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GENERAL COMMITTEES

Public Bill Committee

DEFENCE REFORM BILL

Seventh Sitting

Thursday 10 October 2013

(Morning)

CONTENTS

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Monday 14 October 2013

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: Mr Graham Brady, †Albert Owen

† Brazier, Mr Julian *(Canterbury)* (Con)
† Brown, Mr Russell *(Dumfries and Galloway)* (Lab)
† Colvile, Oliver *(Plymouth, Sutton and Devonport)* (Con)
Docherty, Thomas *(Dunfermline and West Fife)* (Lab)
Donaldson, Mr Jeffrey M. *(Lagan Valley)* (DUP)
† Dunne, Mr Philip *(Parliamentary Under-Secretary of State for Defence)*
† Ellwood, Mr Tobias *(Bournemouth East)* (Con)
† Gilbert, Stephen *(St Austell and Newquay)* (LD)
† Hamilton, Mr David *(Midlothian)* (Lab)
† Harvey, Sir Nick *(North Devon)* (LD)
† Hinds, Damian *(East Hampshire)* (Con)
† Jones, Mr Kevan *(North Durham)* (Lab)
† Lancaster, Mark *(Lord Commissioner of Her Majesty's Treasury)*
† Mordaunt, Penny *(Portsmouth North)* (Con)
† Pawsey, Mark *(Rugby)* (Con)
Phillipson, Bridget *(Houghton and Sunderland South)* (Lab)
† Seabeck, Alison *(Plymouth, Moor View)* (Lab)
† Wheeler, Heather *(South Derbyshire)* (Con)
† Woodcock, John *(Barrow and Furness)* (Lab/Co-op)

Georgina Holmes-Skelton, *Committee Clerk*

† attended the Committee

Public Bill Committee

Thursday 10 October 2013

(Morning)

[Albert Owen *in the Chair*]

Defence Reform Bill

11.30 am

The Chair: I remind hon. Members that this sitting will finish at 1 pm.

Clause 6

Status of contractor

Alison Seabeck (Plymouth, Moor View) (Lab): I beg to move amendment 11, in clause 6, page 5, line 28, after 'State' insert

', in accordance with any instruction or guidance that the Secretary of State may provide.'.

We tabled the amendment because we continue to have concerns about the freedoms apparently given to the contractor. While the amendment is probing, it is important that we understand the reasoning behind the clause, which I am sure the Minister will set out clearly when he speaks. We touched on a related area on Tuesday, but could the clause effectively allow a renegotiation of existing contacts by the GoCo contractor, whether acting in the name of the Secretary of State or not? Does the Minister foresee that creating any uncertainty for industry? Will the GoCo contractor, for example, have free rein in the way it carries forward existing contracts or will it be expected to follow the Secretary of State's guidance? If so, how will that be ensured? That is part of the reason for the amendment's wording. The status of the contractor and the signals sent to it about the level of discretion it may have are important.

Should companies with existing contracts or terms of business agreements be worried? Few contracts have yet been renegotiated, although the Minister highlighted one that was announced at the Defence Security and Equipment International event held at ExCeL London. Can we, as some of the Bill's proposals suggest, expect a wave of renegotiations once the GoCo is in place?

Mr Kevan Jones (North Durham) (Lab): Does my hon. Friend think it would help if, as I suggested at the previous sitting, the Minister published a list of contracts that have been renegotiated and of possible future targets for renegotiation?

Alison Seabeck: My hon. Friend made many important points on Tuesday and I hope the Minister was listening. The suggestion my hon. Friend has just made would enable us better to understand the expectations of the GoCo. Businesses certainly need to understand what particular contracts are likely still to be on the table for negotiation once the GoCo is in place.

Clause 6(2) and (3) give the contractor the power to exercise the powers and rights of the Secretary of State and to fulfil the Secretary of State's duties and liabilities under existing contracts up to the vesting date, which the explanatory notes describe as the date that

"the contractor first assumes responsibility for defence procurement services".

The clause also makes it clear that the Secretary of State cannot be penalised for allowing the contractor to exercise such duties or for any liabilities that may occur in its doing so. Perhaps specifying that the use of such powers must be, as our amendment suggests,

"in accordance with any instruction or guidance that the Secretary of State may provide"

would enable a future Secretary of State to keep a degree of closer control.

It is entirely possible, however, that the Minister is about to leap to his feet to say that there is no need for the amendment because subsection (4) is the catch-all. If so, I will withdraw the amendment.

The Parliamentary Under-Secretary of State for Defence (Mr Philip Dunne): It is a pleasure to be back at the Committee for our important deliberations. I am grateful to the hon. Lady for tabling an amendment to clause 6, because it allows us to have a brief discussion about the clause's intent.

In response to the hon. Lady's specific questions, the clause's intent is not to open up the opportunity to renegotiate contracts. The Department takes the view that several of the contracts entered into under the previous Administration were not as rigorously in favour of taxpayer value for money as we think we can secure. A number of renegotiations have taken place, therefore, starting with the largest contracts, and some are ongoing. We are not, however, adopting the approach of renegotiating all contracts—there is a large number of contracts, but only a small number in which there is scope to make improvements. In particular, I draw the Committee's attention to some of the private finance initiative contracts—throughout Government we are looking to see what we can do about renegotiating certain clauses, to make them better value for taxpayers.

Mr Tobias Ellwood (Bournemouth East) (Con) *rose—*

Mr Jones: *rose—*

Mr Dunne: I will give way to my hon. Friend and then to the hon. Gentleman.

Mr Ellwood: I shall make a brief intervention before the hon. Member for North Durham steps in and takes over the Committee. If the Minister does not have the answer to my question, perhaps he will write to me. Will there be a difference in the size of contracts from a financial perspective? For anything less than £5 million, for example, will a small or medium-sized enterprise be required to provide a different level of information in comparison with the larger contracts? Smaller SMEs do not necessarily have the legal capabilities to provide the same amount of information.

My second point was to do with challenging the contract. My understanding—forgive me if I have misinterpreted some of the press comments—is that a

contract could be challenged from a price perspective for up to two years after the building works have actually started. That needs to be looked at, if so.

Mr Dunne: We are in danger of heading off at a tangent, away from the object of the clause, which is to allow a GoCo—if that is where we end up—to act as an agent on behalf of the Secretary of State in negotiating contracts. Our intent is not to open up as a matter of course contracts that are already in place, and it is highly unlikely, unless there is a particular abuse in a contract that we think could be remedied through renegotiation. For example, small or medium contracts with SMEs are unlikely to be subject to a renegotiation. For renegotiation, we are considering the large contracts in which a substantial saving could be made.

On Tuesday, I may have misled the Committee, inadvertently, by referring to the contract that I announced at DSEI as a renegotiation of an existing contract. It was actually a renegotiation of a new contract at the point at which the previous contract, for support of helicopter engines, had come to a natural break. It is a good example, because that is the approach we are taking more widely: where there is a natural break in a contract, because it terminates or because there is a break clause, we look to renegotiate the terms of the successor contract on a more favourable basis. That is what happened in that case.

Mr Jones: That clarification is most useful. Obviously, when contracts come up for renegotiation, they should be renegotiated—all Governments do that.

Will the Minister publish the list of contracts that are earmarked for renegotiation, or whatever he now calls it? In the budget for this year, there is an earmarked figure of £700 million to be saved against renegotiation of contracts. When the GoCo comes into being, will it be renegotiating contracts, rather than the Ministry of Defence?

Mr Dunne: I shall resist the hon. Gentleman's entreaties to publish a list of things that we might do in the future. I am happy to consider producing a list of contracts that have been renegotiated, which has been the thrust of his questions up until now, but I will not look forward and give him a list of things that we might renegotiate, because we might not do so.

Mr Jones: There are two issues there. First, why has the Minister been reluctant to answer my parliamentary questions so far on the contracts that have been renegotiated? Secondly, how are Parliament, the Opposition or Select Committees in a position to take a view on whether the £700 million figure earmarked in the so-called balanced budget is achievable?

