apply it appropriately, and so strengthen freedom of speech.

If I may, I will give a couple of examples of where the duty of care comes into its own. A famous filmmaker and political activist, Mr Kenneth Loach, was invited to speak at his old college, St Peter's College, Oxford. A number of the Jewish students in the college were unhappy at Mr Loach's previous commentary in relation to the Jewish community. That was their perception and, using traditional student language, they suggested that he was not welcome in their college.

There was a complication, as this was during Covid. What normally would have happened is that Mr Loach would have appeared, and there would have been a noisy protest to signify to him that he was not welcome by a number of the students because of what he had said, and he then would have spoken and life would have moved on. Here, because it was online, the university failed to find a way for those students to register the protest that would have happened in real life. This illustrates brilliantly that one person in that situation had free speech and others objected, but what they required, and are entitled to, was the ability to have their speech; that might have been through a protest—very traditional in student environments—or a countermeeting, but they have an equal entitlement to free speech.

Take that instance as an example. What might a university do now? If that meeting had been timetabled for a Friday night, it would have inhibited the ability of any religiously observant Jewish student to participate in a protest or countermeeting, and so their freedom of speech would have been inhibited by the timing. If the meeting had been located in St Peter's, that would have been neutral territory, but if it was located, say, next to the Jewish chaplaincy, there would have been an increased aggravation on behalf of those Jewish students, and the protest would perhaps have been wider and stronger. That might suggest that Mr Loach's freedom of speech, which was not in itself being challenged, would be an impingement if the location of the meeting had been somewhere that was seen to be hostile to a section of the community—in this case, the Jewish students. The publicity for the meeting was "Ken Loach speaks on whatever", but if it had included swastikas on the head of the Prime Minister of Israel or on the Israeli flag, there would have been an increased incentive for people to shout loudly in protest and demand that he did not speak.

All of that would fall into the category of a sensible duty of care to those students, so that their ability to have their freedom is equal to that of someone who they regard as a controversial speaker—not to restrict the content of what Mr Loach would say, to break up the meeting or to prohibit his right to speak or someone's ability to invite him. That is an example from before this Bill came forward, but one whereby, if the principles of the Bill are got right, then two sides in an argument can have equal freedom of speech. They may not all be 100% happy but everyone can have their say.

I will give another, more vivid example. I will not give too much detail but it is a real example. Let us say that a convicted terrorist is allowed into the country. I have the ability to go to the Home Secretary—and I have occasionally done so—to say that this person should not be allowed in because they are a threat. If they are allowed into the country, by definition—even if they have served a prison sentence as a convicted terrorist—they are able to speak, including at one of our universities. What happens if a student at that university is the cousin of one of the people murdered by the group of which the individual who is about to speak was a member when the terrorist outrage took place? So we have a student, in this case a Jewish student, whose cousin was murdered, and a member of the group convicted and imprisoned for that offence—with no argument or ambiguity about that—is speaking. Here, the Jewish student demanded that this convicted terrorist not be allowed to speak.

I have argued, previous to this Bill and now, that freedom of speech is absolute; the person is allowed to speak. But there is clearly a duty of care on a university when you have at least one student extremely distraught, for rational reasons, about somebody who was involved in the murder of their cousin speaking in their university.

[Lord Mann]
That is not to say that we should ban, stop or restrict, but we must make sure that that student also feels empowered in the situation—perhaps they want to be part of a protest or have a countermeeting. They may need other welfare support in that context. That strengthens freedom of speech; it does not contradict or balance it. This is not a balancing act—it is about everyone having the right to freedom of speech.

I will give a milder example. In the last week I met the vice-chancellor of a university, one of whose very good policies—I will not embarrass or praise them, however you judge it, by naming it—is that all of its academics have been told that it is unacceptable to use the term "Tory scum" in their lectures. It is being directed at government Ministers primarily, whom they clearly oppose on various grounds. One can envisage what might be going on there. The reason this has been done by that vice-chancellor, with due regard to great and wonderful government Ministers, is not the sensitivity of government Ministers but the result of going through the process of thinking through the duty of care. If you were an 18 year-old Conservative-supporting student in that lecture, perhaps in your first term at university, you might be listening to lecturers calling one of your favourite Ministers "Tory scum".

That is a milder example, but it shows rather good practice. If one wants to put an argument against the Government, turning to abuse to do so is not very effective. It becomes a weaker argument. The student in that position perhaps thinks—I am not making a political point—that there are not masses of Conservative students in solidarity with each other, certainly not in their first year, in certain courses at certain universities. The likelihood is one Conservative-supporting individual among a cohort who they might think are not—who might be delighted at such language and want stronger. But their rights to be empowered are equal. A simple duty of care there does not restrict free speech but improves it.

I will give a final example. A lecturer makes a controversial speech and then, as is very common, there is an immediate external pile-on. The same thing happened to the Jewish students I mentioned in regard to Mr Kenneth Loach. They protested; they were not trying to block him but some of the language used—"We don't want him in our university"—implied that they were. That was not what they were trying to do, but they got some horrendous anti-Semitic abuse, almost exclusively from people outside the university, because they had dared to challenge Mr Loach.

In this case, a lecturer made a speech which did not appear that controversial when I read it but was deemed so by some. There was a huge email pile-on against the university, attacking that lecturer. The university did not, shall we say, handle it very well. Again, there is a duty of care to the individual. It is one thing to have the right in law to freedom of speech, but the consequences of the speech can be that some people are greatly distressed by the content, or that the speaker is then targeted and needs some support.

Some people—politicians in particular—can thrive in the adversity of debate, but others are more normal human beings. If they are getting abused by thousands of people, or thousands of people are demanding their sacking because they have said something, their reaction will be different. This is not a case in the public domain but one that I am very familiar with; I am happy to give the Minister private detail on it if he wishes. I could go on to give lots of other examples but this is sufficient to make my point.

4.45 pm

Again, on not balancing but strengthening freedom of speech, I put it to the Minister that a duty of care would require universities to think through the consequences. Nothing could be clearer than the cousin of someone murdered—that is a factual statement—allowing free speech: that is, not restricting speech but ensuring that they have the opportunity also to have a say somewhere, not in contradiction but as well. They are empowered from within that situation by their own university. If it is an 18 year-old student versus an experienced political hack or social commentator, there is an imbalance of power there. I strongly advise government that this strengthens the freedom of speech legislation. It does not balance it and it absolutely does not weaken it.

Baroness Falkner of Margravine (CB): My Lords, first, I want to refer to the remarks of the Minister to clarify something; I have not had the opportunity to look at *Hansard* immediately since he spoke on the previous group of amendments. I think I said on Monday that I was speaking in a personal capacity. The Minister has put on the record that I chair the Equality and Human Rights Commission. However, I was not speaking as the chair of the Equality and Human Rights Commission, but in a personal capacity.

The reason this is important is because I have taken advice from the Registrar of Lords' Interests. As the commission's powers in terms of protected characteristics are so wide, I would be able to say almost nothing were I to adhere to his advice that I should not speak on anything where the EHRC has a policy. For the rest of this debate, to put that correction on the record, I would like to make it clear that I will speak only as chair of the Equality and Human Rights Commission when I specifically say so in my opening remarks, and I will always tell the Committee that I am speaking in a personal capacity when I so do.

I would like to speak in a personal capacity to warn the Grand Committee to be extremely careful about the amendment from the noble Lord, Lord Mann, which seems on the face of it to be perfectly reasonable. We do not need to be concerned about his perfectly valid and good intentions, but his peroration has made one extremely concerned about what he would expect to happen through that amendment. The noble Lord referred to the fact that the opponents of a speaker have an equal right to protest or drown out what is being said. He says that their right to be empowered is equal.

Lord Mann (Non-Afl): I am absolutely categorical that the drowning out and breaking up of a meeting would not be acceptable in a democracy, but the right to have a counter-speech or a protest is a fundamental part of democracy.

Baroness Falkner of Margravine (CB): I think the noble Lord does not quite appreciate how qualified Article 10 rights are under the European convention. It clarifies:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society".

It goes on to say that those rights can also be circumscribed

"for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others".

The point here is that they are qualified. The judgment of qualifying those rights, and making decisions about when the qualifications will apply, should rightly lie with the provider and not necessarily be set out in legislation.

The noble Lord referred to the duty of care to students. Of course there is a duty of care to students, but providers have been delivering those duties of care to students, academics and staff throughout this period. There is no evidence to say that they are not capable of doing that, so we can move forward with the Bill.

As I said on Monday, my personal view is that, although the Bill is significant and important in setting out more clearly the importance of differing opinions and viewpoints, the danger we run here is of it leading to so many changes that it actually succeeds in suppressing speech. No one has a right not to be offended. We are in danger of conflating that right not to be offended with safeguarding rights or hurt or distress, which is where we might go were we to pursue this amendment.

Lord Grabiner (CB): My Lords, I will be brief. In his remarks, the noble Lord, Lord Mann, gave some extremely significant examples. Some very bad stories are no doubt out there but, with great respect, might it not be more appropriate for such matters to be dealt with in the code of practice rather than in primary legislation? It seems much more sensible to deal with this by way of advice to, for example, university institutions.

Lord Moylan (Con): My Lords, I take great pleasure in speaking immediately after the noble Lord, Lord Mann, and other noble Lords who have spoken on this topic. I am delighted that my Amendment 35 has been grouped with this interesting debate but I will be taking the discussion in a slightly different direction, which explains my hesitation at leaping in at this point. None the less, I am on my feet and will speak to Amendment 35 in my name, which is in this group.

At least some of us who were in Committee on Monday began to wonder how much this Bill would achieve by way of change, both culturally and in practice. I say that by way of introduction to my remarks on the amendment because I am coming to the question of how the Equality Act is interpreted in connection with the duty, which already exists under the 1986 Act, on universities to protect freedom of speech and freedom of expression. I remind the Committee that, under the Equality Act, all public bodies have a broad duty to

"eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act … advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it … foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

The 1986 Act, as I say, has the obligation to protect and advance free speech but, in recent years, we have found that the Equality Act obligation is frequently being interpreted by universities as a reason to take steps to impose their views on equality, diversity and inclusion both on students and in public events. We have seen, for example, gender-critical feminists being turned away precisely because universities have interpreted their presence as contrary to their own public sector duty under the Equality Act.

Amendment 35 does not excuse universities from their public sector/public body duty under the Equality Act—they remain required to fulfil that broad duty. But it does insert a university-specific balancing requirement that requires universities also to have regard to free speech in interpreting this duty. This is a balancing amendment that ensures that potentially contradictory public law duties do not clash with one another. It is for that reason that I advance it but, to be honest, if we do not see something like this happening at various points in the Bill, it is hard to see how current practice and culture will change at all. With that in mind, I recommend Amendment 35; I hope that the Minister will be able to give wholehearted agreement.

Lord Smith of Finsbury (Non-Afl): Might I ask a question of the noble Lord? He spoke about how he was anxious to have the duties under the Equality Act and the duties under freedom of speech promotion sitting alongside each other, but his amendment refers to having

"particular regard to the duty"

of freedom of speech. Does that mean that the duty of freedom of speech would overtake the duties under the Equality Act instead of sitting beside them?

Lord Moylan (Con): My Lords, that is not the intention. The use of "particular" arises because universities, both as universities and as public bodies more generally, have a range of obligations under the law. All the wording is intended to do here is to say that that particular obligation needs to be taken into account because this Bill relates to freedom of speech in academic bodies. It is not intended to give priority; it is intended to draw attention to, and have particular regard to, that matter.

In natural language—this is of course legalistic language, to some extent—one would say "to have regard particularly to that as among the other obligations that universities have", but this is how it is expressed in legal language. I assure the noble Lord that the intention is not to trump one over the other but to require a balancing of these existing obligations and put that requirement in the Bill. At the moment, although it might be said that they both exist and it is for universities to balance them, universities are not balancing them in a way that satisfies the intentions of this Bill.

Baroness Fox of Buckley (Non-Afl): I will speak to Amendment 35, to which I have put my name; it relates to amending the Equality Act, as has just been

[Baroness Fox of Buckley]
discussed. I will also speak in support of Amendment 69 in the name of the noble Lord, Lord Sandhurst, which would strengthen the academic freedom protections of the Prevent duty.

I start with Amendment 69 on Prevent. On Monday, a noble Lord—I think it was the Minister, the noble Earl, Lord Howe, but I cannot find it in *Hansard* so I cannot say; I wrote it down at the time—said that there is no place on campus

"for extremist views that masquerade as facts".—[*Official Report*, 31/10/22; col. GC 21.]

I do not know who said that but somebody did, and it is quite a frequently said thing. I want to probe who the extremists are; indeed, I want to probe who the fact-checkers are in this instance.

During his first unsuccessful leadership bid, the present Prime Minister suggested an expanded definition of extremism to include anyone who hates Britain. It hit the headlines for a while, with people going around saying that there would be Prevent orders thrown at all sorts of people who might have been heavily critical of Britain or the UK. He backed off from it, but my point is that the whole concept of extremism has become so elastic and broadened that it has discredited whatever it was that Prevent was trying to do.

I have had a problem with the Prevent scheme since its inception. Such is the nature of today that, as this is recorded and in *Hansard*, I want to make it absolutely clear that this is not because I have any soft sympathies with Islamist terrorists of any nature; in fact, if anything, I think that the Government have been rather lackadaisical in not dealing with them more harshly. Putting that to one side, I was always worried about Prevent, particularly in an educational setting.

5 pm

Prevent asked staff to monitor the behaviour and views of their students and look out for signs of whether they were extremists of a particular type. If you read the original Prevent duties, you will see that universities and prisons were discussed in very similar terms as dangerous breeding grounds for extremism. I ought to say that it is also the case, as is well noted, that while at university I was indeed an extremist—I think we can safely say that; some would say I have not grown out of it—but that is the problem with extremism. If we are talking about what Prevent was really about, which was the rise of Islamist and nihilistic terrorist activity—and there were undoubtedly people on university campuses who were sympathetic to that—then we all have an absolute interest in ensuring that that is dealt with.

However, because nobody wanted to be accused of being Islamophobic, Prevent ended up being a sort of diktat about extremism, and I am concerned that, as broadly applied, it has ended up arguing that students should be restricted in what they are able to think or say, or listen to and so on. This clashes with the idea of universities as institutions dedicated to truth and questioning. It certainly has made people very nervous about the kind of debates that they have. We know that it has been misused, as in the infamous and well-documented case of the postgraduate student who was caught up in Prevent when he was doing research for his PhD.

The Prevent duty—your Lordships will hear this very often—is used as an indication that there are double standards when it comes to free speech. Here are a Government saying that they want to encourage academic freedom and more open free speech on campus, and yet they have created and promoted the Prevent duty. When students ask if there are double standard here, I think they have a point.

More broadly, once free speech is presented as something which should be balanced with and traded off against security issues—that is, as a threat—in the way that Prevent does, then free speech loses its moral authority. We have seen this in the way that students' attitudes have been shaped over recent years, not by themselves but by the way that we as a society have socialised them into seeing free speech as frightening; hence the demands for safe spaces and to be protected from dangerous speech. There is a sort of moral blackmail that says, "I can't have that person speak on campus because it means I won't feel safe". This is the language that students who are more censorious use, and it is exactly what the Bill is trying to challenge. We have to look at this again.

It is one reason, by the way, why I am worried by the duty of care proposed by the noble Lord, Lord Mann. Again, I understand its intention, but I am absolutely with the noble Baroness, Lady Falkner, on this one. The duty of care for students to be protected from harm was exactly the language used last week in saying that Helen Joyce, by speaking on her book, was a threat to students at Cambridge. I always find the harm, distress and duty of care argument problematic.

Finally, on Amendment 35, the noble Lord, Lord Moylan, explained the point about the Equality Act very well, but I think we all received the SOAS briefing on the Bill beforehand. It complains that the Bill requires universities to protect the speech of Holocaust deniers and others seeking to deliberately provoke or offend. It goes on to say that it directs universities to ignore equality law, which in effect is trumped by free speech. It argues that the Bill should be got rid of, because there is a real problem if the duty to ensure freedom of speech overrides the Equality Act.

The point I make, as I made on Monday, is that one of the difficulties is that the Equality Act has been used in a censorious fashion, often because it has been misinterpreted by university authorities. Informally, universities and student unions will say that they need to protect a group of students from harm, as provided for by the Equality Act, and so will ban X, Y or Z; it is frequently used in that way. Students with protected characteristics are dragged out as some kind of stage army, as though all women or all racial minorities have the same views. Those are some of the more dangerous aspects of identity politics.

It is always equality legislation that is used to clamp down on free speech. For me, that is abhorrent. As someone who has fought for equal rights and who wants diversity—diversity of opinion in particular—and to include as many people as possible in higher education, "diversity", "equality" and "inclusion" are three words that I dread in the context of universities and many other institutions. These words are used to silence or often demonise other people who have different opinions. We have to be careful that equality legislation does not

end up drowning out the good intentions of this Bill. If the free speech bit can be strengthened, that is all to the good.

Baroness Bennett of Manor Castle (GP): My Lords, I will speak to Amendment 69 from the noble Lord, Lord Sandhurst. The Committee will note the unusual situation, in which the noble Baroness, Lady Fox, and I have both signed the same amendment. That shows that there may be different ways of coming at this issue. My focus is very much on the independent evidence and the statistics about the impact that Prevent has had in universities.

I begin with the leading human rights group, Liberty, which says that the biggest threat to free speech in our higher education institutions comes from Prevent. To quote its director of advocacy:

"There is a substantial irony in the government spuriously accusing today's students of threatening free speech when, in fact, the true threat to free speech on campus is the government's own policies".

The University and College Union briefing is useful to the entire Bill. It notes that

"Prevent has encouraged the policing of mainstream discussion of topics such as British foreign policy and Palestine".

The Committee might ask how many events this affects. Figures from the Office for Students, from 2019, show that, in more than 300 higher education institutions in England, nearly 60,000 events and speakers were considered under the Prevent duty. Nearly 2,100 appeared only with conditions attached. We do not know how many proposed events and speakers did not even get to that stage because people were scared off by the idea of being tangled in Prevent—but that is 2,100 events.

If the Committee does not want to listen to those sources, perhaps it will look at the inquiry of the Joint Committee on Human Rights of the two Houses, which reported in 2018. I come back to comments I made on Monday about the direction, and indeed the existence, of this Bill. The Joint Committee said that this area relates to

"a small number of incidents which have been widely reported".

I contrast this with the kinds of examples noble Lords have raised. Remember, it was the Joint Committee on Human Rights of both Houses that noted that Prevent was a significant "chilling" factor on free speech in universities. It said that there is "fear and confusion" surrounding the Prevent strategy.

I note also that research from SOAS academics found that Muslim students on campus were modifying their behaviour because of Prevent, for fear of being stigmatised, labelled as potentially extremist or subjected to discrimination on campus.

My position remains that this Bill is not necessary or productive. However, if we are to have it, it should surely contain Amendment 69, which addresses what a number of independent sources have identified as the most chilling source of restrictions on free speech on campus.

Lord Sandhurst (Con): My Lords, I am grateful for the support that has already been given to Amendment 69 by the noble Baronesses. I can therefore deal with it quite quickly, just to explain what it does.

It would add a new provision to Section 31 of the Counter-Terrorism and Security Act. The effect would be that the duty imposed under Section 26(1) of that Act, which I will explain in a moment, will not apply to any decision made by a provider, in effect, which directly concerns the content or delivery of curriculum, the provision of library or other teaching resources, or research carried out by academic staff.

The simple way to look at it is this. Section 26(1) of the Counter-Terrorism and Security Act applies directly to a specified authority and imposes a duty to

"have … regard to the need to prevent people from being drawn into terrorism"—

in other words, the Prevent duty. Section 31(2) provides that, when a specified authority—in other words, an academic institution—is carrying out that duty, it must have regard to the Prevent duty. Such an institution

"must have particular regard to the duty to ensure freedom of speech, if it is subject to that duty"

and

"must have particular regard to the importance of academic freedom".

Amendment 69 would clarify what is to be encompassed in that on a more express basis by making it absolutely clear that, where the specified authority is directly concerned with content or delivery of curriculum, the provision of library and teaching resources, or research, the Prevent duty will not apply. That is all it does. It is very simple and clear, and it protects academic freedom. I think that is all I need to say in the light of the speeches that have been made.

Baroness Smith of Newnham (LD): My Lords, on this occasion I speak as myself—I do not think I have to go quite as far as the noble Baroness, Lady Falkner of Margravine, in saying that I speak as myself and not as a Cambridge academic. And I do not have to channel my noble friend Lord Wallace, because he did not give me any briefing notes for these amendments.

The amendments in the name of the noble Lord, Lord Mann, are potentially helpful but I assume that, as with any legislation, the Government are extremely unlikely to say, "That's a really good amendment. We'll just take it lock, stock and barrel and put it into the legislation". That normally does not happen. Even if a Minister agrees in Committee that an amendment might have some validity and value, there is usually a reason why its wording or a particular idea in it would not be quite right. I therefore ask the Minister, in responding to the amendments, to respond instead to the sentiment of what the noble Lord, Lord Mann, is saying.

5.15 pm

What is so important about the noble Lord's three amendments is that they are asking for clarification and an explanation of how freedom of speech would be guaranteed. If this legislation is necessary—like the noble Baroness, Lady Bennett of Manor Castle, I am still not wholly persuaded that it is—and if we are going to have this legislation, then the least it could do is explain how the Government intend it to work. An explanation of how these freedoms can be guaranteed would be helpful. Whether that should be in the Bill or in a code of practice, as suggested by the noble Lord,

[Baroness Smith of Newnham]
Lord Grabiner, is something that can be discussed, but if the Minister could elaborate on that then it would be very helpful.

With regard to the other two amendments in this group, as the noble Baroness, Lady Fox, has pointed out, not all women necessarily think the same way. We do not necessarily all agree even on this legislation, and we are not necessarily going to agree on particular amendments. However, on Amendment 69 and the Prevent duty, as an academic, I have wondered whether that duty is necessarily fit for purpose.

I remember debating that in the Chamber when the legislation was passed in the first place and we tried to secure various amendments. As the noble Baroness pointed out, when the Prevent duty started off, a lot of it referred mainly to Islamist extremism, yet in the five years since the legislation was passed, we have seen other terrorist activity coming from the far right. I wonder whether the Minister feels that the Prevent duty is doing quite what is needed and whether certain amendments might not be beneficial in order to allow academic freedom to be expressed, but also whether we should not at some point think about the framing of the Prevent duty.

Lastly, on the amendment about the equality duty, I have some reservations and hesitations about the term "particular regard" in the framing of the amendment. Again, I ask the Minister—who corrected me on Monday when he suggested that I had talked too early about the question of how the proposed legislation links with other duties such as the Equality Act and the Prevent duty—if he could say at this stage how he envisages the different pieces of legislation interacting. Clearly there is a question of how academics or anyone else seeking to implement the proposed legislation will evaluate to what they should give most precedence. Is particular regard to the Equality Act something that is going to override the present legislation, or is this legislation going to take precedence? How should that be evaluated? While universities may have many lawyers, and there are clearly many lawyers in the Grand Committee, the people making the decisions on a day-to-day basis need legislation that is clear, and does not require people to have a whole set of manuals, in order to ensure that we have the academic freedom that everyone is seeking to ensure.

Lord Smith of Finsbury (Non-Afl): My Lords, I remind the Committee of my declaration of interest as master of Pembroke College, Cambridge, although I am of course speaking in an entirely personal capacity.

I have considerable sympathy with the amendments tabled by the noble Lord, Lord Mann. I fear some of the practical consequences of the amendments as exactly framed, but the principle behind them seems to be rather an important one. The Bill is all about ensuring that universities do what they ought to be doing, which is encouraging and facilitating freedom of speech, expression and ideas, while also encouraging the contesting and debating of those ideas. That is what an academic process has to be all about.

There is a danger in some of the advocacy for this Bill in assuming that only one kind of freedom of speech, rather than all kinds, is to be encouraged and facilitated. Ensuring that what we do here enshrines the principles of contest and debate alongside the principle of freedom of speech is rather important. I am not sure that the precise amendments of the noble Lord, Lord Mann, get us there but it is important that we find a way of doing so.

Turning to Amendment 35, as I indicated in my intervention in which the noble Lord, Lord Moylan, kindly allowed me to ask a question, I am worried about the phrase "have particular regard to" the freedom of speech duty. Universities have to take account of an array of different bits of legislation, such as the Equality Act and the Prevent duty, and their responsibilities as employers under employment law. Now, they also have duties under freedom of speech legislation. They need to find ways of balancing those duties. Putting into the Bill language implying that the freedom of speech duty should trump everything else in all circumstances seems to present us with a problem. It should not.

Baroness Fox of Buckley (Non-Afl): My Lords, I think the difficulty here—this goes back to our earlier discussions—is around what the purpose of a university is. The purpose of a university is not employment or fulfilling equality; it is the open pursuit of knowledge without any restraint to academic freedom. That is the purpose of a university. It should be a space distinct from somewhere else. Surely in some ways a greater privilege has to be given to academic freedom than to those other duties. What has happened is that this has become only one of the many different things that happen on campus so universities have forgotten that academic freedom is the core purpose of a university.

Lord Smith of Finsbury (Non-Afl): I think we are entering dangerous territory if we seek to argue that one bit of law is more important than another. Upholding the duties that are placed on a university generally is something that universities have to do. Giving universities the task of balancing the requirements placed on them under legislation is the way we ought to go.

Lord Moylan (Con): I think the noble Lord slightly missed the point made by the noble Baroness, Lady Fox of Buckley. She was not suggesting that there are various legal duties and one is more important than another; she was making an ontological point about what a university is. Freedom of expression and freedom of speech are built into the DNA of a university. This is not simply a matter of balancing legal obligations. The point she was making is that privileging it is absolutely appropriate because that is what universities are for.

I want to make a further point, if I may. I hear this quite a lot from those who object to taking this forward. Do noble Lords recognise that there is a problem? The noble Lord will have his own experience of academic life, although I appreciate that he is speaking in a personal capacity. The free speech protection duty was last expressed in statute in 1986. The difficulty is that, whereas in 1986 the universities saw it innately as their duty to protect freedom of speech, the years have moved on, and now the university authorities themselves are oppressing free speech—not in every

case, of course, but it is tending in that direction. So the circumstances have changed, and the need for some sort of balancing is apparent to many of us but seems not to be to those who speak, to some extent, even if in a personal capacity, on behalf of the academic community. That surprises us.

Lord Smith of Finsbury (Non-Afl): I would not fundamentally disagree with either the noble Lord or the noble Baroness about the free exploration of ideas and knowledge being central to the purpose of a university; that is almost self-evident. However, we need to ensure when we are putting legislation through the House that we are not imposing impossibilities on the people who lead universities, making it very clear to universities, colleges and student unions that they have a responsibility to promote freedom of speech and a responsibility to promote respect for all students within their community, for example. That is a sensible approach to ensuring that the Bill achieves what we all might want it to achieve.

On Amendment 69, I have a lot of sympathy with clarifying the Prevent duty in the way that the amendment suggests. That might be a rather useful way of ensuring that Prevent becomes rather more sensible than perhaps it has tended to be over the last few years.

Baroness Falkner of Margravine (CB): My Lords, I declare an interest as chair of the Equality and Human Rights Commission, as Amendment 35 specifically relates to the Equality Act 2010. I hope that my remarks will clarify the intentions of the noble Lord, Lord Moylan, as regards the Equality Act, because I have a great deal of sympathy with what he is attempting to do. I also have an enormous amount of sympathy with some of the comments of the noble Lord, Lord Smith of Finsbury, because, in a much more tangible way, they set out what some of the problems are.

I will speak very briefly. My first point is that the public sector equality duty is not specifically concerned with freedom of expression. Our assessment in the commission is that, although there may be some evidence —the point made by the noble Lord, Lord Moylan, is a strong one—that more recently this has become a tool used by universities to avoid their duties in terms of freedom of expression, nobody has mentioned that other part of the Equality Act and the public sector equality duty, which is the need to foster good relations between groups who share protected characteristics. Therefore, that duty—the need to foster good relations—allows those who wish to hide behind the public sector equality duty to use it that way. Universities sometimes tend to use the fostering good relations duty a bit too widely, but because it is not circumscribed and does not define what it means, they can so do.

We have guidance on freedom of expression for higher education providers and student unions across Britain. When a university considers whether to permit an event to take place, it must take account of all its statutory duties, as the noble Lord, Lord Smith, referred to. These include Section 43 of the Equality Act, Article 10 of the Human Rights Act, student unions' obligations under charity law, and the Prevent duty, as well as the public sector equality duty. Balancing is therefore a necessary task that they must do. My sympathy with those institutions lies in the fact that, in every case, every decision will be different depending on the facts of the decision. In that sense, balancing will be a necessary exercise, irrespective of whether his amendment is accepted or not. Having "particular regard" nevertheless places it in a hierarchy.

5.30 pm

My concluding comment is simply about that hierarchy. I understand why the noble Lord seeks this, but it would mean that the public sector equality duty would be different for higher education providers compared with other public bodies, which would create additional complexity. It would create a hierarchy. Other public bodies will be concerned with protecting Article 10 rights, and they would then require further amendments to the respective laws that govern them. Our guidance will, we hope, be superseded by the guidance produced by the Office for Students to accompany this Act when it comes into force. I hope that the guidance will clarify the "particular regard" that Amendment 35 seeks to add in.

Lord Collins of Highbury (Lab): This has been a really informative debate. Fundamentally, the noble Baroness, Lady Falkner, has set it in the proper context. I am not sure which hat she was wearing but whichever it was, this has been put in context; it is about balancing duties.

I must admit that, the more we discuss the clauses in this Bill in detail, the more I think about unintended consequences. If we have existing duties and responsibilities, why have they not worked? Why is it that Governments immediately resort to legislation rather than thinking about what is actually going on and asking what powers that they have could be better utilised? On the first day in Committee, a number of noble Lords made precisely that point. They highlighted where they think that things have gone wrong, but did not see this legislation as being particularly the right mechanism for putting it right. This debate has been extremely useful.