Mr Dunne: It is not the purpose of this Committee to determine whether an individual budget figure for the MOD will be achievable. We are talking about setting up the structures for how the procurement would be conducted in future. In the event that we go down a GoCo route, it would be acting on the instructions of the Secretary of State, as we discussed on Tuesday, both to enter into contracts and to implement MOD policy on the instruction of the Secretary of State.

Mr Jones: Does that include renegotiation? If so, it is relevant that the Committee should know which contracts the GoCo will renegotiate. It is quite important not just for procurement but for future defence, especially if the so-called balanced budget that the Secretary of State has introduced is reliant on £700 million of savings from renegotiation of contracts.

Mr Dunne: As the hon. Gentleman knows, the Government are reaching new levels of transparency in making available to the public and the Opposition details of contracts that have been concluded. We are not in the business of revealing information about negotiations that are ongoing because they are commercially sensitive. We will not provide information, forward looking, on contracts that have been signed. Any contract over a value of £25,000 is already published. One reason the hon. Gentleman has been getting the answers that he has to his parliamentary questions is that he has been seeking to encourage civil servants in the Ministry of Defence to spend much of their precious time researching information that is readily available on the internet. His researchers could do that work for him.

Oliver Colvile (Plymouth, Sutton and Devonport) (Con): Can my hon. Friend tell us how much that might have cost the MOD?

Mr Dunne: I am grateful to my hon. Friend for reminding me—

The Chair: Order. I ask the Minister to stick to the clause.

Mr Dunne: Within the context of the clause, Mr Owen, responses to parliamentary questions that might cost more than £600 are routinely refused. I am afraid that in some cases that has applied to questions from the Opposition Front Bench to this Department.

Mr Russell Brown (Dumfries and Galloway) (Lab): I thank the Minister for clarifying the statement he made on Tuesday. Is there any element of the renegotiation, on which he inadvertently gave us misinformation the other day, where savings were made?

Mr Dunne: As the hon. Gentleman will remember from my remarks on Tuesday, I specified a saving to the Department of £300 million over the next six years through the terms of the new contract, compared with the contract that it replaced. So that was a very material saving. It will not go all the way to meeting the figure the hon. Member for North Durham referred to because it lasts for six years; but if he divides the number by six, he will find that it accounts for £50 million of the £700 million he is looking for this year.

Mr Jones: There is another £650 million to go. I know the Minister was not in the shadow Defence team when his party was in opposition, but I think this is a bit rich, given that umpteen thousand parliamentary questions were tabled then daily. Anyway, getting back to the point, Mr Owen, on the question of transparency—

Mr Ellwood: Will the hon. Gentleman give way?

Mr Jones: This is an intervention. The hon. Gentleman has been here long enough to know that he cannot intervene on an intervention.

Mr Ellwood: The hon. Gentleman was going on for so long I thought it was a speech.

Mr Jones: It is up to the Chair to decide that, not you, Mr—*[Interruption.]*

The Chair: Order.

Mr Jones: I am making an intervention, if people will allow me to continue. The Minister hides behind commercial confidentiality. I am not asking him for details of the individual negotiations; I would just like an indication of the types of contract or areas that are being looking at. What is commercially sensitive about that?

Mr Dunne: I can happily respond to the hon. Gentleman as I have already. I have indicated that we are looking at the largest contracts and at the PFI contracts; those are the two specific areas. Let me now make some progress.

Clause 6 provides the contractor with the authority to act on behalf of the Secretary of State in respect of existing contracts, and describes the extent of that authority. Given the complex nature of the role the contractor will play, it is essential to establish publicly from the outset in clear and unambiguous terms the extent of the contractor's authority.

11.45 am

The clause provides the contractor with authority to act on behalf of the Secretary of State in relation to DE&S contracts awarded before vesting day. That is important because most existing defence contracts are silent on that issue with respect to a GoCo, as that was not in contemplation when the contracts were entered into. The clause removes any doubt about as to whether roles and responsibilities under a contract can be performed by a contractor on the Secretary of State's behalf.

The provisions of the clause apply to contracts entered into by the Secretary of State before vesting day to give the contactor clear authority to act where a contractor acting on behalf of the Secretary of State to deliver defence procurement services was not mentioned or envisaged in the contract. Without that, the contractor's authority could be subject to challenge. To put that in context, DE&S manages many thousands of contracts—when I last asked, some 30,000 were extant. Some are of short duration, but many will last several years. The clarity provided by the clause obviates the need for the renegotiation of each contract, which might be required in the absence of this power.

The intention is that the contractor's employees will enjoy similar authorities to those granted to DE&S civil servants, to the extent that they are necessary or expedient for the delivery of the defence procurement services contract. For any contracts entered into after vesting day—new contracts—it will be incumbent on the GoCo to ensure that such contracts include the necessary rights and authorities that it will require as the Ministry of Defence's agent for defence procurement services.

The amendment would ensure that the GoCo took on such tasks only

"in accordance with any instruction or guidance that the Secretary of State may provide."

Its tabling was prompted, as the hon. Lady explained, by a desire to ensure that the contractor does not misuse any rights and powers under the contracts it carries out on behalf of the Secretary of State. However, as she foresaw, the GoCo will act as agent for the Secretary of State only under those contracts and will have no unilateral power or ability to take action or do anything outside the terms of the contracts. The provisions already apply strict rules around the contractor's permission to act, including restrictions on exercising waivers, terminating contracts, providing indemnities or pledges of credit, settling claims or legal disputes, or accepting additional risk back on the Government. The GoCo contract will make it clear that the GoCo is permitted to act only under an explicit tasking order system, and where explicit investment approval has been provided by the Government.

Mr Ellwood: The Minister has made an important statement. Many of the amendments are probing, and therefore valid, and they suggest that the Bill should be more detailed on the relationship between the GoCo and the companies, but my hon. Friend has made it clear that such detail is not necessary in the Bill as it will be apparent in the contracts set up by the Secretary of State.

Mr Dunne: I am glad that my hon. Friend has raised that issue. He is quite right. The Bill is enabling legislation. The draft contract that has been provided by the Ministry of Defence to the bidding consortia is extensive—so much so that I have not been able to count the number of pages in it, but they run to close to 1,000. It covers a host of aspects that the GoCo contractor will have to take on. Of course, it is a draft, so it has to be negotiated with the consortia, but it covers in great detail many of the concerns that have been raised by the Committee.

Mr Jones *rose—*

Mr Dunne: I know what the hon. Gentleman is about to say, and the answer is that he is not going to get sight of the draft contract at this stage because it is in the process of negotiation so it is commercially sensitive. Once it has been concluded, it will be available for public review, like other contracts, in due course.

Mr Jones If it has been offered to both consortia I do not understand why it is commercially sensitive. I accept that it is in draft form, but if the Committee and the House are to be reassured about some of the issues around this enabling legislation, it would be a good idea to publish that document, even if it has 1,000 pages. I am sure that some of us are capable of reading 1,000 pages of contract.

Mr Dunne: I have just explained that it is not our intent to publish that document at this stage, but we have committed to publish it at the appropriate point. That is normal Government practice that applied when the hon. Gentleman was a Defence Minister.

I want to conclude my comments on the clause by responding to one of the questions asked by the hon. Member for Plymouth, Moor View about whether contractors with existing contracts should be worried that the power will give the GoCo greater authority to renegotiate those contracts. I hope that I have reassured her that that is not our intent, other than in the larger areas, where, frankly, our contractors are already aware of where we are looking to renegotiate contracts. Such instances are rare and infrequent. I hope she will withdraw her amendment.

Alison Seabeck: The Minister's response, particularly to the questions that were raised, is interesting. I share the concern of my hon. Friend the Member for North Durham about confidence in contracts and the need to have sight of that document. Equally, I understand why the Minister responded in the way he did. Will he give us perhaps a ballpark date for when the document is likely to be in the public domain? Will that be on a time scale that enables us to consider it in relation to whether a GoCo or DE&S-plus is the best option? Will it be public before the end of the assessment phase?

To return to the examples given, the Minister clearly stated that the Government are considering renegotiation for big programmes and PFI projects. That is fine, but will that be written into a contract or will it fall within the remit of the clause? Will there be an assumption that those are the projects that the contractor is expected to renegotiate? Will a contractor be able to ignore such an assumption?

Mr Dunne: We do not want to fetter the ability of the Secretary of State or the Ministry to consider contracts. Our general policy is not to re-open existing contracts. If we have a contractual undertaking, we intend to abide by it. There are certain particularly large contracts and certain contracts set up under PFI where it is appropriate, especially if they endure for many years, to look at them again. It is not appropriate to fetter the Secretary of State's ability to do that.

Alison Seabeck: I thank the Minister for that reply, and I understand his point, but he is, in part, making our point. I understand that we do not want to fetter the Secretary of State, but might there be a circumstance where guidance was required from him, because it appeared that the GoCo was starting to go through every screw, nut and bolt, down through every single contract? The GoCo could do that, which, in part, is the reason for tabling our probing amendment. We want to ensure that there is no way that that could happen without some referral back to the Secretary of State.

Mr Dunne: I can absolutely assure the hon. Lady that that process could not be undertaken without the Secretary of State being content for it to happen. The GoCo will act as the agent of the Secretary of State through the MOD. It will not do anything unless it has been approved by him or his officials.

Alison Seabeck: That is a very broad and, to some degree, brave statement, because I suspect that things will happen without the knowledge of the Secretary of State, although perhaps not intentionally. On that basis, and with the good will behind the Minister's response, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 6 ordered to stand part of the Bill.

Clause 7 ordered to stand part of the Bill.

Schedule 2

RESTRICTIONS ON DISCLOSURE OR USE OF INFORMATION

Alison Seabeck: I beg to move amendment 9, page 34, leave out from line 5 to line 7 on page 36 and insert—

'Information to which Schedule applies

1 (1) This Schedule applies to information if—

(a) it was obtained by the Secretary of State or the contractor under or by virtue of this Part or otherwise in connection with the carrying out of functions under or by virtue of this Part, or is derived to any extent from information that was so obtained, and

(b) it relates to the affairs of an individual or to a particular business,

(2) Information ceases to be information to which this Schedule applies—

(a) in the case of information relating to the affairs of an individual, when the individual dies, and

(b) in the case of information relating to a particular business, on the earlier of—

(i) the day on which the business ceases to be carried on, and

(ii) the end of the period of 30 years beginning with the date on which the information was obtained by the Secretary of State or the contractor.

Offence of disclosing information

2 (1) A person commits an offence if—

(a) the person discloses information, or

(b) information is disclosed or lost as a result of the person's failure to prevent the disclosure or loss through measures taken under sub-paragraph (2), and

(c) it is information to which this Schedule applies.

(2) A person holding information to which this Schedule applies must take adequate technical and organisational measures against unauthorised or unlawful disclosure of, and against accidental loss of, the information.

(3) Sub-paragraph (1) is subject to paragraphs 4 to 6.

(4) A person who is guilty of an offence under sub-paragraph (1) is liable—

(a) on summary conviction, to imprisonment for not more than 12 months or to a fine not exceeding the statutory maximum (or both), or

(b) on conviction on indictment, to imprisonment for not more than two years or to a fine (or both).

(5) The reference in sub-paragraph (4)(a) to 12 months is to be read as a reference to 6 months—

(a) in its application to England and Wales in relation to an offence committed before the date on which section 154(1) of the Criminal Justice Act 2003 comes into force, and

(b) in its application to Northern Ireland.

(6) If section 85(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force on or before the day on which this Act is passed—

(a) Section 85 of that Act (removal of limit on certain fines on conviction by magistrates' court) applies in relation to an offence under sub-paragraph (1) on and after that day as if it were a relevant offence (as defined in section 85(3) of that Act), and

(b) regulations described in section 85(11) of that Act may amend, repeal or otherwise modify sub-paragraph (43)(a).

Disclosure with consent

3 Paragraph 2(1) does not apply to a disclosure made with the consent of—

(a) the individual, or

(b) the person for the time being carrying on the business (or, where there are two or more such persons, all those persons).

Disclosure of information already available to public

4 Paragraph 2(1) does not apply to information that has been made available to the public by being lawfully disclosed in circumstances in which, or for a purpose for which, disclosure is not precluded by this Schedule.

Other permitted disclosures

5 (1) Paragraph 2(1) does not apply where information is disclosed—

(a) for the purpose of facilitating the carrying out of functions of a Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975),

(b) for the purpose of facilitating the carrying out by the SSRO of any of its functions,

(c) for the purpose of enabling or assisting an authorised person to carry out any of its functions,

(d) for the purpose of enabling or assisting a contractor to provide defence procurement services to the Secretary of State by virtue of arrangements mentioned in section 1,

(e) to the person from whom the information was obtained or, where that person is associated with one or more other persons, to any such associated person,

(f) by a person to whom the information is disclosed by virtue of paragraph (e),

(g) under the Freedom of Information Act 2000 where there is a requirement to disclose notwithstanding available defences,

(h) in connection with the investigation of a criminal offence or for the purposes of criminal proceedings,

(i) for the purposes of civil proceedings,

(j) in pursuance of an EU obligation,

(k) for the purpose of facilitating the carrying out by the Comptroller and Auditor General of functions, or

(l) in anonymised form.

(2) In sub-paragraph (1)(d), "contractor" and "defence procurement services" have the same meanings as in Part 1.

(3) For the purposes of sub-paragraph (1)(l), information is disclosed in anonymised form if no individual or other person to whom the information relates can be identified from it.

(4) For the purposes of sub-paragraph (1), disclosures under paragraph 5(1)(a) to (d) and paragraph 5(1)(h) to (k) must be strictly necessary for the purpose, made in confidence and paragraph 2(1) applies to the recipient of that disclosure.

(5) Prior to making a disclosure under paragraph 5(1)(a) to (d) or paragraph 5(1)(h) to (k), the individual or business to which the information relates must be notified of the intended disclosure and must have the opportunity to challenge that disclosure.

Power to prohibit disclosure

6 (1) The Secretary of State may by order—

(a) prohibit the disclosure of information to which this Schedule applies;

(b) provide that a prohibition imposed by virtue of paragraph (a) is subject to exceptions corresponding to those set out in paragraphs 3 to 5 (other than paragraph 5(1)(g));

(c) provide that a person who discloses information in contravention of such a prohibition commits an offence punishable—

(i) on summary conviction, with imprisonment for not more than 12 months or with a fine not exceeding the statutory maximum (or both), or

(ii) on conviction on indictment, with imprisonment for not more than two years or with a fine (or both).

(2) The reference in sub-paragraph (1)(c)(i) to 12 months is to be read as a reference to six months—

(a) in its application to England and Wales in relation to an offence committed before the date on which section 154(1) of the Criminal Justice Act 2003 comes into force, and

(b) in its application to Northern Ireland.

(3) An order under sub-paragraph (1) may repeal paragraphs 2 to 5.

(4) If section 85(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force on or before the day on which this Act is passed—

(a) section 85 of that Act (removal of limit on certain fines on conviction by magistrates' court) applies in relation to the power under sub-paragraph (1)(c)(i) on or after that day as if it were a relevant power (as defined in section 85(3) of that Act), and

(b) regulations described in section 85(11) of that Act may amend, repeal or otherwise modify sub-paragraph (1)(c)(i).

(5) An order under sub-paragraph (1) is to be made by statutory instrument.

(6) A statutory instrument containing an order under sub-paragraph (1) may not be made unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament.

Authority to inspect measures to protect information

7 (1) A person holding information to which this Schedule applies must permit an industry body, acting on behalf of the owner of that information, within six months of the relevant date and subsequently every three years, on reasonable prior written notice and on reasonable confidentiality and other undertakings, to audit and inspect the person's technical and organisational measures for protecting that information in compliance with this Schedule.

(2) A person holding information to which this Schedule applies must comply with all reasonable requests or directions by the industry body to enable the industry body to verify that the person is in compliance with their obligations under this Schedule.

(3) The industry body must provide a report of its findings on each inspection to the Secretary of State within three months of that inspection. The industry body may publish each report within six months of that inspection and must include with each report any response made by the Secretary of State to that report.'.