I must admit that I found the contribution from the noble Lord, Lord Mann, enlightening. My tendency is to look at my own personal experience at university—many, many years ago. There was quite a lot of hostility and demonstrations, and certainly some of the extremists that the noble Baroness, Lady Fox, talked about—maybe even the noble Baroness herself, as I suspect that we were both at the same university—frequently tried to stop me speaking on behalf of the Labour Party. By the way, I like the idea that I have the luxury of speaking in a personal capacity; maybe we should tell Conservative Central Office that that is the case—though I am tempted not to do that.

At the end of the day, what we have here is agreement on fundamental principles but disagreement about how you best achieve them. Invariably, there are competing interests at stake when speakers are invited to our campuses but, as the noble Lord, Lord Mann, said, freedom of speech is not a trump card. I make that point to the noble Lord, Lord Moylan. He may be able to qualify his words but, fundamentally, as the noble Baroness, Lady Falkner, said, those words do put it into a hierarchy, which I think is particularly dangerous.

[Lord Collins of Highbury]

Whether we like it or not, universities have a broad range of responsibilities, and not only to academic staff and students; they are also big employers and so have a duty to other staff as well—particularly when it comes to statutory legislation such as that on health and safety, which is something they must take into account when exercising these responsibilities.

As the noble Lord, Lord Mann, said, students have a right not to be harassed or subjected to hate speech. Most importantly, as he said, they have a right to protest and to say that the opinions being expressed by somebody who has been invited to their university are abhorrent. When I was at university, extremist religious faith groups were saying that my sexuality represented an evil thing that needed to be banned and stopped. Fortunately, we have moved on and do not allow that in quite the same way. If a religious fundamentalist came here, I would expect to have the right to say that I found their opinion abhorrent. The noble Lord, Lord Mann, was absolutely right, and the case that he used to illustrate this is an important one.

When I looked at the Bill's Committee stage in the Commons, I saw that points were made, with reference to the evidence sessions, about how the Equality Act could be used:

"Professor Stephen Whittle from Manchester Metropolitan University acknowledged as much in the Bill Committee, recognising that the Equality Act would afford protection only if the speech were directly addressed to the complainant. That is important because front groups such as Hizb ut-Tahrir, which is not a proscribed organisation but which often espouses antisemitic views, could come on to campus under the guise of freedom of speech."—[*Official Report*, Commons, 13/6/22; col. 80.]

There is real concern here about how we must have that balancing act and ensure that people are protected. The example from the noble Lord, Lord Mann, about a family member of someone who suffered the consequences of terrorism, is a really important one.

At the end of the day, we have to try to take into account the sentiments contained in Amendments 29, 32 and 44 and ensure, as the noble Lord, Lord Smith, said, that we recognise those balancing responsibilities. As the noble Baroness, Lady Falkner, said, it is important that this proposed law does not inhibit the balancing of those responsibilities. I certainly have a lot of sympathy for the amendments in the name of the noble Lord, Lord Mann.

Earl Howe (Con): My Lords, as we have heard, this group brings together a series of amendments that seek to clarify in the Bill how its duties will interact with other duties and responsibilities.

Amendments 29 and 44 in the name of the noble Lord, Lord Mann, seek to ensure that providers and student unions balance their duty to take steps to secure free speech with their duty of care to students, staff and members. Amendment 32 would add this consideration to the duty to promote in Section A3.

I am grateful to the noble Lord for raising this important point and listened with care to the examples he gave. He is quite right that providers have a duty of care to their students under common law, as well as obligations to their staff under employment law. Student unions also have responsibilities to their staff under employment law. It is of the utmost importance that they can fulfil these obligations, providing an environment in which students, academic staff and members can thrive and taking reasonable steps to promote their health, safety and welfare.

As I mentioned, the noble Lord cited a number of examples to illustrate his arguments around the duty of care, one of which was a speaking invitation issued to a convicted terrorist. Inviting a convicted terrorist would likely require consideration under the Prevent duty in addition to the wider points he made on duty of care. I will cover the Prevent duty in more detail when I cover Amendment 69, if he will allow.

Lord Mann (Non-Afl): I thank the Minister but, to clarify, the case I cited was not stopped by Prevent. Prevent was in place. This was an actual example, not a theoretical one, but I do not want to name the college or identify the student in any way. It was perfectly lawful under Prevent; Prevent did not stop it and was not party to it. As an actual example, I think it is a good illustration.

Earl Howe (Con): I was making the point that the case he used to illustrate the issue would have been likely to engage Prevent even if the Prevent considerations had taken second place to the decision to promote freedom of speech. I do not disagree with the noble Lord in the way he suggests.

This leads to the general point that, to assist it to discharge its duty of care, a provider needs to ensure that it has in place effective and robust systems, policies and procedures for supporting and managing students, and that training and awareness-raising is provided for staff. Such a duty of care does not conflict with the duties in this Bill. The requirement to take reasonably practicable steps allows providers to balance that duty with other duties and responsibilities to students, staff and members.

Amendment 35 from my noble friend Lord Moylan would add a new provision to the public sector equality duty in the Equality Act 2010, whereby public authorities would need to have particular regard to their free speech duties. The amendment raises an important point. Providers are subject to different duties, and it is vital that they balance them appropriately. However, the Government are clear that the duties in the Bill will not override existing duties under the Equality Act, nor will those existing duties override the duties in the Bill. The noble Baroness, Lady Fox, cited the briefing from SOAS, which I have read. The briefing is absolutely incorrect to suggest otherwise. We need to remember that the public sector equality duty is a "due regard" duty.

There have been occasions when the Equality Act has been misinterpreted by providers—for example, as to whether the conduct is harassment—but the Office for Students will publish guidance to help bodies under this Act understand their duties and apply them. Providers will be required to take reasonably practicable steps to secure freedom of speech. In deciding what is reasonably practicable, they must have particular regard to the importance of freedom of speech. This does not mean that freedom of speech must always outweigh other considerations but indicates that it is a very important factor and will need to be weighed against other factors, including the public sector equality duty.

5.45 pm

Given that that is already set out in the Bill, I do not believe that it would be necessary or appropriate to amend the Equality Act. The noble Baroness, Lady Falkner, was quite right in what she said: even if that were to happen, it would not change providers' legal obligations as they would have to comply with and balance their duties. as they always have done. To pick up a point made by the noble Baroness and the noble Lord, Lord Grabiner, we anticipate that the Office for Students will issue guidance that will help providers to apply their duties in practice. The noble Lord, Lord Collins, spoke of his fears around unintended consequences but I think the OfS guidance has the potential to minimise those.

Amendment 69 from my noble friend Lord Sandhurst and other noble Lords seeks to amend the Counter-Terrorism and Security Act 2015 to ensure that higher education providers must not exercise the Prevent duty in relation to certain functions; the content or delivery of the curriculum; the provision of library or other teaching resources; and research carried out by academic stuff. The Government are clear that the Prevent duty should not be used to suppress freedom of speech; rather, it requires providers, when exercising their functions, to have due regard to the need to prevent people being drawn into terrorism. Importantly, there is no prescription from government or from the OfS regarding what action providers should take once they have had due regard.

The noble Baroness, Lady Fox, mentioned those with extremist views. That is an issue that I mentioned in relation to Holocaust denial, so I will not repeat what I said on Monday in that regard.

The legislation imposing the Prevent duty in relation to higher education specifically requires that providers and colleges must have particular regard to the duty to ensure freedom of speech and to the importance of academic freedom. For that reason, there really is no need for the amendment since freedom of speech and academic freedom are already taken into account when exercising the Prevent duty, alongside protecting student and staff welfare.

To address a point made by my noble friend Lord Sandhurst, it would not be right to go so far as to exclude the content of the curriculum, for example. If a professor wanted to teach in such a way that he could draw students into terrorism, that is something that the provider should consider having due regard to. I emphasise again that it is up to the provider what action then to take.

In conclusion, I hope I have reassured the Committee that the duties in the Bill have been carefully drafted to ensure that providers, their constituent institutions and student unions pay particular regard to the importance of free speech and academic freedom while retaining the flexibility, by virtue of the wording about steps being "reasonably practicable", to balance the duty with their other obligations and responsibilities to students, staff and members.

Lord Mann (Non-Afl): I beg leave to withdraw the amendment.

Amendment 29 withdrawn.

Amendment 30 not moved.

Amendment 31

Moved by ***Lord Moylan***

31: Clause 1, page 3, leave out lines 32 to 36 and insert "have particular regard to the need to—

(a) eliminate unlawful interference with freedom of speech within the law and academic freedom,

(b) promote and prioritise the particular importance of freedom of speech within the law,

(c) promote and prioritise the academic freedom of academic staff of registered higher education providers and their constituent institutions, and

(d) foster a culture of free thought and open-mindedness,

sin all decision-making concerning the provision of higher education and in conducting and managing research activities."

Member's explanatory statement

This amendment seeks to clarify the steps providers will need to take in order to promote freedom of speech and academic freedom.

Lord Moylan (Con): My Lords, I rise to continue my minute and curious search for means by which the Bill might achieve some noticeable change. I notice I am grouped with an amendment from my noble friend Lord Willetts which appears to be there to ensure no such change is actually achieved in practice or cultural outcomes, so I think we are well matched. I will continue on this hunt for the prospect of change. In this case, I am not suggesting we amend any other legislation or duty, so noble Lords resistant to change will have to find different arguments to respond to me.

This amendment would amend not existing legislation but the text of the Bill. In new Section A3, the

"Duty to promote the importance of freedom of speech and academic freedom"

is defined in a manner which is pleasing to the Government. It simply says that it is there to promote

"freedom of speech within the law, and … academic freedom for academic staff of registered higher education providers … in the provision of higher education".

This is insufficiently clear on which duty is being imposed on universities that does not exist already.

Amendment 31, which I have put forward, specifies what we expect universities to do as a result of the passage of the Bill into law. I will not read out everything it says, but it is there to

"eliminate unlawful interference with freedom of speech within the law and academic freedom … promote and prioritise the particular importance of freedom of speech … promote and prioritise the academic freedom of academic staff … and … foster a culture of free thought and"

open markets—sorry, "open-mindedness". There is nothing wrong with promoting open markets either, but as it happens that is not the wording of this amendment. I am attempting to make clear what it is that we expect universities to do as a result of this duty to promote academic freedom, which the Government agree should exist but have defined in a manner which leaves the whole thing completely open.

There is an acid test to apply to this, which is the case of Dr Kathleen Stock. I do not know her, and I know nothing of her case that I have not read in public sources, so I am not making a special plea on her behalf. I am simply taking the story as emblematic.

[Lord Moylan]
In her case, the university—I think it is fair to say—did not do some of the things it should have done to protect her and her rights. That could easily still be the case, especially with the amount of time that universities will have to spend on the astonishingly complex calibration of duties and obligations, which are apparently going to remain wholly unamended by this Bill. It has let her down.

The acid test is whether this clause would have protected a reputable academic from losing her post after expressing views which were objected to on essentially ideological grounds. My view is that, as drafted, it would not. The amendment I am moving would and I hope the Government will be able to explain why it should not be adopted when what they are doing is clearly not enough. I beg to move.

The Deputy Chairman of Committees (Baroness McIntosh of Hudnall) (Lab): My Lords, I should notify the Committee that, if this amendment is agreed to, I will be unable to call Amendments 32 or 33 owing to pre-emption.

Lord Willetts (Con): My Lords, perhaps this is the moment at which I might intervene on Amendments 33 and Amendments 54 to 56, which are in my name and that of the noble Lord, Lord Stevens. I declare my interests as a visiting professor at King's College London, an honorary fellow of Nuffield College, Oxford, chancellor of the University of Leicester and a member of the board of UKRI.

I am going to rise to the challenge from my noble friend Lord Moylan. My understanding of the purpose of this Bill is to enhance the protection for freedom of speech in universities. That is an admirable objective and I support it. I have some doubts about the practical effects of this Bill, which this Committee is scrutinising, but the objective is the right one.

The evidence is clear—a point made by the noble Baroness, Lady Fox, in the debate on Monday, which I sadly was not able to attend—that, recently, universities have become overpreoccupied by probably a mistaken interpretation of their equality duties and have put insufficient focus on freedom of speech. I personally think that debates such as the one we are having and the shift in attention to this is already beginning to improve things. It is right, therefore, to look at ways in which we might reinforce the provisions of the 1986 Act. This Bill undoubtedly does that, both by a tort provision and a regulatory provision. I personally think that trying to use both of those instruments is overdoing it, but the powers of the regulator, the OfS, on their own are considerable; they will change the balance.

Amendment 33 would make explicit that this protection for freedom of speech sits alongside other duties, such as those in Prevent and in equality legislation—and also, I may add, labour market protections. I was quite interested in the way that the Minister, in his interventions on Monday and earlier today, has focused so much on employment law and labour market protections. One reason why cancel culture will never be able to do quite as much damage to higher education in the UK as it has done in the US is, paradoxically, because of the different framework of labour market and employment protection that we have in this country. It is quite a challenge to those of us historically in favour of deregulating labour markets. This is a context in which employment protection actually works to protect freedom of speech.

In the debate on the previous group of amendments, the Minister put the point very well that there are other duties in other legislation and what this legislation does is to put an obligation on freedom of speech alongside those. In fact, the main purpose of Amendment 33, I can now see, is to put into primary legislation exactly what the Minister has already assured us of: that this obligation on freedom of speech goes alongside other obligations such as the equality duty or Prevent duty.

One can sense from our debate that there are temptations to go in different directions. One temptation is to say that these provisions for freedom of speech must override other legislation, or perhaps—though we have had less of this—be subservient to other legislation. I do not think that it is the intention of the Government that they should either override or be subservient; they are alongside. I suspect that, as the Committee continues, we will find that there are some people who see an opportunity to make this override equality legislation, some people who want it to override Prevent legislation, and a very small group who would like it to override both. I personally think that the wording in this amendment,

"having due regard for all other relevant legal duties",

is the right way to make it clear that there is an intention for this to be alongside those other duties.

As to the effect that the other duties have, we heard an important intervention earlier that one problem is that there has been a misinterpretation of the equality duty. The problem is less the actual equality legislation and rather a misunderstanding of it. For me, the most illuminating case is the Akua Reindorf report on what happened at the University of Essex, which was shocking. It was made absolutely clear that what happened was based on misunderstandings of provisions in equality legislation, particularly, for example, that the protections are for gender reassignment, not gender identity. Similarly, the Prevent duty is another important framework of legislation, and we need to ensure that it is balanced with freedom of speech.

6 pm

I believe that what I am saying is consistent with the Government's intentions, but something follows from this. If we are indeed to make it clear to universities that they have to balance several different and potentially conflicting legal obligations, they are in a very tricky position. Here I come to the earlier intervention from the noble Lord, Lord Grabiner. It seems to me that they need practical guidance on how we expect them to reach these incredibly difficult decisions on a case-by-case basis.

The Minister referred in his intervention on the previous group of amendments to the guidance that will be issued by the regulator, but that is why Amendments 54 to 56, which I am proposing alongside the noble Lord, Lord Stevens, are so important. Again, they would give force to the assurances that the Minister has just given. The amendments make it absolutely clear that

there should be a process of consultation in the development of this guidance, and that it should then be published. It avoids the danger of universities finding themselves being assessed by a regulator when they do not know the guidance which the regulator is using internally to assess what they are doing. I hope that the Minister would find this an obvious, common-sense requirement. There should be a consultation on this guidance and it should be published.