The Chair: With this it will be convenient to discuss the following:

Amendment 12, page 45, line 10, in schedule 5, leave out lines 10 and 11 and insert—

'(1) A person commits an offence if—

(a) the person discloses information, or

(b) information is disclosed or lost as a result of the person's failure to prevent the disclosure or loss through measures taken under sub-paragraph (2), and

(c) it is information to which this Schedule applies.

(2) A person holding information to which this Schedule applies must take adequate technical and organisational measures against unauthorised or unlawful disclosure of, and against accidental loss of, the information.'.

Amendment 13, page 45, line 40, in schedule 5, after "being" insert "lawfully".

Amendment 14, page 46, line 16, in schedule 5, leave out

'in response to a request'.

Amendment 15, page 46, line 16, schedule 5, at end insert

'where there is a requirement to disclose notwithstanding available defences,'.

Amendment 16, page 46, line 28, in schedule 5, at end add—

'(1) For the purposes of sub-paragraph (1), disclosures under paragraph 5(1)(a) to (d) and paragraph 5(1)(h) to (k) must be strictly necessary for the purpose, made in confidence and paragraph 2(1) applies to the recipient of that disclosure.

(2) Prior to making a disclosure under paragraph 5(1)(a) to (d) or paragraph 5(1)(h) to (k), the individual or business to which the information relates must be notified of the intended disclosure and must have the opportunity to challenge that disclosure.'.

Amendment 17, page 47, line 13, in schedule 5, at end add—

'Authority to inspect measures to protect information

7 (1) A person holding information to which this Schedule applies must permit an industry body, acting on behalf of the owner of that information, within six months of the relevant date and subsequently every three years, on reasonable prior written notice and on reasonable confidentiality and other undertakings, to audit and inspect the person's technical and organisational measures for protecting that information in compliance with this Schedule.

(2) A person holding information to which this Schedule applies must comply with all reasonable requests or directions by the industry body to enable the industry body to verify that the person is in compliance with their obligations under this Schedule.

(3) The industry body must provide a report of its findings on each inspection to the Secretary of State within three months of that inspection. The industry body may publish each report within six months of that inspection and must include with each report any response made by the Secretary of State to that report.'.

Alison Seabeck: I shall stick primarily to schedule 2 and our concerns over the need to strengthen it. May I seek your guidance, Mr Owen? I assume we will discuss schedule 5 in more detail towards the end of our considerations.

The Chair: Yes.

Alison Seabeck: Schedule 2 relates to clause 7. We want the schedule to be amended because it is not strong enough. It obviously reads across to schedule 5 in part 2, where protections are offered to business with regard to the transfer and use of confidential information. The amendments and clauses 7 and 8 have been subject to a lot of debate during the witness sessions and in the intervening period. There is a lot to commend the schedule. The protections on disclosure for audit purposes and between parties are fine and as one would expect, but in paragraphs 4 and 5, where various obligations have been placed on parties, there is a failure to detail any penalties or implications for disclosing protected information. Where are the sanctions for inappropriate behaviour?

Many have asked why this part of the Bill does not match or mirror the response in part 2 as to the penalties that might be imposed. I would welcome hearing the Minister's views on that. We have, perhaps a little crudely, adapted the penalties in schedule 5 and proposed them for schedule 2. He has spoken about the protections that he feels will apply through, for example, data protection legislation, but industry still does not agree, so our objective is to ensure that the obligations on the recipients of the information are clear.

Our rationale is simple: a failure to protect protected information from disclosure should be an offence; disclosure under the Freedom of Information Act should be permitted only where there is a requirement to disclose, notwithstanding available defences; and permitted disclosures need to be clarified as to the extent to which the disclosure is permitted, along with the obligations, if any, on the recipient.

There is also a view that permitting disclosure in an anonymised form should be limited to where the owner or origin of the information cannot be inferred. The authority to inspect processes in relation to any person holding information to which the schedule applies should be added, with a requirement to provide a report to the Secretary of State. The MOD has a wealth of experience in working with highly secret and confidential information and transferring it between parties, yet we are now allowing a further third party, with all the potential we have seen elsewhere for IT systems to be hacked and information leaked or sold on with criminal intent.

It is surely right that the Bill should send a clear signal that, in relation to the business of the GoCos, such offences will be punished. The Secretary of State is, after all, providing the contractor with information to which he was party prior to the vesting date, and to which those businesses would have given him access, because at the time there was no intention of a third party being able to have sight of and make use of that information. If they had known that the clause and schedule were on the horizon, with hindsight they might not have been as open as they were. They certainly need to be reassured that there is every intention to prosecute if there are any breaches specific to the information that will be disclosed if the GoCo comes into being.

We do not believe that the schedule offers the protection that industry feels it needs. We therefore ask the Minister to consider carefully whether the amendment—or a revised amendment, tabled in another place by the Government—might be sensible. I await his response on that, but this is a matter of principle for us and we will probably vote on it.

12 noon

The Chair: Before I call the Minister, I will clarify and repeat that we are dealing with schedule 2. The amendment on which we will vote, if that is the wish of the hon. Member for Plymouth, Moor View, is amendment 9. If she wishes to press for a vote on amendments 12 to 17, which come under schedule 5, that will be dealt with later with schedule 5. It is okay, however, for the Committee to discuss those matters now.

Mr Dunne: Thank you for clarifying that, Mr Owen. May I ask for one further piece of clarification? The hon. Member for Plymouth, Moor View has restricted her comments to amendment 9 only at this point. I take it that she would like to talk to her other amendments before we put that amendment to the vote. If I have got that wrong, I will restrict my comments just to amendment 9 as well.

Alison Seabeck: I spoke just to amendment 9, because the others will come up later.

The Chair: They will come up a lot later, with schedule 5. Is the hon. Lady happy discuss those issues now, because they are for debate at this point, or does she wish to delay that?

Alison Seabeck: I am happy to hear the Minister's response to the amendments tabled, because he will have a view as to whether the key amendment is relevant, or he may put forward an argument that we will listen to.

The Chair: I am grateful. Just for procedural purposes, I encourage the Minister, if he wishes, to consider the other amendments as well. The hon. Lady will then have the opportunity to close the debate and refer to those amendments if she feels it necessary. If she wishes to press her amendments to a vote, we will, however, vote only on amendment 9 today.

Mr Dunne: Thank you, Mr Owen, for making that crystal clear. I will take this opportunity to discuss all the amendments being considered with amendment 9. That may take some time, so I may go on beyond the moment of interruption. Hopefully I will not—we will see how we get on.

Schedule 2, in its current, unamended form, is necessary to allow a GoCo to have access to existing confidential information provided by defence suppliers, which is held by DE&S, so that it can take over management of existing MOD contracts. If the GoCo does not have access to that information, it will seriously curtail the contracts that it will be able to manage: it will not be able to manage contracts that involve the need to access confidential information provided by a supplier.

If the Ministry of Defence provides confidential information from existing programmes to the GoCo without the protection conveyed by schedule 2 in its current form, the supplier of the confidential information may claim that the Ministry of Defence has no legal right to do so. The MOD could seek to negotiate amendments to contracts, or obtain licences to supply the necessary information. However, the volume of information concerned—as we discussed in relation to the previous clause—the amount of time and resource required to undertake those negotiations, the cost in licence fees that may be incurred and the possibility that the owner of the information may refuse to provide it means that that is not a practical proposition, hence the need for the schedule.

The schedule, in its current form, provides protection for owners of confidential information, because there are only limited circumstances—essentially where necessary or expedient for defence procurement—when the Ministry of Defence can share the information with the GoCo. The schedule also provides that the GoCo is subject to the same confidentiality obligations that exist for the MOD under that contract. For example, some of the information the GoCo has will be classified as UK eyes only, the classification applied to information that cannot be shared with non-UK nationals because of national security issues. A GoCo will not be able to share that information with any employee or parent company that does not meet the nationality requirements. Should the GoCo misuse confidential information, the owner of that information can bring an action directly against the GoCo in the same manner as it could have done if the Ministry of Defence had misused the information.

Mr Jones: How will contracts that involve information sharing with, for example, the United States be managed? Will the GoCo have to apply for exemptions to allow the US to access the information or is that matter covered by agreements already in place with the Ministry of Defence?