If I might assure my noble friend Lord Moylan, this surely should then satisfy his challenge to us about what is going to be different. The difference is that there will be a regulator with a power to intervene and a set of published guidance on how these tricky decisions should be conducted. That is a different regime from the one we face at the moment. It recognises that universities now face an amount of public scrutiny and assessment of the sort they did not used to have before.

I would love to be in a world where we quite simply trusted universities to exercise these fine judgments on their own. Sadly, rightly or wrongly, that world has gone. Given that we are entering this new world, transparency around what the guidance is, so that universities know where they stand, is a minimum requirement for the extra powers that this law would bring in.

Baroness Chakrabarti (Lab): My Lords, I will briefly probe the amendment of the noble Lord, Lord Moylan, and probe the Minister a bit by way of that amendment. I support the amendments in the names of the noble Lords, Lord Willetts and Lord Stevens of Birmingham.

On the latter, I lament this intrusion into university autonomy, which has been going on for some time. I listened carefully to the point raised by the noble Baroness, Lady Fox: what is a university? Clearly, universities are to be places of free speech but also of free inquiry and independence from the state. They predate all the legislation that we have cited, which is really quite special. I am concerned about regulatory creep—not on employment and non-discrimination but on the content of the actual academic enterprise, if I can put it like that.

I broadly support the noble Lords in their common-sense amendments and I do not think anybody should really disagree. I do not want the Office for Students and all the rest of this architecture to be needed, but if it is going to be there then surely the duty to provide guidance should be a "must", not a "may", once we have entered this arena.

The amendment of the noble Lord, Lord Moylan—I am using it as a means to probe the Minister—wants the universities to

"have particular regard to the need to … (a) eliminate unlawful interference with freedom of speech within the law and academic freedom".

Surely he should want them to seek to eliminate lawful interference with free speech too. Some of the problems that he must be concerned about are where people are not putting bricks through windows or breaching the criminal law to intimidate but are just making it not very pleasant to have debate and free speech. If he is to bring his amendment back, I say in a spirit of bipartisanship that that is a drafting problem or has not been completely thought through.

My real probe relates to something that the noble Lord, Lord Stevens of Birmingham, said last time that I found particularly revelatory. Of course a university must be a place of free speech and debate, but it must also be a place of academic excellence, or at least of academic quality. Surely that must sit alongside free speech. A university is not just a debating society or the public square; it is a place of academic improvement, inquiry and even excellence. Despite my politics, I do not shrink from the word "excellence".

My question to the noble Lord, Lord Moylan, is again on the territory that we opened up with the Minister last time: where in this proposed statute or any other, if we are going to be prescribing duties around free speech, are the duties to protect academic standards? It was the noble Lord, Lord Stevens, who opened up this issue in my mind and I have been worried about it for the last couple of days. If free speech trumps everything, or at least academic standards, and those standards and the duty to maintain them are not prescribed in law, what happens with bad science and fake facts? What happens when a person declares that they must be protected from management, and possibly even from losing their post, because they are just writing and teaching rubbish? Our students, who are now consumers, deserve better.

Earl Howe (Con): I am not sure the noble Baroness was in the Committee when I covered that very point quite near the beginning of our debate today. I tried to cover it on Monday but I expanded on it today as well.

Baroness Fox of Buckley (Non-Afl): My Lords, I am very much in favour of Amendment 31. To put a different emphasis on it from what there has been so far, the amendment by the noble Lord, Lord Moylan, is helpful in making a positive attempt at promoting free speech. The amendment says

"foster a culture of free thought and open-mindedness, in all decision-making concerning the provision of higher education and in conducting and managing research activities".

It is that bit about promotion that is helpful in terms of shifting the emphasis of the discussion a little bit about how we should view the Bill.

I found that I was reading this small HEPI—if that is how you say it—pamphlet in preparation for the student union group of debates later on. I found it a really interesting little book. The foreword is by Professor James Tooley, the vice-chancellor of the University of Buckingham, which has also co-published the book. I should declare my interest that I am a visiting professor at the University of Buckingham. Professor Tooley says:

"For many academics, the focus"

is

"only on the negative, on the 'sticks' of the law".

He advocates that we focus on

"the positive, the 'carrots' of the intellectual and social attraction of academic freedom".

Many people have said that the problem with the Bill is that does not tackle the cultural issues—that it avoids the question of what has happened to the positive association of universities with academic freedom. One of the contributions earlier asked why the 1986 duties have not worked and what the point is of bringing

[Baroness Fox of Buckley]
them under the Bill. Quite a lot has changed since those duties were brought in in the sphere of academic freedom, which is why I believe we need to pass a version of the Bill, no doubt amended, but not to use it as a silver bullet that avoids tackling the cultural issues. Anything that the Bill does to foster the promotion of free speech is very important. The main thing that I would urge is that the status quo position of "leave it as it is" is not acceptable. That is the kind of complacency that I hear. Universities will not survive and the academic standards that have just been referred to will deteriorate.

There is a tendency to blame students when we look at what has changed recently; they are either disparagingly written off as "Generation Snowflake" or, more positively, posed as uniquely sensitive to the issues of oppressed identity groups—unlike previous generations, who have never understood suffering—and having a unique insight into them. A combination of both is true. I do not want to blame students, but it is true that, whenever I talk at universities on free speech, many of them talk about it as if it were a value from "ye olden days". They sometimes say: "We respect your right to think that free speech is important, but we have other priorities."

I often find that commitment to free speech, on and off campus, is under strain not among the young but among the grown-ups, as it were. At best, there can be a shallow, instrumental lip service paid to the value of free speech, with so many "ifs", "buts" and caveats that it is barely there. There is hardly a compelling case for the positive virtues of free speech, but rather a grudging acceptance that it is important, always accompanied by an emphasis on how it can play a corrosive and dangerous role in society and lead to a toxic political culture, hate crimes and, as we have heard in this debate, all these charlatan quack scientists dragging down educational standards.

Even the emphasis that the Bill and everyone else want to place on free speech within the law as a qualifier feels a bit tepid, especially when Governments of all stripes have regularly infringed free speech through legislation. As we speak, we have a Government proposing a pro-free speech Bill at the same time as the Online Safety Bill and the Public Order Bill, which are hardly wildly pro-free speech pieces of legislation. On campus, we have seen lots of academics, rather than students, introducing things that have undermined the culture of academic freedom. Whether it is mandated courses in microaggressions or unconscious bias, people feel as though they are walking on eggshells.

It is very important that we use this legislation—this is why I like Amendment 31—to make a positive case for the inviolable moral good of free speech. There was a lot of coverage of the seminar in Cambridge where, as the newspapers described it, students were trained in free speech. One of my colleagues ran it, Alastair Donald from Living Freedom; Andrew Doyle, the author of *The New Puritans*, spoke on Milton and Dr Piers Benn on Locke. What was really fascinating was that the reports of the students who attended last night said things such as, "I thought that coming to Cambridge would be like this, but it hasn't been until tonight". They also said that they often feel constrained in what they can say at university by their own tutors tut-tutting if they say the wrong thing.

When I brought out my book *'I Find That Offensive!'* in 2016, I was warned that it was exaggerated—of course, it ended up completely underestimating the problem—and that young people would hate it and shun me because it addressed "Generation Snowflake" and the culture of "safetyism". The truth is that, when it was published, the people who hated it were the educational establishment; it got terrible reviews in all the educational press. The people who really liked it were students. I spent two years doing a tour of all universities speaking about it. The students said, "Phew, it's a relief to have somebody talking about this. I had never heard arguments like this before. I never really understood the history or philosophy of free speech." It was not that they all loved me or agreed with me; they were just glad that someone was prepared to have the open discussion and debate.

We have to use this piece of legislation to promote free speech and academic freedom as much as we can. I support Amendment 31.

6.15 pm

Lord Hope of Craighead (CB): My Lords, I hesitate to intervene in this debate as I am not an academic. I look on the wording of the provisions in the Bill as a simple lawyer. For my part, I like the very simple wording of the existing provision in new Section A3. It is capable of accommodating changing circumstances and the various situations that academic institutions have to deal with.

The problem, with great respect to the noble Lord, Lord Moylan, is that he complicates that simple expression in new Section A3 with a serious of steps that are to be taken. I am not sure that anything he has said is inconsistent with what we find in new Section A3, but I would much rather keep it in the simple form that is already in the Bill without adding to the complication. To put it another way, the noble Lord, with great respect and with very good intention, is perhaps trying to do too much by expanding and trying to explain the duty already in new Section A3.

I do not object to the addition suggested by the noble Lord, Lord Willetts, but I do not think it is necessary as, if it is a relevant legal duty, it is already there to be performed; it does not need to be said. As a lawyer, I prefer simplicity—not all lawyers do—and I would like to keep it simple in the way it is already expressed in the Bill.

Baroness Smith of Newnham (LD): My Lords, from these Benches we have relatively little to add. I strongly support what the noble Baroness, Lady Chakrabarti, said on various issues, not least about academic excellence because it is not just about academic freedom. Part of the purpose of a university is about educating and engaging in debate, but we are also trying to ensure that the minds of students are being stimulated. It is not just about academic freedom but that is part of it. As the noble and learned Lord, Lord Hope of Craighead, has said, Amendment 31 seems somewhat unnecessary. While on these Benches we support the amendments in the names of the noble Lords, Lord Willetts and Lord Stevens, if the Minister can persuade us that they are all implicit in the Bill and are not necessary, then perhaps they could not be moved.

Lord Willetts (Con): Briefly, the debate we have just had shows why the amendments are necessary. They do not change the underlying framework of law but make explicit something which otherwise would just be implicit. There are benefits for universities and people participating in them by it being explicit.

Baroness Chakrabarti (Lab): My Lords, I forgot to declare my interests as a visiting professor of practice at the LSE and in receipt of research services from a PhD student from King's College London. To support the noble Lord, Lord Willetts, if this is becoming such a difficult area, it will be tempting for regulators that "may" issue guidance not to do so in a particular contentious area. We go down this road or we do not, to some extent. If there are rows between competing minority interests and around particular foreign policy issues, then if I were a regulator, it would be all too tempting to sit back. That has sometimes been the case in the past, whether with the police or regulators. That is in support of the rather tighter duty that the noble Lord, Lord Willetts, proposes to put on the regulator.

Baroness Thornton (Lab): My Lords, I am not going to say very much because this debate has covered most of the ground that we need to cover on how this issue should be decided. However, I always listen to the noble and learned Lord, Lord Hope, very carefully. When he says that simplicity is best, that is probably right. We definitely find Amendments 33 and 54 to 56 the more attractive amendments. As my noble friend Lady Chakrabarti said, they are the common-sense amendments. I am more attracted to them than to Amendment 31 in the name of the noble Lord, Lord Moylan.

This debate has shown, and I agree with those who have said so, that while the words in the noble Lord's amendment are of course very laudable, actually it is the words that go in the Bill and create the law that are important. That is our job here in this House. It is certainly not our job to put words into legislation that might create more confusion and proclaim values at this stage. The Minister will probably tell us how the Government feel about that. My noble friend Lord Smith outlined in the earlier debate what a hard job the leaders of our universities have in balancing their duties and rights. That was amplified by the noble Lord, Lord Willetts, when he spoke to his amendment.

In reflecting on the remarks of the noble Lord, Lord Moylan, I do not think that this amendment would have stopped what happened to Kathleen Stock. That was a failure of the leadership of her university to fulfil their duty of care to her and their need to promote free speech in their institution. This amendment would not have stopped that, because it is to do with how that university conducts itself.

Lord Grabiner (CB): My Lords, I will be very brief. On the point made a moment ago by the noble Baroness, one of the oddities about the Kathleen Stock case—the noble Baroness, Lady Falkner, knows a lot more about this than I do—is that she undoubtedly would have had a claim for breach of contract. It appears that some agreement was arrived at and the matter was settled, but she would have had a very clear and good claim against the employer for breach of contract, without the need for anything in this Bill, which does not advance matters. However, we will come to that at a later moment.

I respectfully support the amendments from the noble Lord, Lord Willetts, but I am not going to get involved in the Moylan debate. I firmly support Amendments 54 to 56 because what is critical, as has become apparent in the course of these debates, is the importance under the Bill of the guidance and code of practice. It is vital that the code of practice that eventually results is an absolutely bullet-proof and really impressive document. The proposals from the noble Lord, Lord Willetts, would achieve that and strengthen the current drafting.

Earl Howe (Con): My Lords, this group of amendments relates to duties and powers to promote freedom of speech under the Bill. Amendment 31, tabled by my noble friend Lord Moylan, seeks to clarify the steps that a higher education provider or college would need to take in order to promote the importance of freedom of speech and academic freedom. This amendment would replace the duty to promote the importance of freedom of speech and academic freedom with a duty to have particular regard to certain matters, including the need to eliminate unlawful interference with freedom of speech and academic freedom and to promote and prioritise the particular importance of freedom of speech.

By replacing the duty as drafted, I suggest to my noble friend that this amendment would in fact weaken the duties under the Bill by replacing a duty to do something—the words, "must promote"—with a duty to "have particular regard". Providers will already be required, under new Section A1, to take reasonably practicable steps to secure freedom of speech. In doing so, they will need to have particular regard to the importance of freedom of speech. As part of this, we would expect providers to consider many of the matters suggested by this amendment and do not consider it necessary to set these out in detail. Indeed, prescribing the matters to which providers must have regard in this way could have unintended consequences, and result in providers taking a less comprehensive and balanced approach to their duties overall.

My noble friend asked me why specifically I could object to his amendment. There is a good reason, as I have indicated, which is that the amendment would have the effect of removing the duty to promote the importance of freedom of speech and academic freedom. That is a new and important duty, created by the Bill, that will drive forward a culture where freedom of speech is fostered and celebrated and students, staff and visiting speakers feel confident to express their views freely.

Amendment 33 in the name of my noble friend Lord Willetts and the noble Lord, Lord Stevens, seeks to amend the duty to promote the importance of freedom of speech and academic freedom by adding a duty to have due regard to all the other relevant legal duties. We have already discussed the issue of the interaction of the Bill with other duties. The main duty in the Bill is to take reasonably practicable steps to secure freedom of speech within the law. That means that providers, colleges and student unions can

[Earl Howe]
take account of all their legal duties on a case-by-case basis. So the duty does not override existing duties under the Equality Act 2010 regarding harassment and unlawful discrimination nor, for providers, the public sector equality duty or the Prevent duty. If another legal duty requires or gives rise to certain action, it would not be reasonably practicable to override that.

I agree that the University of Essex report showed that there were misunderstandings of how the Equality Act should be properly applied, but we hope and trust that the measures in the Bill will, as I said earlier in response to a point made by the noble Lord, Lord Collins, serve to minimise those misunderstandings.

As I have previously said, the duty is derived from the current legislation in the Education (No. 2) Act 1986, so it is not new. Providers have been balancing their legal duties for many years: in relation to unlawful discrimination and harassment under the Public Order Act 1986 for 35 years, in relation to the public sector equality duty since 2011, and in relation to the Prevent duty since 2015. However, the new duty to promote the importance of freedom of speech and academic freedom might mean that a provider speaks out publicly to defend the freedom of speech of a staff member in the face of calls for them to be removed for something they had said, or it might involve giving talks to staff and students on the importance of freedom of speech in democracies.