Mr Dunne: That will depend on the nature of the security classification that the United States requires. For example, if it is held within the UK-US security treaties under which, on the UK side, only Crown servants are eligible to have sight of that information, it will be handled in that way and the military personnel on secondment to the GoCo will be the individuals authorised to see the information. If, however, the information is not subject to such security requirements, other individuals within the GoCo will be able to have access to that information. It will depend on the security vetting status of the information supplied by the US. That will apply to any other countries with which we have Government-to-Government relationships.

Mr Jones: May I therefore ask whether the United States, for example—I know other countries are affected as well—is content with that type of arrangement?

Mr Dunne: We covered some of this matter on Tuesday, when we talked about the extent to which our international partners are comfortable with what we are proposing. At this stage, as I said on Tuesday, we have gone through with the United States a number of test examples in contracts that exist between us, and the US has not found any red lines that it is concerned about. That is a long way of saying that we think that that matter has been dealt with adequately to the satisfaction of the United States.

Mr Jones: Would that include special contracts—black contracts and others—with the United States?

Mr Dunne: I did not completely hear what the hon. Gentleman said, but I think his intent was to ask whether that answer included the most sensitive security contracts. My understanding is that the United States has raised no red lines in relation to the proposal. I cannot say with absolute certainty that we have been through the contracts he referred to, but as no issues have been raised that have caused difficulties in the process up to this point, the assumption would be that that issue has been dealt with adequately, or if it has not, it will be.

Mr Jones: As the Minister knows, some of those contracts are highly sensitive in nature and cover a whole host of different capabilities. How would the Ministry of Defence deal with those contracts if the United States, for example, raised objections to the system proposed in the Bill?

Mr Dunne: As I said on Tuesday, in the event that the United States is not happy to see a particular contract handled through the GoCo, that contract will be taken out of the scope of the GoCo. At this point, no such contracts have been identified and we therefore do not think there will be a problem. If there were to be a problem on the US's part, the contract would no longer be in the GoCo's scope. That is very clear. We are not seeking to disrupt any of the essential relationships we have with the United States. I hope I have been able to reassure the hon. Gentleman on that point.

In the event of a misuse of confidential information, the owner of that information can bring an action directly against the GoCo in precisely the same way that it would have done if the Ministry of Defence had misused the information. That is in addition to the confidentiality obligations that the MOD will place on the GoCo through its contract with the GoCo, the management services contract. The GoCo will be contractually required to maintain the confidentiality of supplier information and not disclose it to third parties without the prior permission of the Ministry of Defence. The GoCo's parent companies will be third parties, so the GoCo will not be able to disclose the information to them without the MOD's permission. Significantly, the Official Secrets Act will also apply to the GoCo and its staff. The information will therefore receive essentially the same protection from disclosure as it does in DE&S today.

The proposed amendment to schedule 2 involves deleting the existing schedule in its entirety and replacing it with what is largely a replication of schedule 5, in part 2, which creates a criminal offence of the disclosure of confidential information provided to the single source regulations office. The creation of such an offence is reasonable in that context, where the information is highly detailed supplier information that will be received under the single source pricing regulations and that suppliers are required to provide by statute.

However, that situation is very different from the GoCo situation, and in our view it is not appropriate for a criminal offence to be created for the disclosure of information acquired in the normal course of defence procurement on individual projects and programmes, and where any confidentiality can be protected by the GoCo contract, coupled with the schedule 2 constraints. We do not want to create new offences unless it is absolutely necessary to do so. That has been the Government's posture, across Departments, since we came into office.

The single source provisions cover a supplier's future financial performance, anticipated business plans and planned subcontracting activity. That is forward-looking information. It is highly unusual for the MOD to receive access to such information, which is covered by schedule 5. The offence and tariff proposed is consistent with those applied to other price-regulated industries, such as the water utilities, telecommunications and railways. It is not appropriate to day-to-day defence procurement business, which is best conducted through a commercial relationship between the MOD and its suppliers.

The new statutory framework outlined in part 2 has been designed to help ensure that we get value for money on an average of some £6 billion a year of single-source procurement. Our single source suppliers can price in the knowledge that they will not be undercut by a competitor. That is a very unusual position that is not conducive to getting good value for money, so we must address it. That was why the "Yellow Book" regulations were originally established some 45 years ago, and we are seeking to update them through the provisions in part 2.

To update those provisions, we need information about the suppliers' actual costs. Information alone is not enough—we need enough detail to be able to use the information to negotiate with suppliers on price, comparing their forecast costs with our experience from other projects. We need to be able to track and manage our many hundreds of large single source contracts, so the information must come in a standard format. We need enough detail to uncover where suppliers have charged us costs that are clearly unreasonable. Sadly, that is not the rare occurrence that one might expect it to be, as recent press articles have made all too clear.

If hon. Members are interested, I could identify the sorts of costs charged under single source arrangements that we have sought to recover from companies. However, under the existing "Yellow Book" arrangements, we are only in a position to recover such costs once the relevant contract has come to an end, so it is backward-looking work for the Department. It is currently successful to the tune of between £60 million and £120 million a year. The effort involved in uncovering such overcharges is precisely what has led us to introduce measures to change the single source arrangements so that we do not have to drag information out of contractors as we currently have to.

To get value for money, we require a quantity and detail of information much greater than would be necessary in a typical competitive or private sector environment. Our single source suppliers recognise that, even if they may not particularly welcome it. Much of the single source information covers business plans and other forward-looking projections, as I have said, which justify the cost being charged. Some information is not routinely provided to the MOD for competitive tender procurement.

12.15 pm

In return, we recognise that we have a responsibility to our suppliers to treat their information with the care it deserves. Much of it will be commercially sensitive, and some of it market sensitive. Significant commercial damage could be done were it to get into the hands of their competitors or market analysts.

We take that responsibility seriously, as a new criminal offence we are seeking to include in schedule 5 makes clear. In making the new criminal offence, we considered its scope carefully. The new offence will carry with it significant procedural consequences. New processes will have to be put into place to ensure that Crown employees do not inadvertently create a situation where they are suspected of a criminal offence. We need to ensure that the additional overheads and process involved will not overly constrain the operation of Government. Therefore, for example, we have allowed the information to be shared across the Crown if that is needed.

The proposed amendments, taken together, would place additional burdens and responsibilities on the MOD, the GoCo and the single source regulations office in handling industry information, for example, by extending the scope of the criminal offence to the whole of part 1 and all other procurement undertaken through

the GoCo, and through the unusual suggestion of allowing industry audit rights over how the Government handle the information. We will resist the amendments when we reach schedule 5, as they do not strike the right balance between protecting sensitive industry information and enabling the Government to fulfil their functions efficiently.

I would again like to thank the hon. Lady for tabling amendment 9 to schedule 2. As I will explain, her amendment is misguided and unnecessary, but it gives us the opportunity to discuss the schedule in some detail and to respond to some of the concerns that industry has raised about whether it could end up with a criminal offence under this section of the Bill.

The amendment would remove provisions in the Bill that will allow the MOD to disclose confidential information received from a supplier to the GoCo and its service providers. That may be providing it with ancillary services such as an IT function, where such disclosures are necessary or expedient for providing the MOD with a defence procurement service.

The amendment would also make it an offence to disclose confidential information provided by a supplier to the MOD or the GoCo, except with the consent of the supplier or under certain other circumstances: for example, where the information is already in the public domain, where disclosure is needed to meet the Government's requirements under law or regulation, or for carrying out certain ministerial functions. As I have said, the Government intend to resist the amendment.

First, regarding the proposal to remove the current provisions of the Bill that allow the MOD to disclose confidential information to the GoCo, those provisions are necessary to allow the GoCo to have access to confidential information necessary to manage contracts. Without them, the GoCo will not be able to manage many of the contracts DE&S currently manages.

Under proposed new paragraph 5(1)(d), no person would commit an offence by disclosing information where information is disclosed

"for the purpose of enabling or assisting a contractor"—

presumably the GoCo—

"to provide defence procurement services to the Secretary of State by virtue of arrangements"

in the Bill. However, proposed new paragraph 5(4) suggests that such disclosure

"must be strictly necessary for the purpose"—

not just necessary, but strictly necessary.

It is unclear what is meant by "strictly necessary". One could argue that disclosure is not strictly necessary until all other avenues have been explored. That could mean the MOD or the GoCo having to place new contracts to replicate past work in order to obtain the same or similar confidential information while securing the necessary rights of disclosure in the new contract. That would increase costs and delay the MOD's programmes. In extremis, it could be argued that unless compelled by law or regulation, it is seldom strictly necessary to disclose anything to anyone.

Proposed new paragraph 5(5) suggests that, before any disclosure of confidential information by the MOD to the GoCo,

"the individual or business to which the information relates must be notified of the intended disclosure."

The fact is that DE&S holds very significant amounts of confidential information from many suppliers. Compelling the Ministry of Defence to notify suppliers of every item of confidential information from every supplier before disclosing it to the GoCo would clearly consume scarce resources and add cost and delay to the matériel strategy programme. I suspect that is not the intention behind the hon. Lady's amendment.

The current provisions in the Bill already provide suitable protection for suppliers of confidential information. The Bill allows for disclosure of confidential information between the MOD and the GoCo and the GoCo's service providers, where it is necessary or expedient for the purposes of providing a defence procurement service in accordance with the Bill. However, any disclosure or use of the confidential information by the GoCo or its service providers that is beyond the terms of the original obligations placed on the MOD when it received the confidential information will be an unauthorised disclosure or use of that information. The Bill therefore puts the GoCo in the shoes of DE&S in relation to its disclosure and use of confidential information.

If the GoCo misuses such information, the supplier will have cause for action against the GoCo, just as it does now if the MOD misuses the information, either itself or as DE&S. In addition, the contract that the MOD places on GoCo for provision of defence procurement services will include provisions that restrict the use and disclosure by the GoCo of suppliers' confidential information for defence procurement services for the Ministry unless the MOD permits otherwise. At present, there are 25 pages of clauses in the draft contract that govern the use of confidential material and intellectual property.

We note that the proposed amendment mirrors that creating an offence for wrongful disclosures of confidential information in relation to the single source provisions in part 2. However, that is intended to protect highly detailed supplier information, as I have already said, and not procurement information such as that covered by the current schedule 2. The proposed amendment omits the key aspect relating to confidential information in a single source environment. Schedule 5(1)(1)(c) states that the provisions of schedule 5 that create the offence of wrongful disclosure of confidential information apply to information

"of a kind specified in single source contract regulations".

The proposed amendment mirrors the provisions in schedule 5 but crucially omits the key limitation to information specified in single source contract regulations. Consequently, the scope of the proposed amendment is very broad and appears to cover any information obtained by the MOD that relates to the affairs of the business or individual. While it would be appropriate to create an offence of disclosure of confidential information for specific information as identified in single source contract regulations, as is done in schedule 5, the creation of a general offence for the disclosure of confidential information, as the amendment appears to propose, is not proportionate.

The MOD and industry have been exchanging confidential information for decades. On the basis that our confidentiality arrangements are adequately covered by confidentiality agreements or confidentiality provisions in contracts, this has appeared to work well for both the MOD and industry. We are not aware of any significant

problems that have arisen in that regard. The Bill will extend those confidentiality obligations currently on the MOD to cover the GoCo and its providers when supplier-confidential information is disclosed to them. We should not be creating or extending criminal offences unless absolutely necessary. We judge that the extension to the GoCo of the confidentiality obligations agreed with the MOD for confidential information that the MOD passes to the GoCo offers sufficient protection to the owners of that information.

At this point, and if we are to have an opportunity to consider other amendments later, I urge the hon. Member for Plymouth, Moor View to withdraw her amendment.

The Chair: May I try again to clarify to the Minister that we will be debating them today but not taking a vote on them until we reach schedule 5? If the Minister wishes to carry on, the shadow Minister can then conclude the debate.

Mr Dunne: Thank you, Mr Owen. I shall, in that case.

I turn to amendment 12, which the hon. Member for Plymouth, Moor View has not yet addressed, and I will try to explain what it seeks to do. It endeavours to include, within the scope of the criminal offence of unauthorised disclosure, information disclosed as a result of carelessness. It also seeks to impose a statutory duty on holders of information to take appropriate protective measures.

The amendment would replace schedule 5(2)(1). Proposed new subsection (1)(a) and (c) recreates what was originally there, and proposed new subsections (1)(b) and (2) are new. Proposed new subsection (2) would place a duty on a holder of the information to

"take adequate technical and organisational measures against unauthorised or unlawful disclosure of, and against accidental loss of, the information."

It is worth noting that officials holding the information will follow the technical and organisational measures laid down by their Departments, such as process and IT systems. Giving them responsibility for those measures, as the amendment seeks to do, seems overly onerous.

Proposed new subsection (1)(b) would make the disclosure or loss of information as a result of failing to fulfil the above duty an offence. I take that to be the principal issue of the amendment. The offence as currently drafted does not specify that the disclosure must be deliberate, but legal opinion is that, should the matter come to court, the need for deliberate intent would be read into the clause, as is the case with most criminal offences. That is because, for the kind of criminal offence we are creating, the default legal principle is that there must be intent for a crime to have been committed. There must be mens rea, or a guilty mind.

The information we will be getting from our single source suppliers is, as I have said, unusual in acquisition processes within private and competitive sectors, in terms of its quantity and detail and the fact that it comes in a standardised form, making it open to analysis and comparison. However, that is not unusual in price-regulated activities. Across all our price-regulated sectors, including water, power, rail and communications, there is a requirement for detailed and standardised information to be provided. The regulators need that information, as we do in the Ministry of Defence, to assess the reasonableness of service providers' costs and their relative efficiency to ensure the customer gets good value for money. The information received by the price regulators also contains highly sensitive commercial information that, similar to our situation, would be of great value to competitors and market analysts. That information will be held centrally so it can easily be compared and analysed. The price regulators therefore represent a good comparator to the provisions of part 2, in terms of the nature and quantity of the information to which they have access.

In all these cases, the unauthorised disclosure of information obtained under the powers of the price regulator is a crime. However, in no case is release due to carelessness covered, and I am not personally aware of any cases where such information has been released to competitors resulting in substantial damage to the commercial interests of a service provider. This approach appears to work in the regulated sectors, and we see no reason why it should not also apply and work for defence.

In coming to our judgment that carelessness should not be covered by the criminal offence, we also considered general legal principles. Carelessness—or negligence, to use the more precise legal term—is seldom sufficient for an indictable offence. A criminal offence is a serious matter. Apart from the possibility of imprisonment, which would be limited to a maximum of two years under the schedule 5 offence, there is also the subsequent impact of the individual having a criminal record. In our case, where lives will not be threatened by the release of this confidential commercial information, there is no justification for criminalising mere carelessness.

Mark Pawsey (Rugby) (Con): I am listening very carefully to the detail the Minister is giving. However, is not the point that if the burdens on contractors become excessive, many will be discouraged from coming forward to tender in the first instance?

Mr Dunne: My hon. Friend makes a valid point. What we seek to do throughout our procurement processes is to introduce efficiency and transparency where possible, and not impose undue burdens on our contractors, which would put up their costs, and therefore put up the cost to the taxpayer. He has made a valid point. If the contractors have to go through the processes proposed by the hon. Member for Plymouth, Moor View to satisfy themselves that they are not risking suffering criminal proceedings in the event of a leak of information, that will inevitably increase the cost the contractor pays—as well as within the GoCo and the Ministry of Defence—and thereby increase the cost of defence, rather than reduce it, which is what we are trying to achieve.

12.30 pm

Mr Ellwood: Further to that important point, the burden placed on contractors will differ depending on the size of the contract. Is there a financial line in the sand as to the level of due diligence that will be required for very small contractors compared with the big long-term ones?

Mr Dunne: My hon. Friend makes a useful intervention. He is clearly a doughty champion of small and medium-sized businesses, not only in his constituency but in the

sector. Under the amendments proposed, there is no distinction as to size of contract or contractor that would be subject to such onerous obligations.