We come back to an objective that I have mentioned before, which is the need in some institutions for a change of culture. Noble Lords will appreciate that the duty to promote is a high-level duty designed to give rise over time to a change in culture on university campuses. It is not a duty to promote freedom of speech. Rather, it is a duty to promote the importance of freedom of speech. As such, I do not believe that it needs the additional "due regard" duty as proposed.

Amendments 54, 55 and 56 in the name of my noble friend Lord Willetts seek to require the Office for Students to consult on and publish guidance relating to the promotion of freedom of speech and academic freedom, and to require it to give advice on that in a timely manner. Clause 5 inserts new Section 69A into the Higher Education and Research Act 2017. This provides that the OfS may identify good practice and give advice to providers and colleges on the promotion of freedom of speech and academic freedom. This wording is entirely based on Section 35 of the 2017 Act, which provides that:

> "The OfS may … identify good practice relating to the promotion of equality of opportunity, and … give advice about such practice to registered higher education providers."

Accordingly, the provision does not concern the new duty on providers and colleges to promote the importance of freedom and speech and academic freedom in new Section A3 that I have just described. Rather, it concerns the duties of the OfS and the advice that it can give to providers and colleges generally about how they can promote freedom of speech on campus.

I hope my noble friend Lord Willetts will be reassured to know that Section 75 of the 2017 Act, as amended by this Bill, will require the regulatory framework of the OfS to include guidance for providers on the general ongoing registration conditions, which will now include specific registration conditions on free speech in accordance with Clause 6, as well as guidance for student unions on their freedom of speech duties. Therefore, it will be here that the OfS will set out guidance on the new duty under Section A3 to promote the importance of freedom of speech and academic freedom, which must be complied with under the registration conditions.

6.30 pm

Given that, I do not think that the changes proposed by my noble friend are needed as this is not about advice on compliance with the new duties imposed on providers and colleges. This is a general provision about good practice, and as such, it is not necessary to make it a requirement rather than leaving it to the discretion of the OfS. I hope that that explanation reassures my noble friend and noble Lords as to how the provisions on the promotion of freedom of speech, and of the importance of freedom of speech, will operate.

Lord Moylan (Con): My Lords, I am grateful to all noble Lords who have spoken in this debate. I hope they will forgive me if, in the interests of time, I respond only to the comments made by my noble friend Lord Willetts.

First, I must congratulate him on his masterpiece of oratory whereby he implicated our noble friend the Minister in his view such that it would appear almost churlish, by the time the Minister came to respond, that he should disagree with my noble friend on almost any matter at all. I have much to learn from him in that regard.

However, I wish to turn to one point made by my noble friend Lord Willetts. It has struck me with increasing force because it builds on something said earlier by the noble Baroness, Lady Falkner of Margravine, and other noble Lords: that nothing will be changed by this Bill and all change will be achieved by the code of conduct. That seems to be the message; in fact, it was almost explicitly the message given by my noble friend. I have been in your Lordships' House only a couple of years but the tendency I have seen here is to say that, where guidance of a binding character is to be issued, we should scrutinise it and set the terms for it. When it came to what the College of Policing is doing about non-crime hate incidents, it was a united view across the House that the guidance issued by the college should become statutory guidance precisely so that we could scrutinise it.

Here, however, we seem to be taking a completely reverse approach. Nothing must appear on the face of the Bill, and everything must be left to the guidance to be issued by the Office for Students. As far as I can tell—I am open to correction by noble Lords—this guidance is not to be the subject of parliamentary scrutiny nor issued through the "made affirmative" process as a statutory instrument. It is not to come to our attention in any way at all. We are simply abdicating all the guts of the Bill to the Office for Students in how it will apply. I simply say to my noble friend that I find this really rather strange. I am tempted to suggest to

him that, if my amendments were reformulated not as obligations on universities but as obligations on the Office for Students to include those things in the guidance, his principled objection would fall away—or is he absolutely determined that the Office for Students should have a completely free hand, with no parliamentary scrutiny, in how this Bill will be implemented if it becomes an Act?

I raise that as a challenge to what I might call the forces of institutional conservatism, which range across the Room—those who wish to see nothing change. Are your Lordships really suggesting that change can be achieved only by abdicating our responsibilities to a relatively new public regulator?

Baroness Chakrabarti (Lab): I congratulate the noble Lord, if I may—he congratulated his noble friend in what became an absolute tour de force of a response itself. I have huge sympathy for his general proposition that in this place we allow too much not to be in the statute book and delegate far too much to secondary legislation and even to guidance. It is often something that we do when we are giving overly broad powers and we have made a bit of a mess of the legislation—"Don't worry, it'll all be sorted out in guidance." However, I have to say, in fairness—perhaps I have become part of the new forces of conservatism; that I am now considered a conservative will show you how much politics has moved to the right in this country—that there is a qualitative difference between coercive police powers and pedagogy and creating a culture of learning and inquiry in an academic establishment, which would be very hard to legislate for at the level of detail that I personally would like something such as police powers to be provided for. I have huge sympathy with the noble Lord's general proposition that bad law leaves a lot of stuff to be dealt with later invisibly by guidance but I am not sure that the analogy with police powers and creating cultures in universities is quite comparable.

Lord Moylan (Con): I have to say that I am sinking in sympathy on the general principle in this Committee, which is coming at me from every side. Nobody lacks sympathy with what I am saying—in general. It is only in the particular that they object to what might be put forward to practical effect—I am always open to the charge that I may have erred in drafting and may have got the wrong approach, and all that—but without substituting any particular proposal for the ones that they particularly find objectionable in my case. I agree that it is not a suitable parallel. Coercive police powers are not a suitable parallel with pedagogy—I picked it off the shelf—but they are perhaps a suitable parallel with somebody being driven out of their job because of particular views, because that too is a coercive act. If they are not defended from being driven out of their job, and we are simply saying that it will be dealt with by guidance and not in the Bill, what are we doing? They are skewered, because they now admit the need for change but they want it done by somebody else.

I now come to my noble friend the Minister, because I really must wrap up, and we have to move on.

Baroness Smith of Newnham (LD): My Lords, surely there is a difference between something that is appropriate as guidance, where right-minded people would think that guidance was appropriate, versus Henry VIII clauses, where Ministers are seeking to grant themselves sweeping powers over which there is no scrutiny. What we are saying here is not, "Let's grant Henry VIII powers to a Secretary of State", but rather that there are appropriate places for things, and on this occasion, guidance is the appropriate place.

Lord Moylan (Con): It is absolutely clear that of course there is a difference between guidance and Henry VIII powers but we are not in that field here. We are talking about what our contribution is as legislators and the fact that, on what we acknowledge to be tricky and difficult issues on which the public and leaders of universities would like to know our views, we are saying, "We aren't going to agree on any of that. We're going to give it to a body where we have no say and where there is no supervision for us at all, and we will trust them." Frankly, it is a cop-out.

None the less, I am going to move to a close and thank my noble friend the Minister for the careful consideration that he gave to my amendment. I think that in some ways he is encouraging me to redraft it better for Report, as he pointed out its various flaws. He somewhat failed the acid test I set him of how his clause as currently drafted would deal with the situation of Professor Kathleen Stock. The noble Lord, Lord Grabiner, said that frankly it did not need to because existing provisions already do so and it was simply a failure of the university to apply them. If that is the Minister's view, I think he should say so. Still, I am grateful to him because he gave very careful consideration to the amendment. With that, I beg leave to withdraw the amendment.

Amendment 31 withdrawn.

Amendment 32 not moved.

Amendment 33

Tabled by ***Lord Willetts***

33: Clause 1, page 3, line 36, at end insert ", having due regard for all other relevant legal duties"

Member's explanatory statement

This amendment is to ensure – and make explicit – that the Bill does not impose duties on universities that are inconsistent with other legal duties that apply to them.

Lord Willetts (Con): My Lords, I would like briefly to—

The Deputy Chairman of Committees (Baroness McIntosh of Hudnall) (Lab): I should point out to the noble Lord that if he wishes to speak again on his amendment then I will have to put the amendment and it will be open to further debate. Of course, I do not seek to influence the noble Lord in any way.

Lord Willetts (Con): I will resist. I shall not move the amendment, and I look forward to further exchanges.

Amendment 33 not moved.

Amendment 34

Moved by ***Lord Moylan***

34: Clause 1, page 3, line 36, at end insert—

"**A4** Duty to secure freedom of speech and academic freedom: funding and grants

The governing body of a registered higher education provider must take reasonable steps to ensure that grants of funds by the provider for the purposes of academic research are not refused to—

(a) any individual member or group of members of staff of the provider,

(b) any member or group of members of the provider, or

(c) any student or group of students of the provider,

on the grounds, solely or inter alia, that such persons adhere to or propagate any particular lawfully-held principle or political opinion."

Member's explanatory statement

This amendment prevents discrimination in the distribution of research funding by higher education providers based wholly or in part on the lawfully-held principles or political opinions of the potential recipient.

Lord Moylan (Con): My Lords, I struggle on, looking for the prospect of meaningful change. In this case, unlike the previous groups—in one I was seeking to amend an existing statute, while in the last one I was merely seeking to amend the wording of the current Bill—I am motivated by a sense of a lacuna on reading the Bill, particularly at Second Reading, and I made mention of this at the time.

It is a well-known fact that what makes the world go round is money. Money is a very sensitive subject when it comes to universities. It used not to be—it used to be that anyone in a university who mentioned anything as vulgar as money would not be invited back to high table—but now money is an important consideration. The Bill is not silent on money, of course; it has a section on overseas funding. It is not to that section that I am turning my attention. The lacuna that I referred to is that it appears to say nothing whatever about funding coming from domestic sources.

This series of probing amendments—if the Committee wishes me to refer to them, Amendments 34, 45 and 46—try to box the compass, so to speak, of the various sources of money and how they can be used to prohibit free speech. Amendment 34 discusses grants made by universities to academics working for them or within their ambit. Amendment 45 refers to grants made downwards, so to speak, by UK Research and Innovation. Amendment 46 relates to donations that are made to universities. All of these could be used in a manner that was intended to influence, limit or shape freedom of expression within a university.

Sometimes we actually welcome that. I notice that it is a normal condition of cancer research charities that recipients do not have anything to do with tobacco companies. Many noble Lords would welcome that; they would say it was a good interference with freedom of speech and freedom of action attached to a flow of money as a condition. However, once one grants that, one ends up asking where to draw the line. These amendments are intended to test the role of money in doing that.

It has been suggested that Amendment 45 could trip over the Haldane principle, which dates from nearly 100 years ago but is still very properly entrenched in our constitutional process—that decisions on grants for research purposes should not be made by Ministers but must be made independently, and therefore to legislate on the matter at all is to offend the Haldane principle. But it is not, of course, because nothing in my amendment gives Ministers any power at all. There is nothing in the amendment that even relates to Ministers. Rather, it says that we as Parliament would be creating conditions, which we already do, for the operation and manner of operation of UKRI. I do not believe that Amendment 45 conflicts with the Haldane principle at all. I would very much like to hear my noble friend the Minister respond, so I shall not go into further detail.

6.45 pm

I now wish to move on briefly to Amendment 53. Reference was made earlier to an unlikely alliance between the noble Baronesses, Lady Bennett of Manor Castle and Lady Fox of Buckley. I find myself here in perhaps an unlikely alliance with the noble Lord, Lord Sikka, for whom I have a very high regard, especially when it comes to anything concerning money—and with universities, given his long academic career as a professor of accountancy.

I resiled from boxing the compass totally; I thought that what this really needs is a further amendment that deals with the relations between corporations—businesses—and universities. I simply thought that if I tried to draft that, with all the various exemptions that may be necessary, I would fall over and make a fool of myself. Hence I rather welcome the amendment from the noble Lord, Lord Sikka, as opening up, at least on a probing basis, the fourth side of the compass, so to speak. We have donations; we have corporate relations; we have grants going downwards within universities, from the university body to its own; and we have grants coming down from higher above, from the research councils and UKRI, towards the universities.

It is intended to cover all flows there might be, probably unsuccessfully, as some may escape, but it is at least a chance to hear from my noble friend what the role of money is. Are we going to blink and just ignore this absolutely huge means of influencing free speech and expression of opinion?

Lord Sikka (Lab): My Lords, it is a great pleasure to follow the noble Lord, Lord Moylan, on this. He mentioned money; I wish I had some, like many other people. Let me declare an interest: I am emeritus professor at the University of Essex and the University of Sheffield.

My amendment seeks to loosen the shackles imposed by private sector research funders upon the ability of academics to publish research. Those shackles have got much tighter with the advent of the research excellence framework, which attaches weight to the external research funding that is raised by universities. Within universities, indeed, any academic these days wishing to be promoted has to show that he or she has managed to secure a lot of research funding.

This research funding comes with lots and lots of strings attached, which raises conflicts of interest. Can your Lordships imagine trying to get some research money to look into gambling or the development of weapons? It would come from the gambling industry or from British Aerospace and others. Then if you produce research which is critical, would they really let you publish it? That is really the question.

I have looked at many research contracts—some colleagues have told me about them—that include clauses which give the funders the final say on whether the research can be published. Funders can vet, and have vetted, the research questions, methodologies and methods, data analysis and the conclusions of the studies. In many cases, draft papers need to be submitted to the funders. I have experienced that myself, and their approval is needed before anything can be disseminated, perhaps at a conference—because many academics present papers at conferences before they submit them to any peer-reviewed journal—so they need to be vetted. Funders can block, delay, or demand changes to the papers because they do not like the research findings, or they may just sit on the paper for a prolonged period to make its research very stale and untimely. Again, I have experienced that, as I explained at Second Reading.

One prominent scholar told a peer-reviewed journal:

"In our commissioned research project, the commissioner's representative interfered with both the entire study and the publication because I did not let him influence the sample. Instead of random sampling, we should have made a 'comfort sample'."

There is a classic example of a pharmaceutical company funding a researcher to compare its branded thyroid drug with a generic competitor's. The researcher found that the generic products were as good as the expensive branded products. The publication of the research could have jeopardised the funder's sales and profits so the drug company went to enormous lengths to suppress the research, including taking legal action against the researcher and her university to prevent the paper's publication.

In the past few days, one UK academic told me that the funder vetted his paper and did not like the negative health effects associated with the consumption of processed food. The funder decided that some cases of negative effects were outliers and were to be eliminated from the paper. It is bit like saying, "Somebody has died from this disease but it is an outlier so let us ignore and suppress it". The academic concerned refused to accommodate the changes and the paper was never presented at a conference nor published. Another academic told me:

"The funder demanded control of all the raw data relating to the negative effects of a drug. Under pressure, I agreed. Subsequently, the funder would not allow me to release the data to a peer-reviewed journal and I could not publish the study, which was less than complimentary about the funder's products."

Over the years, several studies have established links between passive smoking and lung cancer. Tobacco companies have a long history of trying to subvert research by framing the research questions, designing the study, collecting and providing data and even writing the final papers for academics. Industry funding and the quest for research grants have persuaded many scholars to ignore important research questions because they simply will not get funding otherwise. Indeed, in my own field, it is incredibly rare to find research that is critical of auditing or the anti-social practices of the finance industry. None is ever funded by anybody from the City or the world of accounting because that is not the kind of thing that they fund. Many academics also do not do that kind of research because it jeopardises their chances of getting research funding from the world of accounting and the City, so such issues are basically ignored.