Oliver Colvile: Does my hon. Friend also recognise that there would be a significant impact on the skills base as well? In my constituency, that is something that I am very concerned to protect.

Mr Dunne: My hon. Friend raises another aspect that perhaps had not been thought through when the amendments were tabled. There is no doubt that small companies would not have the resource to be able to ensure that they did not put themselves at risk from criminal sanctions, and therefore some of them might choose to withdraw from the defence supply sector altogether, and that would be particularly damaging in the smaller business sector. Many of the maritime specialist companies tend to be relatively small companies—an addition to the major primes—and that might have a particular impact in my hon. Friend's constituency.

I shall move on to amendment 13. Paragraph 4 of schedule 5 authorises the release of information if it is already in the public domain. Amendment 13 would require that such information must have been placed in the public domain lawfully. Adding that test of lawfulness places another burden of assessment upon the holder of the information subject to schedule 5. Before releasing information that they know to be in the public domain, they would be required to make an assessment as to the legality of the original release. That is potentially a very difficult thing to do. They would have to determine all of the original routes whereby the information was provided to the public, and in each case they would have to assess whether this was legal , which would be likely to require specialist legal knowledge. Given that unauthorised release may result in a criminal offence, this is an unacceptable burden of assessment to place upon the information holder, which, in this case, would be the GoCo.

It is worth noting that just because a release is authorised, it does not mean that the information would be released. It means only that release would not be a crime. Government officials will not proactively release information to the press simply because it has become publicly known.

I have dealt rapidly with amendment 13. Amendments 14 and 15 refer to authorised release of information under the Freedom of Information Act. The Government are firm believers in transparency and freedom of information, which is why we have included a release under the Freedom of Information Act as an authorised release. The Freedom of Information Act places a duty on public bodies to release information that they hold to facilitate greater openness, understanding and transparency around how the Government operate.

However, given that some of the information that the Government receive can be highly sensitive and affects the effective operation of both the Government and business, the Freedom of Information Act, as members of the Committee are no doubt aware, already has safeguards to prevent disclosure that would be detrimental to the overall public interest. In particular, the Freedom of Information Act has two main protections against disclosing information of the sort that we would expect to receive under part 2: namely, information provided in confidence, and information whose release would prejudice the commercial interests of the provider.

Section 41 of the Freedom of Information Act provides an exemption where information is obtained by a public authority and its disclosure to the public by the public authority would constitute a breach of confidence actionable by the person who provided it, or any other person. That is an absolute exemption.

Section 43 provides protections against the disclosure of trade secrets and commercial information which, if released, are likely to be of detriment to a company's financial or commercial position. This is subject to a public interest test. This demonstrates that safeguards are already clearly built into the Freedom of Information Act to ensure that information is properly protected. As it is today, it will be the responsibility of the person or team who receives or owns this information to judge whether either of these exemptions apply and to consider the public interest test which ultimately has to be approved by a senior civil servant. The proposed amendment would extend the criminal offence to those who have not pursued every available defence under the Freedom of Information Act for not disclosing the information and would criminalise an official who released information under that Act, incorrectly in the view of the courts.

At this point I should assure members of the Committee that we have good processes in place to ensure that we do not inappropriately release information under freedom of information. Where relevant we inform industry where we have a request to release their information and we work with them to determine whether the protections within the Freedom of Information Act are relevant. To date, industry have not been able to provide a single example of the Ministry of Defence inappropriately releasing commercially sensitive data. Making a potential misapplication of the protections of freedom of information a crime goes well beyond the interpretation of the Freedom of Information Act and seems to me to be excessive and too severe. I will therefore be encouraging the hon. Member for Plymouth, Moor View to withdraw the amendment.

This brings me to amendment No. 16. Its effect would be threefold. First, information could only be disclosed, for example across Government and to the single source regulations office, if the disclosure was strictly necessary. Secondly, any recipient of the information would also be subject to the criminal offence if they disclosed it in an unauthorised way. Thirdly, the Government would have to request permission from the individual or business concerned before disclosing information.

The first element of the amendment would require any holder of protected information to consider whether its release was strictly necessary for the purpose to which it would be put by the recipient. That runs counter to the Freedom of Information Act which is intentionally blind to the requester and the motive for their request. If it later transpires that it was not strictly necessary, even if no harm had been done to any party, the person who released the information could be subject to prosecution under the offence. This is not an outcome that I can support. The person holding protected information cannot be held accountable for the use to which a recipient may put information disclosed to them and they cannot be expected to know that this is strictly necessary. All they should be expected to do is to assess whether the person requesting that information is someone to whom disclosure is authorised.

The second element of the amendment seeks to ensure that the protections attached to the protection of information, including the offence, travel with that information when it is disclosed. I agree that this should be the case. Once information obtained under part 2 has been determined to be protected information, it should remain protected no matter to whom it has been provided. However, that element of the amendment is not necessary as schedule 5 already has this effect. Paragraph 1 defines protected information without reference to the holder of the information once it is protected information. It does not cease to be so if it is disclosed to another person. Paragraph 2(1) states that a person commits an offence if they disclose protected information. Again, that does not change by virtue of the protected information being disclosed. The current drafting provides for the travel of the protections to recipients of protected information so, again, the second element of the amendment is not necessary.

The third and final element of the amendment seeks to provide notice to and obtain consent from the business or person to whom the information relates before it can be disclosed. This means that every time a Government official provides information to, say, the GoCo, the single source regulatory office or another Department, they must notify a supplier and give them the opportunity to challenge this disclosure. As hon. Members will quickly realise, that is an onerous requirement.

Mr Julian Brazier (Canterbury) (Con): If I may, I should like to underline my hon. Friend's point. The complaint that one gets time and again from suppliers—particularly smaller ones—is the extraordinary amount of bureaucracy involved in dealing with Government. It is difficult to imagine a provision that would do more to worsen things than the amendment.

Mr Dunne: I am grateful to my hon. Friend, who is extremely experienced in arguing the cause of small companies in his constituency. The burden of bureaucracy in dealing with Government has already been brought to my attention by, I regret to say, all too many MOD suppliers. If they had to comply with the provisions in question, it would undoubtedly add to the frustrations of dealing with the MOD, but also to the time taken and therefore, almost inevitably, to the costs that they would charge to it.

One of the key aims of part 2 is to improve efficiency in single source procurement. As we have just been discussing, a balance needs to be struck between providing protections and not making them so restrictive that they compromise the efficient running of Government functions and the defence industry that seeks to provide our equipment. I do not, therefore, consider that the additional protection is necessary. Protected information can be disclosed only by way of a permitted disclosure under schedule 5. That includes, for the purposes of legal proceedings, all the Government's own audit functions. It would not be appropriate for another party to limit the Government's functions in such a way, so I urge the hon. Member for Plymouth, Moor View not to press amendment 16.

Amendment 17 would give the provider of the information an industry body with the power to audit and inspect the technical and organisational measures taken by any part of Government holding the information under part 2. That includes the Ministry of Defence and the single source regulations office, but it also has much wider ramifications, as it includes any other Department given the information, or information derived from it, which could often be the case for the Cabinet office and No. 10.

The hon. Lady's suggestion is a surprising one. I am not aware of any precedent for an industry to be given audit rights over Government, with Government effectively accountable to industry for performance. My hon. Friend the Member for Canterbury might like to introduce it, but so far as I know it applies nowhere else in Government. The principle mechanism through which the Government are currently held to account is through the work of parliamentary Select Committees—not through an industry body, which would undoubtedly have its own interests foremost in its mind.

The Ministry of Defence is also subject to additional checks and balances. We have an in-house defence internal audit function, reporting to a non-executive director, that is organisationally independent and provides assurance to the permanent secretary and the defence audit committee. That looks at a number of functional areas, including information management. We are also separately subject to external scrutiny provided by the National Audit Office, Her Majesty's Treasury and, ultimately, Parliament itself. The new single source regulations office would also be subject to internal audits, as stipulated by the Treasury's internal audit standards, as well as external audits by the Comptroller and Auditor General.