The Government are also a culprit. Commenting on a June 2016 report by Sir Stephen Sedley, *Missing Evidence: An Inquiry into the Delayed Publication of Government-Commissioned Research*, Nick Ross concluded that

"expensively commissioned findings sometimes fail to see the light of day and weak rules are used to bury unwelcome evidence for long enough to make it stale."

In November 2020, the *British Medical Journal* published an article, "Covid-19: Politicisation, 'Corruption' and Suppression of Science", which reported four instances of the suppression of science during the pandemic. It was all to do with the government-funded research. One instance related to the suppression of the 2016 study codenamed Operation Cygnus, which documented deficiencies in the UK's pandemic preparedness. The report was eventually released in 2020 after an outcry in the media and interventions by the freedom of information commissioner. The Government did not want to publish it; their suppression denied the public, parliamentarians and medical communities vital information. The funder of the study stifled the debate.

The *BMJ* reported that a Public Health England report on Covid-19 and inequalities was delayed by the Department of Health; a section on ethnic minorities was initially withheld and then, following public outcry, was published as part of a follow-up report in 2020. Authors from Public Health England were instructed not to talk to the media about it. On 15 October 2020, Richard Horton, editor of the *Lancet*, publicly stated that an author of a research paper, a government scientist, was being blocked by the Government from speaking to the media because of a "difficult political landscape."

Another example relates to what the Government codenamed Operation Moonshot. The project required an immediate and wide availability of accurate, rapid diagnostic tests for Covid. This research concluded that the Government procured an antibody test, which cost £75 million, that in real-world tests fell well short of the performance claims made by its manufacturer. Researchers from Public Health England and collaborating institutions sought to publish their study findings before the Government committed to buying a million of these tests but were blocked from releasing them by the Department of Health and the Prime Minister's office. Public Health England then unsuccessfully attempted to block the *British Medical Journal*'s press release about the research paper. The reason for all this was that the research was damaging to the commercial interests of the corporation involved in these tests.

I have provided only a brief glimpse of some of the ways in which academic research is subverted and suppressed and, consequently, scholars and policymakers are denied the opportunity to see the evidence, data and

[Lord Sikka]
findings. This is damaging to academic freedoms, scholarly endeavours and society as a whole. Amendment 53 seeks to prevent funders exercising undue influence on the design, conduct and dissemination of research. After all, what kind of expertise do they have in these matters? If they had any, maybe they would be doing the research themselves. This amendment makes scholars, their communities and journal reviewers the final arbiters of the quality of research. I urge the Minister and the House to support it.

Lord Triesman (Lab): My Lords, I can probably do this quite briefly. These are very helpful amendments, which illustrate an extremely important point. To work out why or how the Bill will be useful or effective, it is important to understand what academics do—what life on the ground is actually like and what having a career entails. I want to follow my noble friend Lord Smith of Finsbury's earlier comments, but I think that is for a later debate. If academics want to pursue a career, there are facts on the ground that cannot be overlooked, and these amendments address them.

There is a longish history to this; I must confess to having my fingerprints on parts of the REF at different times in the past, so I want to acknowledge that I have probably contributed to a problem. Today, if you want to make progress, it is entirely commonplace in universities to expect that, in the last period of assessment of research, you will have produced at least three articles in reputable referee journals. If you have not done so, you will not be promoted and if you do not have tenure, you will probably not survive at all. It is imperative. It is a gating process about which this Grand Committee will do nothing, because it is not in our power, but that is how it happens.

7 pm

My noble friend Lord Sikka has illustrated an important point about the final element of this. If we are serious about the contestation of ideas, then people are plainly going to have to raise research money to do the research and contest ideas. But they do it in a real world with real constraints and if they do not meet the criteria I have mentioned, their careers are over.

It may well be that in these amendments we could set out what higher education institutions may not do to impede those people even further. I have a suspicion that we may prove unsuccessful, but not in terms of higher education institutions or the research councils; it may be that the people who purchase research will go and purchase it elsewhere rather than run risks of another kind. I have seen that happen as well; it happens in pharmacology quite a lot.

If we think that we can have an impact on it, we plainly have to address the ways in which freedom of speech can be impeded for every academic who thinks that they have a career which involves original research. If we ignore it and it remains the lacuna that has been described, then we have basically ignored one of the key drivers of either academic freedom or impediments to it in our university sector.

Baroness Smith of Newnham (LD): My Lords, I realise that people have been declaring interests at various points during proceedings. As an academic I assumed, having declared my interests at the start of proceedings on Monday for the same Committee that I did not need to rehearse them again. If necessary, I am happy to rehearse my interests at Cambridge University and associations with other higher education organisations.

The noble Lord, Lord Triesman, has begun to flesh out slightly that there is a difference between two types of funding. There is research grant funding which might come from UKRI, where one would imagine it should be funding blue-sky thinking. The ideas in the amendments proposed today—whether they have appropriate wording or not—are that people's academic freedoms should not be damaged, everyone should have an equal chance to secure funding and that should not be constrained in any way, for example, by one's political beliefs. It is difficult for anyone to refute that suggestion. However, if an academic proposes to do research for a third party, where that party is looking for findings in a certain area and wants certain things to be done, if they are then engaged in a contract the person providing funding might reasonably say "Actually, I don't wish this research to be funded".

This goes back to "unintended consequences". I wonder whether these amendments work for the contracts or consultancy that academics might be undertaking, which is quite different. If you undertake consultancy, its funder might not want to publish the findings because they do not meet what they expected. It is quite difficult to see how you could constrain a funder in that way, when it is a different sort of research funding to that which a university or UKRI might provide to individual academics. I am not opposing the amendments but I wonder whether some of these things need to be explored a little further.

Lord Stevens of Birmingham (CB): My Lords, I should take the noble Baroness's prompt and declare my interest as an honorary fellow at Balliol. I was prompted to speak by what has just been said in respect of the amendment from the noble Lord, Lord Sikka. He makes a very important point but, were this to progress beyond Committee, it would require very careful attention to the wording so as not to produce completely counterproductive results.

I was looking it up as the noble Lord was speaking, and I think I am correct in saying that, in 2019, about a quarter of R&D was via the higher education sector and about two-thirds was through the business sector. There is a sort of make-buy boundary, a decision, for a lot of research funders as to where they will get their research done. It just happens to be a contingent fact that quite a lot of that is done through the university sector, but it need not be. As worded, the amendment would capture, for example, conversations that the Wellcome Trust or Cancer Research UK would want to have with individual academic research teams, particularly about their research methodologies. Those are very productive conversations that improve the quality of research. So I understand the thought, but the precise mechanism perhaps warrants further attention.

More broadly, I oppose Amendment 34 from the noble Lord, Lord Moylan, specifically in relation to its suggestion that statute should be interfering in the discretion that universities have in grant funding allocations where the amendment says that universities would no

longer be able to take into account in those grant allocations the lawfully held principles that individual researchers might adhere to. I get the bit about political opinion, but the "principle" bit is, I think, potentially quite problematic. One of the many dictionary definitions of a "principle" is "a general scientific theorem with numerous special applications across a wide field". If you do not believe in the scientific basis of cell biology and have a particular "principled" adoption of homeopathic beliefs in bio-miasms, you will be driven in a particular direction. It seems to me that universities have a responsibility to say no to putting homeopathy funding on an equal basis with anything else. We want them, in pursuit of their distinctive mission to advance knowledge and education through structured debate and evidence-based reasoning, to be able to say no so that research on certain "principled beliefs" can be disbarred.

This comes back to the confusion that we touched upon on Monday. The Minister dealt with this point in respect of the employment of academics but, when it comes to the grant funding, we cannot have a situation in which universities' hands are tied and they are not able to make judgments as to the merit on which those grants are allocated across their institutions. It is the inclusion of the phrase "lawfully held principle" of a grant application that ensures that, unfortunately, Amendment 34 as currently worded is fundamentally flawed.

Baroness Fox of Buckley (Non-Afl): My Lords, I really welcome the contributions of the noble Lords, Lord Sikka and Lord Moylan, on their amendments, because this issue of money is important and it is a good way of getting the discussion going—or not just to discuss for the sake of it.

What I cannot get my head around is how in any way you can legislate on this. I cannot see a way of doing it, even though I think I have added my name to one of the amendments. But it is important to discuss this. As I listened to the noble Lord, Lord Sikka, I thought he made a very strong case for the problem of corporate funding of research if it distorts outcomes. Nobody wants that, but I do not necessarily know that I do not want any corporate funding of research—so the question is how you deal with it.

It is also the case that, these days, some of the big players in terms of funding are charities or NGOs. We mentioned the Wellcome Trust, which I worked with for many years. It is true that the Wellcome Trust would often say, "These are our priorities this year" and you knew that, if you wanted a Wellcome Trust grant, you had to fit your research into those priorities. That had a distorting impact—I am not suggesting it was corrupt in any way, but you knew that was the way that you would get the money. I certainly know people who shifted their focus in order to get the grants.

This is important in terms of academic freedom. I wonder if the popularity of politicians saying, "The evidence shows", and evidence-based policy being fashionable incentivise a tendency towards politicised research outcomes. There is a sense in which a lot of academics have wanted to be in on the policy discussion, often with outcomes predetermined. There have been times when I have said to Ministers, "Where's the evidence for that?", and they have said, "We have commissioned the evidence"—but they were announcing the policy. Do not tell me that it has not happened before because it happens all the time. They have commissioned the evidence from a university, in fact. I am just saying.

The reason why I think it is important that research is completely separate from that is because there is a place where academic freedom is under the surface and genuinely under threat, although I do not know whether the law can change that. I know of two people who put in for research on detransitioning—to raise that issue—and they were told there was just not a cat in hell's chance of getting any funding for that because it was going to be too controversial. Whether we like it or not, the broad problems around some of the other issues in terms of what you can and cannot look at are affecting what is funded in terms of research, particularly postgrad research. There are a lot of complaints about that when you meet postgraduates.

By the way, that does not mean I do not appreciate what the noble Lord, Lord Stevens, said. It is also the case that people can for ever more moan that they are not getting their research funded when it is actually no good, and that actually, you do want academic judgment. I am just pointing out that politics enters into it.

The one thing that I am really concerned about is that UKRI, which after all distributes billions of pounds of research money, produced a draft equality, diversity and inclusion strategy—my favourite topic—earlier in the year, in January, which is a cataclysm of management-speak and right-on political outlooks. You could write it; you know exactly what it is going to say and do. A lot of it is about its staff, which is fine. I have no objection to that. But I worry when it starts basically to express its political aims. You have to question its impartiality.

As far as I am concerned, in the sciences the money should be given to the best science that advances knowledge; it is not humanities research, which is likely to give us interesting insights, and so on. But UKRI demands of people that apply for it that they deliver on the diversity and equality outcomes. A lot of people who read that immediately thought, "How do I prove that?" That is a layer of work that you have to do that you do not need to do. The document sounds quite threatening: "If you don't tell us when you apply for this that you're going to deliver on these things, you won't get it." So great science is sidelined in the name of equality, diversity and inclusion. That is something that we have to watch. I do not know if the Bill can do anything. I am hoping it will create a climate of discussion about the importance of academic freedom that will counter some of these trends and some of the secret censorship that goes on behind the scenes.

Baroness Chakrabarti (Lab): My Lords, like the noble Baroness, Lady Smith of Newnham, I would be grateful for guidance from someone as to how often one is to redeclare interests in the course of Committee. Should one do it in every group that one speaks on? I am sure there is an answer and that this is just my ignorance. I gather that it is once, but is it once a day or once in Committee in total? I have done it today.

The Deputy Chairman of Committees (Baroness Finlay of Llandaff) (CB): For clarification, it seems that it is once for the Committee stage rather than each time we speak.

Baroness Chakrabarti (Lab): I am grateful to the Deputy Chairman. I hope the Committee will forgive my ignorance; I hope that will help others as well.

I think noble Lords are really on to something here. I have found all the previous contributions compelling. They speak to aspects of my own experience. I have seen the way that funding can either promote or chill free speech, expression and academic inquiry. I understand that there are real challenges in this area. In particular, it is going to be very difficult to compel a corporation in any way to fund research that would be directly contrary to its interests. However, I do not think that we should totally give up on all of this; I do think that my noble friend Lord Sikka and the noble Lord, Lord Moylan, are on to something.

7.15 pm

For example, where research has been commissioned, an attempt to use a contract or another document to prevent it being published could be made unenforceable by way of statute. Arguably, when the funder is a public authority, it may be breaching the Human Rights Act in any event—depending on the nature of the recipient of the grant. In legislating in this area, why do we say that it is easy enough to legislate for students' views on campus but do not try to legislate for something as important as academic funding being used to chill free speech?

Something could be attempted in this Bill. It will not solve the complexity of the problem that my noble friend Lord Triesman described, where people are just given a nod and a wink and told, "You ain't going anywhere in this town; you're not going to get funded or refereed". Some of this stuff is never written down. It is a nudge; it is cultural. You cannot deal with that in statute but, if Ministers and the Government ever abuse their financial relationships with other public bodies, that can be legislated for, to some extent. If corporates—or, for that matter, philanthropists, NGOs or charities; whoever they are, whatever their politics—put clauses into research grants or contracts that the Committee thinks are contrary to our consensus idea of academic freedom and free speech, those gagging clauses can be made unenforceable as a matter of statute. That may be something that the noble Lords who have done the work in this area might want to contemplate for the next stage of the Bill.

Baroness Falkner of Margravine (CB): My Lords, on this occasion, I declare my interest as chair of the Equality and Human Rights Commission.

I had a lot of sympathy for the myriad examples put up by the noble Lord, Lord Sikka. In fact, beyond sympathy, to address the noble Lord, Lord Moylan, I had some deep concerns. However, on hearing many of those examples, they were entirely familiar to me. I recall having come across them in the media, if nowhere else.

The point made by the noble Baroness, Lady Smith of Newnham, about how this amendment would apply to third parties commissioning research was really significant. All manner of bodies use university academics to do a piece of research for them, including collecting and collating survey evidence and/or other evidence—particularly in the social sciences and humanities, where it is a bigger problem because the boundaries are less clear-cut.

In the past, much of our non-statutory guidance has been based on that kind of research because you seek to find an evidence base for whatever you are saying. We have had complaints about some of the stuff we have said; in fact, my daily joy is opening my parliamentary email and finding complaints addressed to me in that capacity rather than the correct capacity. However, when you look into what people are complaining about, you can find that the survey evidence was perhaps interpreted in a certain way or that the methodology does not stand up today to the contemporary standards that one would wish to use. The noble Baroness, Lady Chakrabarti, rightly raised some of the ambiguities that lie there if this serious and important amendment is taken away and reflected back to us on Report.

The noble Baroness also raised the issue of academic standards. You get a great diversity in institutions as regards the quality of research. If you found that you perhaps ended up having commissioned an institution that did not deliver for you, I would hope that any amendment that we might seek to make would emphasise the fact that you can only take reasonable steps and that where it says in proposed new Section A8(2) that

"providers must not require changes to academic research as a condition for a grant",

the change does not come at that stage; it might come when you look at the data collection.

An example of data collection in our case is that the majority of the UN conventions that we apply tend to have been written immediately after the Second World War, generally between 1945 and 1960, and they use language that muddies the water. The convention on the elimination of racial discrimination is a good case in point because it refers over and over again to nationality, whereas frequently what we look for in racial discrimination is not necessarily the Polish person suffering race discrimination but potentially the Afro-Caribbean or African or Asian person. You commission the research and then you discover that the dataset does not hold up, because nationality was taken into account by the researchers rather than particular ethnicity; you might have wanted a narrower framework.

I urge the Minister, if he is inclined to take on board the amendment, which is significant and important, to clarify those things for us when we come back to this.

Lord Willetts (Con): My Lords, I will briefly make three comments on this debate; I realise that I will not occupy the same moral high ground as most of the participants in the debate so far.

The reality is often that co-funding, with public money and private money, is going into research projects which are believed to be of value for the British economy. I will give your Lordships a simple example. You may find that some public funding is going into a

wind tunnel and some Rolls-Royce money is going into it so that it can research the functioning of a jet engine and improve Rolls-Royce's capacity to be a market leader in jet engines. A lot of that goes on. Indeed, in a different part of the woods, we are told that more of that should go on and that we should be thinking more fully about how we use publicly funded research to promote business investment. There are lots of reasons for being wary but those type of relationships exist, and if anything, are being encouraged, and would not be possible under the provisions here. That is my first point.

Secondly, the American pressure on us with regard to the research we conduct and then publish, is because by and large they think we are very naive about what they call dual-use research of concern. They think that we publish lots of stuff which is the equivalent of publishing nuclear physics in the early 1930s. There is a lot of pressure from them for us to publish less, and they think we are naive about some of the possible implications of the research. If we are to have research partnerships with these international partners, if anything, the pressures are the opposite of the ones we have been hearing this afternoon.

My third point is really a question for the Minister. This is an issue which raises another angle where there is concern about this legislation. It is marvellous to have a Minister from the Department for Education as well as a Minister from the Cabinet Office. Several provisions of the Bill relate to the activities of BEIS and our research effort. The research activities of universities are not part of the DfE, and it would be good to be reassured that, on many provisions of this legislation which affect research capacity, we will have the voice of the business department, which is the ultimate responsible body, and that there has been suitable liaison across departments so that implications for research and innovation are properly considered as part of our deliberations.

Lord Collins of Highbury (Lab): Does the noble Baroness not wish to speak?

Baroness Smith of Newnham (LD): I think I have said everything that needed to be said from these Benches.

Lord Collins of Highbury (Lab): I was tempted to declare my own interest as an assistant general secretary of a trade union that used to commission research. Once I knew the question and its answer, I would commission the research. There is that political side; social science is often involved in that sort of thing.

This has been a worthwhile debate. I am pretty certain that this Bill, or even this debate, is not the right place for these amendments.

The noble Lord, Lord Willetts, raised some fundamental points. One of my responsibilities is as the shadow FCDO Minister. In global research, how research—particularly medical research—can be innovative, and who controls and pays for it, is an interesting question. I certainly do not relate that to academic freedom; that is a different, commercial issue.

The noble Lord, Lord Stevens, made the excellent point that, if you are going to do research in a particular medical area, you are not going to be bound by employing someone who has no interest in pursuing that line of inquiry. For me, whenever these sorts of questions come up, the interesting thing about the sort of research done by my noble friend Lord Sikka is that the key is always transparency. Whenever a piece of research is published, I want to know who has funded it. I want to know who is ultimately responsible. To me, that is absolutely the key to this issue.

I was going to ask the Minister about impact; the noble Lord, Lord Moylan, raised this. Students Organising for Sustainability asked whether these duties would present a conflict between some universities' health departments—at Imperial, for example—that have funding conditional on not recommending big tobacco in their careers service? That relates to advisers and freedom of speech. It would be interesting to hear the Minister's view on that in relation to the debate on these amendments.

I have promoted debates in the Chamber on the broader issue of commercial research, particularly about who at the end of the day owns and controls the—I have a mental block.

Baroness Thornton (Lab): Copyright? Intellectual property?

Lord Collins of Highbury (Lab): Yes. Then we get into a much bigger question, which for me is the most important political question. I know my noble friend has also entered into debates on that issue, including on TRIPS and stuff like that.

I will be interested to hear the Minister's response to this point. Personally, I do not think that these amendments are in the right Bill or the right place.

Earl Howe (Con): My Lords, this group of amendments relates to impartial research funding. Amendment 34 in the name of my noble friend Lord Moylan would introduce a new duty to require higher education providers to take reasonable steps not to refuse to grant funds for research because of a recipient's lawful principles or political opinions.

Amendments 45 and 46, also tabled by my noble friend, seek to make clear, first, in respect of donations and sponsorship to registered higher education providers and, secondly, in respect of funding through UK Research and Innovation, that the donor, grantor or provider may never restrict the freedom of speech of those working under the funding. Amendment 53 in the name of the noble Lord, Lord Sikka, is about the awards of grants for academic research.

7.30 pm

It is right to be concerned about the provision of research grants and that the process of giving such awards should not be open to abuse in the way that the amendments suggest. However, the Bill already requires in the main duty at new Section A1(1) that higher education providers must take reasonably practicable steps, having particular regard to the importance of freedom of speech, to secure freedom of speech within

[Earl Howe]
the law for members, staff and students. This duty includes securing academic freedom. The Bill also states in proposed new Section A1(11) that

"references to freedom of speech include the freedom to express ideas, beliefs and views without suffering adverse consequences".

"Adverse consequences" would clearly include the refusal of a grant of funds for academic research. Equally, if a donor or grantor insisted on certain conditions that would restrict freedom of speech for the funding they give, the provider should not accept it. If they did, they would potentially be in breach of their registration conditions.

As drafted, these provisions therefore already require a provider to take reasonably practicable steps to ensure that research grants are not refused because of the recipient's stated lawful principles or political opinions. A member, staff member or student should be able to express their lawful ideas, beliefs and views without suffering adverse consequences; the provider must take reasonably practicable steps to ensure this.

It is clear that higher education providers should not interfere with academic freedom by imposing, or seeking to impose, a political or ideological viewpoint on the teaching, research or other activities of individual academics, either across the whole university or at the department, faculty or other level. Nor should providers seek to influence the academic freedom of staff by interfering with academic research by making conditions on grant funding applications. The duties in this Bill safeguard against these eventualities. Indeed, the Bill protects academic staff in higher education so that they are free to research and teach on subjects that may test the boundaries without this damaging their prospects of promotion or getting a job at another university.

Finally, my noble friend Lord Willetts posed a question about interdepartmental working within government. I can absolutely assure him that UKRI and the Office for Students work closely together all the time. Indeed, approval for the policy that underpins this Bill was subject to cross-government agreement.

I trust that those noble Lords who have proposed amendments in this group are reassured by this explanation, which makes it clear, I hope, that the Bill already covers impartial research funding as required.

Lord Moylan (Con): My Lords, given the hour, I will be brief on this occasion. I am grateful to my noble friend the Minister for explaining that, despite the fact that there is no explicit mention in the Bill of the large and important topic of money and how it makes universities go round, it is there; it is just that none of us had spotted it. Let us hope that those who are directly within the ambit of the Bill, if it becomes an Act, will be able to spot it. I would have thought that it would have been helpful to have a few words in the Bill to that effect but, no, it is there—only in a subterranean way. So we must all take comfort from that.

I am very grateful to all noble Lords who have contributed. I am particularly grateful that, on this occasion at least, they agree with me that this is an important and large topic. I am simply disappointed that, at least for the two Front Bench spokesmen, it is simply too large to put in the Bill. It is too big; it is too complicated; it is very important but—

Baroness Smith of Newnham (LD): I did not say from these Benches that it was too big to be included. I suggested that there needs to be more discussion and clarification of the issues at stake because they are even broader than the noble Lords, Lord Moylan and Lord Sikka, were discussing. That is not to say that they should not be included.

Lord Moylan (Con): I am very grateful for that clarification, which I take as an encouragement to myself and the noble Lord, Lord Sikka, to enter discussions with the noble Baroness as we prepare for the next stage of the Bill to reach satisfactory wording on the topic.

Finally, I simply say how very grateful I am to everybody who spoke in the debate and managed not to say that it should be dealt with in the code of conduct. With that, and given the lateness of the hour—though I suspect the topic may come back—I beg leave to withdraw the amendment.

Amendment 34 withdrawn.

Lord Sikka (Lab): My Lords, if I may respond to some of the points—

The Deputy Chairman of Committees (Baroness Finlay of Llandaff) (CB): For the convenience of the Committee, the noble Lord, Lord Moylan, has already withdrawn his amendment and no one has objected to that.

Clause 1 agreed.

Clause 2 agreed.

Amendments 35 and 36 not moved.

Clause 3: Duties of students' unions

Amendments 37 to 46 not moved.

Amendment 47

Moved by ***Baroness Garden of Frognal***

47: Clause 3, leave out Clause 3 and insert the following new Clause—

"Duties of students' unions

(1) Section 22 of the Education Act 1994 is amended as follows.

(2) In subsection (1), at end insert "and secures freedom of speech within the law for members of the students' union, students of the provider, staff of the students' union, staff and members of the provider and of its constituent institutions, and visiting speakers."

(3) In subsection (2), at end insert—

"(o) the use of any premises occupied by the students' union is not denied to any individual or body on grounds in relation to an individual or society or other body's ideas, beliefs or views;

(p) the terms on which such premises are provided are not to any extent based on such grounds;

(q) affiliation to the students' union is not denied to any student society on such grounds;

(r) use by any individual or body of premises occupied by the students' union is not on terms that require the individual or body to bear some or all of the costs of security relating to their use of the premises."

(4) After subsection (3) insert—

"(3A) The code of practice shall set out—

(a) the students' union's values relating to freedom of speech and an explanation of how those values uphold freedom of speech;

(b) the procedures to be followed by its staff and its members who are students of the registered higher education provider in connection with the organisation of—

(i) meetings which are to be held on the premises occupied by the students' union and which fall within any class of meeting specified in the code, and

(ii) other activities which are to take place on those premises and which fall within any class of activity so specified;

(c) the conduct required of such persons in connection with any such meeting or activity; and

(d) the criteria to be used by the students' union in making decisions about the union's support and funding for events and activities to which the duties in this section are relevant, and whether to allow the use of premises and on what terms.""

Member's explanatory statement

This amendment suggests an alternative method for placing duties on students' unions by amending the Education Act 1994, and along with the proposed removal of clause 7 seeks to probe whether the OfS should directly regulate SUs or whether they should be regulated via the relevant provider.

Baroness Garden of Frognal (LD): My Lords, I will also speak to the Clause 7 stand part notice in my name and that of my noble friend Lord Wallace, who is absent. I note with interest that the noble Baroness, Lady Fox, referred earlier to the HEPI report on students, which made interesting but fairly depressing reading—particularly with regard to students these days being very reluctant to discuss anything with which they disagree.

These amendments are at the requests of students and student unions, which are very concerned that provisions in this Bill could involve them in costly, time-consuming administration and litigation. Our revised Clause 3 aims to provide clarity on the responsibilities for freedom of speech in a more student-friendly manner. We were also alerted to the problems of geography. Many higher education providers have operations overseas. Does free speech "within the law" mean the law at home or away? There are many Welsh and Scottish higher education providers that have campuses in England as well. Will these duties apply to all of them?

We note that student unions are not public authorities and so are not subject to regulation in the same way. Many of them may be tiny theatre providers; they may be further education providers with a handful of higher education students. Their governing bodies may be a small group of 17 year-old students. Are the provisions in Clause 3 really appropriate for such unions?

If Clause 3 is bad, Clause 7 is even worse. We read in that clause that an individual would be able to refer their complaint to the Office for Students complaints scheme at the same time as pursuing it through a provider or the student union's internal procedures, which would surely be the appropriate way. It could also be addressed by the Office of the Independent Adjudicator for Higher Education, or a court or tribunal. How confusing and cumbersome this is. Surely such complaints should not be escalated; rather, they should be dealt with at the lowest possible level. Currently, the adjudicator considers students' complaints only once the local process has been completed. For the Office for Students to rush in with a monetary penalty would surely be untimely and disproportionate. We really feel that this is not a reasonable use of the Office for Students' powers.

At a later date, we shall come on to discuss the director of freedom of speech and academic freedom. It is not at all clear how that post will fit in with all these other complaints processes.

As I say, these amendments have been tabled at the request of students and student unions. On that basis, I beg to move.

Lord Triesman (Lab): My Lords, this is probably the only appropriate place to raise this point. There was a debate earlier in which my friend, the noble Lord, Lord Smith of Finsbury—he may be on the Cross Benches but he is steadfastly a friend—and the noble Baronesses, Lady Fox and Lady Smith of Newnham, took part, about what the core functions of a university are and what its DNA is. I do not resile from what I said about the role of a university in the development of knowledge and the challenge to knowledge, but I would not for a moment suggest that that is the only function.

I come to the other thing that I think universities are fundamentally there for, because the students and student unions are so central to it. Universities are also the place where we see the transmission of knowledge between generations. They are the place in which we try to instil in students the methods best suited to elaborate knowledge and to challenge all spheres of knowledge, and to do so in a way that reflects the fact that it is a community. Those are also fundamental obligations of a university, and it would be very foolish if we were to neglect them.

The strength of the very word "collegiality" is that it means we believe that, in a collegial environment, people should not suppress the views of others, silence others or interfere with their individual rights. Apart from overcoming those negatives, it also cements together a community that has, if I may put it this way, a mutual obligation to proceed with respect. In my view, that is quite central to the DNA of a university.

I make these points because those frequently relatively young people—although it is a much more diverse age group now—are central to what we think about when we think about what universities do and how they should do it. Indeed, we have embodied in other legislation measures to deal with the quality of teaching to ensure that this part of what universities do is at the best standard that can be achieved, and we punish them by not letting them have gold stars or whatever if they fail to do it. Student unions are a part of that education provision, part of that community, and what we try to impose on them becomes extremely significant.

7.45 pm

I was looking at this having listened carefully to the noble Earl, Lord Howe, when I last raised the question of how things get policed. I hope he will not mind if I remind him of one of the things that he said. I was saying that if events taking place get out of hand, the police may decide to intervene. The noble Earl said, to paraphrase a little, that he did not really accept my argument. He continued:

> "If an event is properly planned—which it should be, particularly if it is sensitive or controversial—its security implications should surely be considered in advance. If it involves a police presence, that consideration should surely encompass the cost of that police presence."—[*Official Report*, 31/10/22; col. GC 43.]

I will come on to how that might impact events organised by or in student unions.

The notion that each institution has one student union is flawed. Of course they have student unions, but they also have a wide number of other clubs and societies which are part of that student union. In some universities, when you join the student union you are automatically enrolled in all the others as well, to give you freedom to get around and do all sorts of interesting things. I began to ponder who these people are who would engage in expert planning, particularly if it is sensitive and controversial. I want to share the extent of the issue that this provision would need to grapple with. I will start with a few universities—I will come to all of them in a moment.