We take seriously industry's concerns about the need to ensure that its information is adequately protected—particularly the detailed and copious new information that we will require under part 2 of the Bill. The new criminal offence sends a strong signal that we shall do so. I am grateful to the hon. Lady for her amendments, because in resisting them I have been able to explain the Government's position. I hope I have made things clear. It is not the criminal offence that will protect the information; it is the people and the processes that they use, and the training that they are given. The criminal offence needs to be seen in the context of a wider package of measures that we are taking to protect the information obtained under part 2.

In the process of designing those processes and the training, our intention is that all the information will be provided to a central group of specially trained people. The central database of information will be available only to a select few, and there will be appropriate IT infrastructure and security, such as passwords and fire walls. The information will be passed on only when appropriate. When it is, it will be accompanied by appropriate markings highlighting the commercial sensitivity, the restrictions on disclosure and the existence of the new criminal offence. We are working together with industry through a specially created working group and will be sharing all our proposed processes and training material to make industry as comfortable as possible.

12.45 pm

It is not in the interests of the Ministry of Defence, the single source regulations office or Government more widely to release information carelessly. Even one high-profile release will substantially damage reputations and undermine the new framework. The MOD has a

good track record of keeping commercial information, some of which is vital to national security, secure. The importance of following security processes is clearly ingrained in the culture of the Department. While we cannot remove all risk, the strong package of measures being introduced will mitigate effectively the risk of careless disclosure.

In conclusion, we take seriously industry concerns about treating information with care and we intend to do that. It is not in our interest to release such information. We will be introducing special processes and training, which will be reviewed by industry. We have a good track record of keeping information secure and the new criminal offence in part 2 of the Bill will provide added focus to Ministry of Defence and single source regulations office employees. Those of the GoCo—if we take that route—will also be under the same obligations to treat information with care. That is how we intend to minimise the risk of unintentional release and I urge the hon. Lady to withdraw the amendment.

Alison Seabeck: I thank the Minister for his thorough run around the reasons why the amendments are inappropriate or potentially onerous. He is aware that industry and academics were looking hard at the issues prior to the Bill and raised concerns about this area. The Opposition believed it important that the Government were asked to explain exactly what the intention was behind the proposal and whether dangers might exist were certain actions taken.

Our amendments were serious, but largely probing. At the beginning of discussions around the clause and the schedule, we were not sure whether we would need to vote on the principle, as opposed to the specifics of amendments, whether well drafted or not. On balance, we will probably not press any amendments and I will explain the reasons why.

The issues are genuine. With the increase in whistleblowing, which is an option that people sometimes feel that they need to use to get information out there, and the growing problem of malicious release of information, the concerns behind some of the lobbying that we have received—I am sure other Committee members have experienced it, too—about the need to ensure that there is some form of redress if that type of incident occurs are perfectly honest and reasonable.

The Minister set out clearly and with great confidence that legislation such as the Official Secrets Act is in place and ought to be able to deal with any misbehaviour or inappropriate release. He also set out the clear differences between schedule 2 as it applies to the SSRO and to the GoCo and the difference in the level and degree of information that might be at risk. I fully accept that point.

On amendment 12, the Minister mentioned that giving officials additional duties could be overly onerous. He comprehensively set out issues on legal advice and legal opinion, which was useful in enabling us to reach a view on whether that amendment was entirely relevant. He talked about the complex and difficult way in which carelessness could be criminalised, and the potential costs that sit behind that.

Contributions from Government Members, standing up to speak mainly on behalf of small businesses, were entirely appropriate and fully justified. It shows the strength of the Committee process when we have full engagement and people raise those issues. I say to Government Members that the amendments came from concerns expressed directly to us by SMEs. The SMEs were aware that additional burdens potentially sat within the amendments, but both we and they felt that it was important to have a debate about outcomes and criminal behaviour.

Mr Brown: My hon. Friend is exactly right and I want to add a little more emphasis to her points. Undoubtedly, not only every Member sat on the Committee, but every Member in the House who has an interest in SMEs sees what we are developing through the Bill as a significant step forward.

For some small businesses the Bill is, to some extent, a leap in the dark. They want to be sure that months, if not years, of progress, finance, time, money and effort are not wasted by something that is not tied down tightly. I appreciate the points that the Minister has made. He has given the best answers he can. While my hon. Friend has said that the amendments are probing, they have significant substance behind them.

Alison Seabeck: I thank my hon. Friend and agree with his analysis of how we have got to this point. As he said, the Minister's response has been thorough. Defence is an area where there is a lot of cross-party agreement. We do not generally become extremely divisive, and that is not our intention here; we want to tease out points and ask questions. Some of them might seem stupid and some of them are sensible, but if there are issues of concern to people outside, it is important that they are raised, so raise them we will.

On amendments 15 and 16, the Minister talked about the highly sensitive information that the Government receive and share and said that there are protections in place. He talked specifically about some of the safeguards on the release of information through FOI, including the public interest defence.

I accept his robust attack on the proposals in those amendments, and I understand why he would not want to take them forward. It was interesting that he agreed that some of the proposals in the second part of amendment 16 have some validity, but he went on—for my benefit, I suspect—to explain that some of the defences are already in the schedule. I am grateful for that.

It behoves the Committee to probe and dig and ensure that the Minister gives a full and thorough explanation as to why the schedule should stand as it does. I accept his arguments. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Schedule 2 agreed to.

Clause 8

Intellectual property rights

Question proposed, That the clause stand part of the Bill.

Alison Seabeck: We move on from disclosure of information to the nature of the information at risk. All of us in this room are well aware of how important IP is

to the defence industry—and, indeed, in ensuring that Britain maintains its technological edge in both defence and aerospace.

A company's IP is perhaps its most valuable asset. Therefore, the ability for that to be exposed, passed on, shared or leaked to a third party or another private company with defence interests has become a major cause for concern, because of some proposals in the Bill. Those proposals are not just about the Secretary of State providing protected work—whether owned by the MOD or a private company—to the contractor or service provider; it is about the contractor or service provider then having permission potentially to supply that protected information to yet another person or persons. The proposals also allow for information made available under a different set of rules—in other words, before the vesting date when the GoCo is established—also to be passed on.

I have a problem with the transfer of historic data, which was offered to the Secretary of State in the certain knowledge that it was not to be passed on, through what will be potentially three sets of hands. Yet the Bill allows that information, which was originally expected to be passed only from the contractor to the MOD, or vice versa, now to wing its way through a number of other interested parties. Those private hands potentially have conflicting interests. We all heard from industry that these proposals will not please many companies. Opposition Members have deep reservations about conflicts of interest, as we pointed out earlier. Although those arguments were not successful earlier, they are pertinent to the discussion of the clause.

Retrospectivity means that the ground rules are different. Could the Secretary of State face challenges, for example, from firms about disclosure of information to the GoCo when the original contract with the MOD had no mention of any extra private interests, such as a GoCo, having access to their information? Where are the protections in place specific to the individuals employed by the GoCo and the risk, for example, that if they were head-hunted out of an organisation—we touched on this earlier—they could take valuable soft and hard IP knowledge with them? The Minister earlier said that that happens all the time, but this is a new set-up. Companies out there are expressing concerns and we should pay heed to those.

We previously debated head-hunting and how difficult it is for the MOD to keep hold of its talented staff. That brings us back to concerns about exactly what they can take with them. The Minister allayed some of those concerns on the lack of legal penalties for those infringing IP laws in our discussion on the previous schedule. I would like, however, some reassurance about how the spread of IP will be prevented in regard to this clause.

We talked about copyright infringements and data protection. In the witness sessions, the Minister tried to suggest that concerns voiced by industry and academia were unnecessary. Hard IP is simpler to understand, but I am still unclear about how soft IP can be protected: knowledge gained in the process of the GoCo about, for example, how a company might run a successful bidding campaign.

In addition, we need to be clear about intellectual property rights and the MOD's internal problems at the moment in that regard. The MOD is attempting to sell the Defence Support Group. There was a consultation in August, designed to ensure there were no ongoing IP conflicts.

Ordered, That the debate be now adjourned.—*(Mark Lancaster.)*

1 pm

Adjourned till this day at Two o'clock.