At University College London, there are 300-plus such additional societies and clubs. At Manchester University, there are way over 400; at Leeds, way over 300; at Birmingham, way over 500. Newcastle is very poorly served in having only 70. Cambridge has way over 400, as I know the noble Baroness, Lady Smith, will be delighted to hear. Queen Mary University of London has over 500. Oxford says that its number is countless; I have done it a favour and counted them—I got to 540. King's College London, to which several noble Lords have mentioned their affiliation, has way over 300. Its website enthusiastically mentions that many of them are campaigning groups and that it is quite right that students should organise themselves into groups that go out and campaign. That may mean they get into the sensitive areas that the noble Earl, Lord Howe, referred to in the speech I quoted.

If you extrapolate back correctly, take account of the number of students in all those universities and try to create a sum of how many of these student union groups and societies exist and would therefore be in scope of this legislation, the number appears to be 67,500. I may be wrong on some of the maths, although I like to think I am not bad at it. Let us assume that it is wrong by several per cent; it will still be way over 50,000 on any count. It is probably closer to my higher figure. The idea that all of them will be able to deal with the pressures to be put on them by this legislation is straightforwardly fanciful.

I appreciate that a lot of them will not be controversial at all. We always seem to come back to Cambridge in the course of this. I assume that the University of Cambridge Allotment Society will not pose enormous problems most of the time, although it probably depends on what they grow and whether that is an issue. However, I have no idea what A Society of Ice and Fire (Iron Throne) does. I do not want to speculate, but I bet I will not like it if I ever find out. The Joy Luck Club appears to engage in activities which bring great joy to those who are its members, but not necessarily to anybody else.

I do not make these points to be completely frivolous, although I appreciate that they will be taken as being relatively frivolous. I am just saying that, if what we are saying here is that the whole student union apparatus is to respond to this, we have decided to climb Mount Everest. A lot of people do that—I know that they queue on it—but I have no great ambition to do it. With great respect, the Government will need to think very hard about what they believe students, student unions and all these kinds of bodies, which all exist and may well be doing all kinds of things, can do. They will also need to think about whether it is prudent on the part of a legislature to feel that the bodies that I have described can fulfil the role that the noble Earl, Lord Howe, described to us on Monday—namely, to have thought it all through, taken prudent decisions and come to a conclusion about how to proceed.

My final point is this: of course, it may be that all 67,000 of them will not conclude that they are going to do awful things, but it is still a very small percentage that will create a very large number. That, I am afraid, is something that we have not worked out at all thoroughly and that cannot be made to work through this Bill in the way that is described.

Baroness Fox of Buckley (Non-Afl): My Lords, I thought long and hard about how to approach this debate because I support the autonomy of students to organise separately without interference, not just the academic autonomy that we have talked about—although I would like that. I also appreciate the points that have just been made about students not being excluded from collegiate atmosphere; you want them to be involved in it. On reflection, though, I think that student unions need to be subject to this obligation to secure free speech. However, I appreciate what has just been said about the difficulties in that; I have no solutions but I want to raise some of the issues.

One of those issues is that student unions have become the power brokers of free speech in the new free speech wars on campus. That is the reality of the situation. They can—and often do—withhold affiliation for student societies on the grounds that they disapprove of their views. It makes them a powerful body in this discussion.

One story that really shocked me was when Kevin Price, a Labour councillor who was also a porter at Clare College, resigned from Cambridge City Council when he felt that his conscience could not allow him to vote for a Liberal Democrat Motion that began, "Trans women are women. Trans men are men". I am not saying that to make a point; these are the facts of the matter. When they learned about his actions, student activists at Clare College, with the support of the college union—I confess that I do not know about Oxbridge because I went to Warwick, but I know that these are

not necessarily student unions; my point is that I get confused—held a campaign demanding that this man resign as a porter. They described him as

"unfit both to hold public office and to be in a position of responsibility over students".

They called him a bigot and a "potential risk" to trans students.

This campaign went on for some time. Nothing happened in the end—although, needless to say, it was very unpleasant for Mr Price—but here were student activists demanding that a member of staff, and not even a member of the academic staff, be sacked. I just think there is something about that story that we can recognise.

The only other story I want to tell involves a group of students at Sheffield University who tried to set up a free speech society in February 2020. When they applied to the student union, their application was declined. Theirs is not the only example of this, by the way; it happened at LSE, which got there eventually, and at Leeds University as well.

The group from Sheffield appealed to the student union. They won—they had some outside back-up—but were told that the student union had identified that the free speech society was on a "red risk list". This meant that officers would have to attend risk assessment training and that they could not invite any speakers on to campus without first having to submit a list of prospective speakers to the student union three weeks ahead of time for full and final approval.

That is one of many stories that any of the people who have done work on this will tell you. I have been involved in lot of them. Students have contacted me, either through a free speech union or through any number of different activist groups. Despite what the noble Lord, Lord Triesman, asked—"How will all these societies cope?"—I assure him that they are already having to cope with a lot of bureaucratic nonsense if they want to invite anyone on to campus to speak, and it is the student unions demanding it.

I once went and spoke at a student event with 250 people. I was giving a lecture on free speech. By the time I arrived at the event, the students who had invited me—remember, these were 19 year-old kids who had set up a free speech society—looked ashen as if they had gone through a terrible experience. They had because they had had so much trouble about inviting me, but I did not know that at that point. They looked as if they were in trauma. When the event was going on, there were three people sitting in the front row with crossed arms and writing notes. I thought that they did not look friendly. I asked afterwards who they were and was told that they were student union officers who had come in to check what I was talking about to make sure that I did not breach any rules. That was disconcerting.

I then went to the bar and the same three people sat at the table next to us. I said, "Do you want to join us?" They said no, and then they sat at their table in silence. It was a bit like the Stasi keeping their eye out. The students who had invited me said, "That's what they do. It's an intimidation tactic"—and it really was intimidating, by the way. I am an old hand and I found it intimidating, so imagine if you are 19.

The outcome of the event was that I did not get them into too much trouble but it was felt that it was too near the mark, so the students had to go on training courses and all the rest of it. The outcome—this is the significant bit—was that the three people who had set up the free speech society at that university said that they were going to drop out of politics because they could not cope with the student union. They did not want the hassle. They had really enjoyed my speech but it was like an ordeal. As it happens, the Committee will be unsurprised to know that this has happened to a lot of students who have invited me to speak, to such an extent that I now warn them off from inviting me to speak and say, "Look, you don't want the hassle, to be frank. It will cause you a lot of hassle." So I do not get cancelled before I arrive because I know that it is probably not worth putting the kids through that.

The main reason why I am telling the Committee all this is that it is the student unions that are implementing all this. In that sense, my collegiate feeling towards student unions have evaporated somewhat, but my collegiate feelings towards those students who want to be politically active have extended. I am hoping that, by incorporating student unions and putting free speech at the forefront, this Bill might help students to be free to organise societies as they wish.

Lord Smith of Finsbury (Non-Afl): My Lords, I should probably have declared an interest when I spoke earlier, not just as the master of Pembroke College, Cambridge, but as the chair of the trustees of the Cambridge Union Society. It is not a student union. It has been a place of free speech since 1815 and continues to be so. The student officers of the Cambridge Union Society regularly invite highly controversial speakers with whom there will be substantial disagreement among the student body, but the whole point is to hear views and debate them. That is how these things ought to happen.

8 pm

I have a lot of sympathy with the point made by the noble Lord, Lord Triesman, that universities are not just about the growth and development of knowledge, wisdom and understanding, and the exploration of ideas. That is not just what universities are about. They are also about helping students to learn about life, to learn about being part of a community and to learn about how to live, work and play with other people as part of that community. That is also a crucial part of the learning that comes from a university experience, and we should never forget that.

Having said all that, I absolutely understand that there needs to be a duty in the Bill—if we are going to have the Bill—to promote and facilitate free speech placed upon student unions. However, I much prefer the wording set out in the amendment by the noble Baroness, Lady Garden, to what is in the Bill as it stands. It usefully places the duty of free speech on student unions but in a slightly less prescriptive form than what is in the Bill itself. I ask the Minister to go away and think about whether that could be done in a rather better way than appears at the moment to be the case in the Bill, bearing in mind that we accept that there should be a purpose of free speech embedded in what student unions are all about.

Baroness Thornton (Lab): My Lords, my main regret about this debate is that my noble friend Lord Triesman did not mention the London School of Economics, which is where I went. While we were having this debate, I looked it up and there are hundreds of societies at the LSE. I enjoyed the fact that, if you look at the history of the student union—the student union at the LSE is the oldest in the country—you find that I feature in there, having led occupations of the director's studio for the nursery campaign in the early 1970s. I was trying to think how on earth we would have coped with this legislation when I was a member of the student union executive at the London School of Economics in the early 1970s.

My noble friend Lord Triesman was quite right. As the noble Lord, Lord Smith, said, I do not think what is in the Bill at the moment meets the test of what will actually work and be able to be delivered by our student bodies. It is too complex. My understanding is that student unions also have the Charity Commissioners as part of their regulation, so that adds extra complexity to this issue.

I think I agree with other noble Lords that the Government need to look at this issue again. The noble Baroness's amendment might provide a good basis for something that is simpler and which can actually be delivered by 18 and 19 year-olds. I look at the Bill team, and some of them are not that far away from having been rather young. They need to think back to what they would have done in their student days and how they might have been able to protect the right of freedom of speech then.

This is one of those occasions when the Government might need to look at this again and ask whether it will work as it is intended. Have discussions taken place with student union representatives in a process of asking them how this will work and whether it will be able to be carried through?

In case noble Lords are looking it up, my name does not appear but I did lead the occupation of the director's studio for the nursery campaign.

Earl Howe (Con): My Lords, Amendment 47 in the names of the noble Baroness, Lady Garden of Frognal, and her colleague the noble Lord, Lord Wallace of Saltaire, seeks to change the way in which student unions are regulated under the Bill.

This amendment would remove the duties on student unions in Clause 3, and instead add them to the duties on providers under the Education Act 1994. The addition of these requirements to that Act would mean that the duty would be on the governing body of the provider to

"take such steps as are reasonably practicable to secure"

the various requirements set out in the amendment and no direct duties would be imposed on student unions. Amendment 47 would therefore make Clause 7 unnecessary. I note the wish of the noble Baroness to remove the clause from the Bill altogether.

Extending the legislative framework to student unions at approved fee cap providers under Clause 3 is a significant step, which fills a gap in the current legislative framework. Freedom of speech on our campuses is an essential element of university life. Student unions play a vital role in this, providing services and support, representing their members and working closely with their provider. It is important that these bodies are accountable for their actions.

There are examples of where student unions have failed to secure freedom of speech. Notably, the student union at Swansea University failed to support members of the university's Feminist Society, who were threatened and abused for supporting Kathleen Stock—a name I am sure we recognise by now. Rather than protect their freedom of speech, the student union removed the society's email account and profile page from its systems, denying this group an important platform for reaching others. This incident illustrates the need for action to ensure that student unions are subject to duties on freedom of speech, since we cannot allow that sort of behaviour to continue unchallenged and unregulated.

I noted the support for the amendment expressed by the noble Lord, Lord Smith of Finsbury, but if we took the approach proposed in Amendment 47, the duty would be on the provider to take reasonably practicable steps to secure the various freedom of speech obligations, as I have said, but there would be no requirement on student unions to comply with those requirements. If they did not, this would potentially only result in an internal dispute with the provider.

Although the Charity Commission is involved in regulating student unions which are charities, that is only in respect of charity law. There would also be no oversight of whether or not providers comply with the duty imposed on them. This means that there would be no enforcement or regulatory action taken if they failed to do so.

Finally, and perhaps most importantly in the context of the new regime that this Bill will establish, there would be no means for individuals whose freedom of speech has been improperly restricted to seek recompense. Since the Bill will impose new duties on student unions, it is also necessary that mechanisms are in place to ensure that compliance with the freedom of speech duties of student unions is monitored effectively and that action is taken if those duties are infringed upon.

The noble Lord, Lord Triesman, read into these provisions a burdensome requirement placed on every single student society in every university in England. I make it clear to him that the duties are on student unions and not student societies, even though they may be affiliated with their student union. In practice, this means that only the student union—that is to say, one union per provider—will be regulated.

Clause 7 therefore extends the regulatory functions of the Office for Students so that it can regulate these student unions. This new provision will require the OfS to monitor whether student unions are complying with their duties under new Sections A5 and A6 as inserted by Clause 3. If it appears to the OfS that a student union is failing or has failed to comply with its duties, it will be able to impose a monetary penalty.

Baroness Thornton (Lab): I need some clarification from the noble Earl. I suspect that most of the things that have caused problems have been organised by the societies and all the organisations that are part of the student union. At the LSE, we had a rugby club that

invited strippers to its annual dinner—you can imagine how well that went down—but it was not the student union that dealt with that. It was not its job to deal with what the rugby club was doing. This was a very long time ago, but lots of the things that we have been calling in aid in this Bill have not been organised by student unions. Some will have been, but most will have been organised by their constituent parts—the societies and other parts of the student union.

Earl Howe (Con): I take the noble Baroness's point. Those societies will be expected to abide by a code of practice which will be promulgated to all students. While the societies will not be subjected to the full extent of the regulation that I have been talking about, expectations will be placed on them. I cannot yet tell the noble Baroness what will be contained in the code of practice but, as I have mentioned, that code will receive appropriate publicity.

Lord Triesman (Lab): To be very clear, I have no difficulty at all with the concept that people in student unions who impede the free speech and academic freedom of others must be dealt with. For the record, I do not have a second's question about that. I just want us to do things in this Bill that we can actually do. I wonder whether the noble Earl, Lord Howe, might discuss this offline with some of us who have helped to run these kinds of institutions in the past to see whether there is a practical solution to the problem that my noble friend has just illustrated. I do not know about the LSE, but I will lay odds that most student unions find out what their rugby clubs have done months after the event, if they find out at all.

Baroness Smith of Newnham (LD): They might find out in the newspapers.

Earl Howe (Con): I would hope that a rugby club would not be responsible for inviting somebody to talk about gender politics.

Lord Collins of Highbury (Lab): The Minister is completely wrong about that. It is highly likely that they would, because there is a highly controversial issue around gender, sex and sport. I think he does not fully understand the range of issues that can be addressed by a huge range of societies in the university community.

Earl Howe (Con): I bow to the noble Lord's superior knowledge on this. If noble Lords will allow, I will conclude.

I mentioned the possibility of a monetary penalty, which was raised by the noble Baroness, Lady Garden. The power to impose a monetary penalty is based on the existing enforcement regime for higher education providers and is intended, obviously, to encourage compliance.

New Section 69B will also require the OfS to maintain and publish a list of student unions at approved fee cap providers. This will make it clear which student unions the OfS has been informed by its providers are subject to the duties in new Sections A5 and A6. It will also require those student unions to provide the OfS with information it may require for the performance of its functions. These are new regulatory functions, intended to ensure compliance by student unions with their new duties. Together with Clause 3, this clause will ensure that freedom of speech is protected by not just higher education providers but student unions.

8.15 pm

The Bill places clear, direct duties on student unions and gives the OfS a mechanism to regulate and enforce them. I hope noble Lords will agree that the Bill as currently drafted represents the best way of regulating student unions as regards freedom of speech.

Baroness Garden of Frognal (LD): I thank the Minister very much for his reply and all those who have spoken in this short debate. There are more issues that we might need to bring back on Report, but meanwhile I beg leave to withdraw my amendment.

Amendment 47 withdrawn.

Clause 3 agreed.

Committee adjourned at 8.16 pm.